SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

----------X

HECTOR RIVERA,

Plaintiff,

-against-

Index No. 150282/2012
Subm. Date: 01/29/2014
Mot. Seq. No.: 001

DECISION AND ORDER

ST. NICHOLAS 184 HOLDING, LLC and
BARBERRY ROSE MANAGEMENT COMPANY,
INC. d/b/a HOWEL MANAGEMENT COMPANY,

Defendants.

----------X

For Plaintiff:
Rosenberg, Minc, Falkoff & Wolff, LLP
By Robert H. Wolff, Esq.
122 East 42nd Street
New York, New York 10168
212-697-9280

For Defendant:
Kaufman Borgeest & Ryan LLP
By Michael R. Janes, Esq.
1205 Franklin Avenue, Suite 200
Garden City, New York 11530
516-248-6000

Papers Considered on this Motion for Summary Judgment:

Notice of Motion with Annexed Affidavits.....1
Affirmation in Opposition.....2
Affirmation in Reply.....3

ELLEN M. COIN. J.:

Defendants St. Nicholas 184 Holding. LLC (Holding) and Barberry Rose Management Company /d/b/a Howel Management Company (Barberry Rose) move pursuant to CPLR 3212(a) for summary judgment dismissing the complaint. Holding owns and Barberry Rose manages the building (the Building) located at 608 W. 184th Street in Manhattan. The complaint alleges that on October 27, 2011, plaintiff, while staying with his sister-in-law and her family in apartment 43 of the Building, went to his wife's adjacent apartment, fell out of the window which he had opened, and sustained serious injuries. The complaint alleges common law negligence and

violation of Multiple Dwelling Law (MDL) § 78 and New York City Administrative Code §§ 27-127 and 27-128. The court notes that §§ 27-127 and 27-128 were repealed by Local Law 33 of 2007.

Plaintiff testified at his deposition that he had gone to his wife's apartment to tighten its drooping clothesline, which ran from the kitchen window of apartment 44 and hung over the interior courtyard of the Building. As he was unable to replace the wheel on the hook from which he had detached it, he placed a closed garbage can in front of the fully opened window, stood on it, "leaned out a little bit," lost his footing, and fell (Exhibit K to Affirmation of Michael R. Janes, dated September 11, 2013, at 97-98). The complaint alleges that the window guard located at the bottom of the window was loose and that there were no window stops.

In support of their motion, defendants principally rely on the non-party deposition of Jonathan Toretsky, the emergency medical technician who came to the scene of the accident. Toretsky alleged that plaintiff jumped out of the window because of a drug-induced hallucination that he was being pursued by a man with a gun. Defendants acknowledge, however, that Toretsky's testimony alone is insufficient to warrant entry of summary judgment in view of plaintiff's testimony and that of his wife to the contrary. Instead, defendants argue that as an adult, plaintiff may not rely upon the window guard requirements of New York City Health Code §131.15 or the window guard specifications set forth in 24 RCNY §§ 12-10 - 12-11. Indeed, the window safety-related requirements imposed by New York City are not applicable to accidents suffered by adults (*Yahudah v Metro N. Riverview House*, 129 AD2d 429, 430 [1st Dept 1987]), and were the complaint based upon a violation of those provisions, defendants would prevail on their motion.

However, as noted above, the complaint alleges common-law negligence and a violation of MDL §78. MDL §78 (1) provides, in relevant part that "[e]very multiple dwelling ... and every part thereof ... shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section." MDL §78 (1) does not impose absolute liability upon owners but conditions liability on actual or constructive notice of an injury-causing defect. (*Bauerlein v Salvation Army,* 74 AD3d 851, 857 [2d Dept 2010]). At her deposition, Dialia Diaz, plaintiff's mother-in law and the registered tenant of apartment 44, testified that she had made written complaints about the absence of window stops twice before plaintiff's accident. Jose Diaz, the managing agent of Barberry Rose, states in his affidavit that there is no record of any such complaints. Where, as here, plaintiff presents evidence of notice and defendants deny receipt of notice, there is a triable issue of fact precluding summary judgment. *(Dunson v Riverbay Corp.*, 103 AD3d 578, 578 [1st Dept 2013]).

