Presinal-Diaz v Parkash
2014 NY Slip Op 32090(U)
July 7, 2014
Sup Ct, Bronx County
Docket Number: 301113/2010
Judge: Howard H. Sherman

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Salvador Presinal-Diaz

Index No.: 303032/13

Plaintiff

DECISION/ORDER

-against-

Ved Parkash and **Luis Inirio a/k/a Iniero,**
f/s/h/a/ Luis "Doe"

Defendants

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The following papers numbered 1 to 4 read on this motion by defendants for an order awarding summary judgment dismissing the complaint

PAPERS	NUMBERED	
Notice of Motion /Affirmation and Affidavits in Support - Exhs. A-I	1	
Affirmations in Opposition - Exh A-C	2	
Affirmation in Reply - Exh. A	3	
Memorandum of Law	4	

Upon the foregoing papers, the motion is denied for the reasons set forth below.

Facts and Procedural Background

Plaintiff seeks damages for injuries sustained on April 25, 2007 in a fall from the top of a locked gate located behind a six-story residential building owned by the defendant Ved Parkash ("Parkash") . The gate was on one end of an alleyway between the subject building and that adjoining it. Defendant Luis Inirio ("Inirio") s/h/a/ Luis "Doe" was the building's superintendent at the time of the incident.

Plaintiff commenced this action in February 2010, alleging that his injuries were caused by the failure of defendants to adequately maintain the building and its appurtenances. He also asserted that the defendants violated all applicable sections of the

New York City Administrative Code and New York City Building Code.

The verified bill of particulars asserts that defendants caused and /or had both actual and constructive notice of the causative condition described as the "entrapments" in the building including in the basement, and/or cellar and garage door [Verified Bill of Particulars

¶ 4]. The regulatory violations were not further delineated in the bill of particulars or in the supplemental verified bill of particulars dated 10/28/13.

The Note of Issue was filed on July 25, 2013.

Plaintiff's fall was preceded by an early morning kitchen fire in one of the building's first floor apartments resulting in the building's evacuation .

Plaintiff, who, with his brother Jesus, was residing in a room in a basement apartment, testified that he was alerted of the fire by Inirio , and then he and Jesus left the apartment, and exited the building through a basement door located near the elevator [EBT: 39-40; 46- 50]. They emerged into an exterior alleyway in the rear of the building that was used for parking, and was enclosed by a fence, and on the other side, a gate about "40 meters" [1]high [Id. 53]. Plaintiff observed smoke coming from a first floor apartment, and "[f]iremen, an ambulance , a lot of people." [2] [Id. 54- 55:10;76-77]. The

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[1] 40 meters is equivalent to 131 feet. Plaintiff revised this estimate to "like 20" meters, when viewing a photograph [Id. 133:16].

[2] Estimated as fifty [Id. 49].

crowd, which included people he recognized as building tenants, was on the other side of the gate [Id. 54;60;62;85], but he could not remember "too well" whether there were other people in the yard besides himself and Jesus [Id.]. Nor could he recall whether the fire trucks or personnel were inside or outside the yard [Id.56]. He testified that the ambulances were on a side street [Id. 59].

Plaintiff ran to the gate and "jumped" [Id. 65:18], or "climbed it at once." [Id.: 85:21]. He got to the top, and swung his feet over, and when he started to come down the other side, he fell [Id. 86-87]. [3] Jesus successfully jumped the fence.

Inirio testified that he heard the porter tell plaintiff, who he observed trying to grab the gate, to get down because "we are going to open the gate." [[Id. 75:10-11]. After he and the porter finished lowering the building's fire escapes after the incident, they opened the gate [INIRIO EBT: 61;106]. The firefighters, who arrived several minutes later, came through the gate into the alleyway, where about a dozen tenants were standing around the superintendent's car [Id. 108]. The gate was typically opened by the porter every morning at 6:00 AM, and closed every night at around 8:00 PM [EBT: 22].

Motion and Contentions of the Parties

Defendants move for an order granting summary judgment dismissing the complaint on the grounds that there is no proof that they proximately caused plaintiff's accident,

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[3] Also as pertinent here, plaintiff was wearing sandals or flip-flops when he evacuated [Id. 88:11].

which it is argued, was caused solely by plaintiff's decision to attempt to climb over the gate. Because plaintiff was outside the building, and safely away from any threat of fire, yet chose to "jump" the gate, his conduct represented an unforeseeable superceding event for which defendants are not liable as a matter of law .

