

Chartis Prop. Cas. Co. v Olmsted

2014 NY Slip Op 31156(U)

April 28, 2014

Supreme Court, New York County

Docket Number: 152088/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CHARTIS PROPERTY CASUALTY COMPANY
as subrogee of MARTIN ZARETSKY
Plaintiff,

Index No. 152088/12

-against-

DECISION/ORDER

ELIZABETH OLMSTED AND RANDALL KAU,
Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Plaintiff commenced this subrogation action to recover for water damage caused by a leak emanating from defendant’s washing machine. Defendants now move for summary judgment dismissing the complaint on the ground that they did not cause the condition or have actual or constructive notice of the condition. For the reasons stated below, defendants’ motion for summary judgment dismissing the complaint is granted.

The relevant facts are as follows. Martin Zaretsky, plaintiff’s subrogor, resides in unit 8A in an apartment in Manhattan. Defendants reside in an apartment directly above apartment 8A. The defendants installed a Maytag stackable washing machine with a gas dryer in the apartment

around 1993. At the time it was installed, it was inspected by the building's managing agent as well as the building's architect and the New York City Building Department. Every two years, a professional came to the apartment to remove lint from the dryer vent. There was no servicing done of the washing machine as there were no problems with the washing machine. On July 2, 2010, the washing machine in the apartment overflowed, causing damage to the apartment below. At the time the washing machine overflowed, it was not in use. Defendant Olmsted learned of the water leak when she was woken up by a phone call from the building superintendent sometime before 6:00 in the morning. She let the superintendent into the apartment, went to the laundry room and found the washing machine overflowing from the top with no clothes inside. Defendants have testified that the washing machine was not used the day before the leak and that defendants were not aware of any problems with the washing machine.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

A landowner "has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk." *Branham v. Loews Orpheum Cinemas*, 31

A.D.3d 319, 322 (1st Dept 2006). A defendant who moves for summary judgment has the initial burden of making a *prima facie* showing that it did not cause the defective condition and that it did not have actual or constructive notice of the condition. *Id.* “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). The First Department has held that where a building owner established that it did not have actual or constructive notice of a defective condition of a water tank on top of the building and that the float device and alarm system “spontaneously and simultaneously failed”, it was entitled to summary judgment dismissing the plaintiff’s claim for water damages sustained to his apartment from the water tank. *American International Insurance Co. v. A. Steinman Plumbing & Heating Corp.*, 93 A.D.3d 559 (1st Dept 2012). Similarly, the Third Department held that a condominium owner was entitled to summary judgment dismissing the claim of the owner below him for water damages incurred when a hose broke in his washing machine where he established that he had no actual or constructive knowledge of any defect in the washing machine hose or the water shutoff valve for that machine. *Antich v. Portland*, 293 A.D.2d 953 (3rd Dept 2002).

In the present case, defendants have made a *prima facie* showing that they maintained their premises in a reasonably safe condition, that they did not have actual or constructive notice of any defect in the washing machine, that they did not create the defect and that the washing machine spontaneously failed. The washing machine was installed by a licensed plumber and the installation was inspected by the building’s managing agent as well as the building’s architect. The defendants testified that they never had any trouble with the washing machine and that it did

not require any repair. Moreover, the overflowing of the washer occurred during the middle of the night when the machine was not in use.

In response, plaintiff has failed to produce any evidence sufficient to require a trial. Plaintiff's allegation that the defendant failed to exercise reasonable care because the washing machine was 20 years old and defendants never had any maintenance or service performed to it is without merit. There is no evidence presented that the washing machine was not working properly to alert defendants to the need to have it serviced. There is no requirement imposed under New York law for persons to have all of their household appliances serviced on a regular basis in the absence of any evidence that these appliances require servicing.

Plaintiff's argument that defendants are not entitled to summary judgment because the washing machine was discarded a month after the water damage occurred is also without basis. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them." *Kirkland v. N.Y.C Housing Auth.*, 236 A.D.2d 170, 173 (1st Dept 1997). "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept 2012). In the instant case, the plaintiff has not made any cross-motion actually seeking sanctions based on the spoliation of evidence and has made no attempt to demonstrate that a spoliation sanction would be appropriate. Instead, it

makes a conclusory assertion that defendants should have preserved the washing machine because they indicated to plaintiff's subrogor, the occupant below them, that they would submit a claim to their insurance company. Plaintiff has not presented any evidence that any request was made to defendants to preserve the washing machine for inspection before it was discarded or that defendants knew at the time that the machine was discarded that any litigation would be commenced with respect to the water damage. Moreover, plaintiff has cited no authority to this court for the proposition that individuals who live in a New York City apartment are required to indefinitely keep broken appliances which may have caused flooding based on the possibility that an insurance company will eventually bring a subrogation action to recover for water damage incurred as a result of the malfunctioning appliance.

Similarly, plaintiff's argument that defendants are not entitled to summary judgment because they have not yet complied with an order of this court directing them to provide the last known address of their former housekeeper is without basis. It was plaintiff's decision to file the note of issue rather than seek an extension of time to file the note of issue based on plaintiff's failure to provide the requested discovery, thereby triggering defendants' obligation to make any dispositive motions within the time frame required by the court. Additionally, this court does not believe that the identification of the housekeeper would change the outcome of this matter as defendants have both testified that they used the washing machine, that it was operating normally and that it was not in use at the time it overflowed.

Plaintiff's argument that a factual issue is raised by the fact that there were prior leaks in other portions of the apartment is without merit as no evidence has been presented that these prior leaks had any connection whatsoever with the washing machine. Similarly, plaintiff's