Plaintiff has submitted an expert affidavit from Alvin Ubell, chief inspector of Accurate Building Inspectors in Brooklyn. Mr. Ubell states that although good and accepted safety standards require that the maximum opening aperture of a window not exceed 4.5 inches, the opening aperture of the subject window was 14.5 inches. Mr. Ubell opines with a reasonable degree of building inspection and window guard technology certainty that plaintiff's accident was caused by the absence of proper window stops on the subject window, that would have prevented the window from being opened more than 4.5 inches above the top of the existing window guard. While Mr. Ubell cites the New York City window guard regulations pertaining to window stops in the course of his affidavit, he refers to those provisions as an example of generally recognized safety standards that prevail even without statutory enactment (*See* Affidavit of Alvin Ubell,

dated October 4, 2013, ¶¶ 5 and 8 [explicitly discussing the generally permissible standard for maximum opening aperture independently from the same limit set by the New York City Buildings Department and the New York City Department of Health]).

With regard to the negligence cause of action, defendants argue that plaintiff's leaning out of the fully opened window, while standing on a garbage can, constituted a supervening cause of his fall, which broke the chain of causality from any defect in the subject window and plaintiff's fall. Citing *Lee v New York City Hous. Auth.* (25 AD3d 214 [1st Dept 2005]), they distinguish a condition that merely makes an accident possible from a condition that proximately causes the accident. While that distinction is valid in general[1], it is not applicable here. In *Yahudah* (129 AD2d 429), the plaintiff fell out of a window when he leaned on it, and it slid open because of the absence of window stops. The Court held that the trial court erred in granting defendant summary judgment, in view of plaintiff's expert's opinion that the absence of window stops was a serious deviation from "'standard and proper practice for multiple dwellings with sliding sash windows in the City of New York,'" and that the absence of such stops contributed to plaintiff's fall. (*Id.* at 431; *see also Radcliffe v Hofstra Univ,* 200 AD2d 562, 563 [2d Dept 1994]) . Mr. Ubell's expert opinion is quite similar to that of Mr. Yahudah's expert. In that case, the plaintiff had fallen through the sliding sash of a window that opened approximately 24 inches wide, when he attempted to open it while standing with one foot on a bed and the other on the window sill. In view of the similarity of the facts of this case to those of *Radcliffe* and *Yehuda,* this court will not hold as a matter of law that the extent to which the subject window could be opened was not

[1] In *Lee*, the condition was a hole in a fence surrounding a baseball field, through which a ball rolled out onto the street, where plaintiff who had gone to retrieve it was hit by a car.

a cause contributing to plaintiff's fall.

The opinion of defendants' expert, Dr. Robert J. Nobilini, Ph.D. at most raises an issue of fact. Dr. Nobilini's surmise, that given plaintiff's height and weight and the position of the subject window, plaintiff would have to have placed his entire torso outside the window in order to have fallen out, is contradicted by plaintiff's deposition testimony that he leaned out only a little bit. Another part of Dr. Nobilini's hypothetical opinion, that plaintiff could have repaired and attached the clothesline while standing on the floor and without leaning out of the window as he did so (Affidavit of Robert J. Nobilini, dated September 6, 2013, at 3), is contradicted by plaintiff's testimony that while standing on the floor, he was unable to reattach the hook (Ex. K to Janes' Affirm. at 92).

Finally, defendants' reliance on *Ramos v 600 W. 183rd St.* (155 AD2d 333 [1st Dept 1989]), holding that at common law a dangerous condition within a demised space is the responsibility of the tenant, is misplaced. In that case, the plaintiff did not plead a violation of MDL §78 (1), which expanded landlord's duties and modified the common-law rule of non-liability of a landlord to a tenant.

Accordingly, it is hereby

ORDERED that the motion of defendants St. Nicholas 184 Holding , LLC and Barberry Rose Management Company, Inc. d/b/a Howel Management Company pursuant to CPLR 3212 for summary judgment is denied.

Dated: March 21, 2014

ENTER:

Ellen M. Coin, A.J.S.C.