Astorga v Bronx 360 Realty Mgt. LLC
2014 NY Slip Op 31956(U)
June 23, 2014
Sup Ct, Bronx County
Docket Number: 303384/2009
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

_____X

ANTONIO ASTORGA,

DECISION/ORDER

Plaintiff,

-against- Index No.: 303384/2009

BRONX 360 REALTY MANAGMENT LLC., et als.
Defendants.

_____X

The following papers numbered 1 to 8 read on the below motion noticed on October 10, 2013 and duly submitted on the Part IA15 Motion calendar of **March 10, 2014**:

Papers Submitted	Numbered
Pl. Aff. In Support, Exhibits	1,2
Defs' Aff. In Opposition, exhibits	3,4
Defs' Supp. Aff., exhibits	5,6
Pl.'s Aff. In reply, Exhibits	7,8

Upon the foregoing papers, the plaintiff Antonio Astorga ("Plaintiff") moves for summary judgment on the issue of liability against the defendants Bronx 360 Realty LLC and TUC Management Company, Inc. (collectively, "Defendants"), pursuant to CPLR 3212. Defendants oppose the motion.

I. Background

On September 28, 2008, Plaintiff alleges that he sustained injuries after being struck by falling debris when a ceiling collapsed inside of his apartment, located within Defendants' building. Plaintiff testified that he had been complaining about a leaking and bulging ceiling in his apartment to building management since 2004, but the condition was never remedied. Plaintiff basis his motion for summary judgment on the theory of *res ipsa loquitur*, arguing that it is undisputed that a ceiling does not collapse in the absence of negligence, that Defendants had exclusive control over the ceiling repair, and Plaintiff did not contribute in any way to this

incident.

In opposition to the motion, Defendants note that a grant of summary judgment to a plaintiff predicated on a theory of *res ipsa loquitur* is rare. Defendants also argue that there are triable issues of fact as to whether Plaintiff's injuries were proximately caused by this alleged incident. Defendants also contend that there is evidence that this collapse actually occurred two days earlier than Plaintiff alleges, and that collapse did not injure anyone. The veracity of Plaintiff's version of events therefore cannot be adjudged as a matter of law, and the motion should be denied.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

A plaintiff sufficiently invokes the theory of *res ipsa loquitur* upon establishing the

following three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*see Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 [1997]).

In opposition to the motion, Defendants do not challenge the fact that Plaintiff has satisfied the three *res ipsa loquitor* elements in this matter. It bears further emphasis, however, that the three elements have indeed been met in this case. The first and third elements have been sufficiently established since the occurrence was clearly not due to any contribution on the part of the plaintiff. Further, falling plaster (or in this case, sheetrock), from a ceiling has been held to be the sort of incident that does not occur in the absence of someone's negligence (*Mejia v. New York City Tr. Auth.*, 291 A.D.2d 225 [1st Dept. 2002], citing *Dittiger v. Isal Realty Corp.*, 290 N.Y. 492 [1943]). It is further undisputed that Defendants retained exclusive control of the condition of the ceiling and its general maintenance.

Satisfaction of the three elements alone, generally, only permits the inference of defendant's negligence to be drawn on the circumstance of the occurrence. It effectively creates a prima facie case of the Defendants' negligence sufficient for submission to the jury, and the jury may - but is not required to - draw the permissible inference (*Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219) [1986]). This is true even where plaintiff's circumstantial evidence is unrefuted (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 207-209 [2006]). In some instances, however, summary judgment may be granted in favor of a plaintiff predicated on the theory of *res ipsa loquitur*. As elucidated by the Court of Appeals, "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment ... That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 207-209 [2006]). Plaintiff may only prevail in the "exceptional case in which no facts are left for determination" (*Id.*).

Plaintiff here has submitted significant, sufficient evidence to show that this ceiling collapsed due to a condition that was admittedly exclusively within the defendants' control, but was left unaddressed for years. Defendants' employee testified that management was responsible

for repairs to the Plaintiff's apartment. Plaintiff testified that he had been complaining about the leaking, bulging ceiling to management since 2004, without any response or repair. Plaintiff was sleeping on a couch in his living room located near the leak when the ceiling collapsed, causing sheetrock to fall on him. The Fire Department responded to the location and addressed the condition.

