

Malinowski v 108 Perry LLC

2014 NY Slip Op 31837(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 113768/2011

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice

PART 47

Index Number : 113768/2011
MALINOWSKI, TARYN
vs.
108 PERRY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 3, 4
Replying Affidavits _____ No(s). 5

Cross-motion
Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed hereto decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 16 2014

NEW YORK
COUNTY CLERK'S OFFICE

G
GEOFFREY D. WRIGHT
AJSC

Dated: 7/9/14

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
TARYN MALINOWSKI,

Plaintiff,

Index # 403318/2010

-against-

DECISION

108 PERRY LLC and JANINA BOESCH,

Defendants.

Present:
Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

108 PERRY, LLC,

TP Index #590840/13

Third-Party Plaintiff

-against

SUNNY WINDOWS, INC.

FILED

Third-Party Defendant

-----X
RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment. OFFICE

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	____ 1, ____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	____ 3, 4 ____
Replying Affidavits.....	____ 5 ____
Exhibits.....	_____
Other.....cross-motion.....	____ 2 ____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff, Taryn Malinowski (“Plaintiff”) in the instant action claims she was injured on November 26, 2011 when she was sitting at a table with a friend in an outdoor café located at 108 Perry Street. Plaintiff claims that a window and frame fell from Apartment 3C of that building and hit her in the head causing her injuries. Perry now moves for and Order pursuant to CPLR 3212 for summary judgment dismissing the complaint, cross-claims and counterclaims against them. Co-Defendant, Janina Boesch (“Boesch”), cross moves for summary judgment pursuant to CPLR 3212 to dismiss Plaintiff’s complaint and all cross-claims against her. Motion

sequence 002 and 003 are consolidated for the purpose of disposition herein.

Defendant, 108 Perry LLC, (“Perry”) owns the building. The frame and window that struck the Plaintiff was part of a capital improvement project by Perry that took place between 2006 and 2007. Perry hired Third-Party Defendant, Sunny Windows, Inc., (“Sunny Windows”) to perform window installations. Perry argues they did not have any notice, either actual or constructive, that there was a problem with the window in Boesch’s apartment prior to the accident. They contend that the plaintiff cannot establish a prima facie case of negligence warranting judgement in their favor as a matter of law and that Plaintiff is incorrect when she alleges *res ipsa loquitur* applies in this case. Perry asserts they did not exercise exclusive control over the window and that co-defendant Boesch was using the window at the time of the Plaintiff’s incident and that she is liable due to her negligence.

At the time of the accident, co-defendant, Janina Boesch, (“Boesch”) who had been living in the apartment for approximately 2.5 years prior to the accident was attempting to close the window which she had previously opened earlier in the day. Like Perry, Boesch’s argues she neither created the condition or had actual or constructive notice of the dangerous condition. She argues that contrary to Plaintiff’s claims, *res ipsa loquitur* does not apply to her because the window was not in her “exclusive control” and that repairs of the apartment were the responsibility of Perry. She argues she would call the superintendent of the building who was responsible for the inspection and repair of the apartments. She claims Sunny Windows was responsible for the installation of the windows and Perry, who hired them, and who later failed to inspect their work, are responsible. Additionally she references the deposition testimony of the property manager Juan Chio who testified that once installed the work by Sunny Windows was never inspected by him or anyone else.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material question of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Houings. Corp.*, 298 AD2d 224 (1st Dept 2002).

In her opposition, Plaintiff argues that Perry is not entitled to summary judgment because they hired the contractors that installed the windows, and through Sunny windows they are responsible for a negligent act which caused the incident. They contend that Plaintiff need not prove notice when a defendant is claimed to have caused or created the condition and that in the instance case the doctrine of *res ipsa loquitur* applies and as such, summary judgment must be denied. Further, they argue that pursuant to Multiple Dwelling Law § 78, defendant had a

nondelegable duty to maintain plaintiff's apartment in good repair, and may be vicariously liable for negligence on the part of the independent contractor in performing repairs. (*Franco v. P&M Mgt. Realty Corp.*, 41 A.D.3d 244, 836 N.Y.S.2d 872, 872 [1st Dept. 2007]) citing (*Dowling v 257 Assoc.*, 235 AD2d 293, 652 NYS2d 736 [1997]; *Jacobson v 142 E. 16 Coop. Owners*, 295 AD2d 211, 743 NYS2d 500 [2002]).

With respect to Boesch, Plaintiff argues that Boesch was using the window at the time of the accident and had exclusive control over the window. Plaintiff claims that Boesch “was responsible for a negligent act which caused the negligently installed window and frame to fall out of her apartment onto the Plaintiff and that Boesch is equally liable.

There is no dispute that a window does not ordinarily fall in the absence of negligence. The doctrine of *res ipsa loquitur* constitutes a specialized application of circumstantial evidence to cases with a particular set of characteristics. The doctrine is based on the understanding, derived from everyday experience, that certain accidents normally do not occur in the absence of someone's negligence. (*Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 501 N.Y.S.2d 784, 492 N.E.2d 1200, (1986)). The doctrine of *res ipsa loquitur* may be invoked when a plaintiff demonstrates that (1) the accident is of a type that does not occur in the absence of negligence; (2) it is attributable to an agency or instrumentality within the exclusive control of the defendant; and (3) the injury sustained was not due to any voluntary action or contribution on the part of the plaintiff (*Roman v. Bd. of Educ. of N.Y.*, 9 A.D.3d 305, 307 (N.Y. App. Div. 1st Dep't 2004) citing (*Mejia v New York City Tr. Auth.*, 291 A.D.2d 225, 227, 737 N.Y.S.2d 350 [2002])). *Res ipsa loquitur* does not create a presumption in favor of plaintiff, but instead permits the inference of negligence to be drawn from the circumstances of the occurrence. The doctrine creates a *prima facie* case of negligence sufficient for submission to a jury, and the jury may, but is not required to, draw the permissible inference (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226; see also, *George Foltis, Inc. v City of New York*, 287 NY 108)

Plaintiff has raised a triable issue of fact as to whether Third-Party Defendant, Sunny Windows, created the condition that caused the window and frame to fall on plaintiff and if Perry is vicariously liable for negligence on the part of Sunny Windows, the independent contractor they hired and whether *res ipsa loquitur* could apply in this case.


With respect to co-defendant Boesch, Plaintiff has failed to demonstrate that Boesch caused, created or had actual notice of, the alleged defective condition. The doctrine of *res ipsa loquitur* is misplaced in her case. Indeed, the record reflects that Boesch, a tenant was not responsible for installing or inspecting the windows and there is nothing in the record to suggest she had done anything more than open and close the window to clean it or to air out her apartment. Accordingly, it is

ORDERED that Perry LLC's motion for summary judgment to dismiss the complaint and all cross-claims against them is denied; and it is further

ORDERED that Janina Boesch's cross motion for summary judgment dismissing the complaint and all cross-claims against her is granted.

This constitutes the decision and order of the Court.

Dated: July 9, 2014


GEOFFREY D. WRIGHT
AISC
JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

FILED
JUL 16 2014
NEW YORK
COUNTY CLERK'S OFFICE