Defendants, in opposition, offer no non-negligent reason for this incident (*compare e.g., Tora v. GVP AG*, 31 A.D.3d 341 [1st Dept. 2006]). Instead, they offer two arguments to withstand summary judgment. First, Defendants argue that there is an issue of fact as to whether Plaintiff's alleged injuries were causally related to this accident. Defendants submit expert medical reports alleging that Plaintiff has no injury stemming from this incident, and has a history of various medical issues. However, Plaintiff's injuries and whether they have a causal connection to this incident is only relevant to the issue of damages, and not to liability (*see Gramigna v. Morse Diesel, Inc.*, 210 A.D.2d 115, 116 [1st Dept. 1994]; *McCochran v. Giustino*, 26 A.D.2d 539 [1st Dept. 1966]). The Second Department decision *Shy v. City of New York*, 266 A.D.2d 275 (2nd Dept. 1999) did not address this issue in a *res ipsa loquitur* context.

Defendants next argue that there is an issue of fact as to when this incident occurred, and therefore whether plaintiff's injuries are causally related to this ceiling collapse. This argument, however, is based entirely on speculation. Defendant initially notes that Plaintiff has not produced any expert testimony regarding the cause or timing of the collapse, and does not substantiate his claim that the ceiling collapsed on September 28, 2008. First, Plaintiff is not required to submit expert testimony to establish his prima facie case under these circumstances (*see e.g. Diovisalvo v. Woodlawn Cemetery, Inc.*, 241 A.D2d 348 [1st Dept. 1997]; *Miller v. Schindler Elevator Corp.*, 308 A.D.2d 312 [1st Dept. 2003]). Next, the fact that Plaintiff was the sole witness to the alleged incident does not bar summary judgment in his favor (*Humphrey v. Park View Fifth Ave. Assoc., LLC.*, 113 A.D.3d 558 [1st Dept. 2014]).

Defendants contend that two days before the alleged incident (September 26, 2008), the apartment below plaintiff, 4A, experienced a ceiling collapse and that collapse was "directly related to the floor of plaintiff's apartment 5A directly above." Defendants buttress this argument with an affidavit of a professional engineer. Upon close review of the record, however, there is

no competent evidence to suggest that the ceiling collapse occurred earlier than September 28, 2008. Superintendent Vargas testified that the ceiling collapse in apartment 4A occurred a few days before the ceiling collapse in apartment 5A. The Fire Department responded on both occasions (Vargas EBT, 46:1-7). The FDNY report generated after their response to 4A makes no mention of a related issue ~~was~~ with apartment 5A. There is no indication that the Fire Department tried to gain access to apartment 5A when they responded to this incident. Mr. Vargas only testified that building employees, not the fire department, knocked on the door at the time. In any event, the responding firefighter, John Henglien, testified that he would have forced entry into apartment 5A if he believed that the condition in 4A was caused by a condition in 5A. The statement in the report of an unidentified occupant of apartment 5A that he experienced "water damage" to the ceiling in the days prior to the Fire Department's response, does not allow the purely speculative conclusion that the ceiling indeed collapsed at an earlier date. The proffered expert affidavit must be disregarded as overly speculative and conclusory, since it is not based on any physical inspection of the incident site (*Garcia-Rosales v. 370 Seventh Ave. Assoc., LLC.*, 88 A.D.3d 464 [1st Dept. 2011]).

In light of the foregoing this Court finds that an inference of the defendants' negligence in this matter is "inescapable" and therefore summary judgment on the issue of liability is warranted (*see O'Connor v. 72 Street East Corp.*, 224 A.D.2d 246 [1st Dept. 1996]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendants' liability only is granted.

This constitutes the Decision and Order of this Court.

Dated: 6/23/14

Hon. Mary Ann Brigantti-Hughes, J.S.C.