In opposition, plaintiff argues that it cannot be said as a matter of law that his conduct was a superceding intervening act because there is a material issue of fact as to whether his conduct was foreseeable in light of the fact that he found himself trapped in the courtyard where he smelled smoke while he was unaware of the extent of the fire.

Plaintiff also submits the affidavit of Scott Silberman, a licensed professional engineer, who reviewed the testimony and photographs , and the certificate of occupancy, as well as a printout of the NYC Department of Buildings that includes a post-fire violation for an illegal basement apartment .

Based upon his review, the expert opines that the owner's creation and continued maintenance of illegal basement units, besides being violative of the code, also deprived the occupants of these units direct access to the sidewalk , because there was no stairway leading from the basement to the ground floor. Of the three units in the basement, only the superintendent's legal apartment had direct access to the sidewalk.

The expert attests that "[w]hile it is unclear whether the building was erected before

or after 1938,[4] section C26 -276.0 of the 1938 Building Code requires that buildings erected before 1938 be brought "up to the 1938 code standards [ ] ", including those for egress, and maintains that while the code did not define the term means of egress, "it meant the same thing then that it does today, egress from the interior of the building to an open exterior space [ ] ", and the courtyard to which access was provided by the basement doors, did not constitute an open exterior space because at the time of the fire, the gate was locked, thereby barring access to the public street . He further attests that access to the ground floor through the elevator was routinely unavailable as the elevators were shut down at night. Moreover, he opines that in the circumstances of a fire , use of an elevator is to be avoided.

Finally, the expert concludes that these departures from good and safe practice were substantial factors in causing the accident and injuries as plaintiff "was unable to use the proper exit to the street provided for in the legal occupancy."

In reply, defendants again maintain that plaintiff's action in attempting to climb over a locked gate was not a foreseeable consequence of an emergency situation particularly in light of the fact, that none of his fifty so neighbors attempted to leave the courtyard in a similar fashion.

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[4] The certificate of occupancy was issued on February 25, 1965 and certifies compliance of occupancy pursuant to the Multiple Dwelling Law of the six-story building completed as of *February 5, 1965* . The "cellar" floor was certified as containing one five-room apartment , as well as boiler and storage rooms.

Discussion and Conclusion

> It is well established that the mere happening of an accident creates no presumption of liability. Liability attaches only if the defendant breaches a legal duty to the plaintiff which breach is a substantial cause of the events which produced the injury. An unforeseeable, superceding event will absolve the defendants of liability. An intervening act is deemed a superceding cause of the injury so as to relieve the defendants of liability if it is of such an extraordinary nature or so attenuates defendants' negligence from the ultimate injury that responsibility may not reasonably be attributed to the defendants. Whether hindsight reveals that greater precautions could have been taken to avoid the harm that eventuated is irrelevant if the injury could not reasonably have been foreseen at the moment the defendant engaged in the activity which later proves harmful.
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> Perez v. New York Tel. Co., 161 A.D.2d 191, 554 N.Y.S.2d 576 [1st Dept. 1990]

A particular accident may be considered unforeseeable as a matter of law " where the conduct or chain of events was so extraordinary that the defendant's duty did not extend to preventing it (see *Di Ponzio v Riordan*, 89 NY2d 578, 583-584, 679 NE2d 616, 657 NYS2d 377 [1997]). " Powers v. 31 E 31 LLC, 105 A.D.3d 657, 965 N.Y.S.2d 7 [1st Dept. 2013], lv. app. granted , 21 N.Y.3d 863, 995 N.E.2d 183 [2013]

Upon review of the papers upon submission here, and drawing all favorable inferences in favor of the nonmoving plaintiff (see, Liberty Ins. Underwriters Inc. v Corpina Piergrossi Overzat & Klar LLP, 78 AD3d 602, 605, 913 NYS2d 31 [1st Dept. 2010]), it is the finding of this court that defendants have failed to demonstrate as a matter of law that plaintiff's conduct was so extraordinary and unforeseeable as to constitute the superceding cause of his injuries such as to relieve defendants of liability.

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It is submitted that under the circumstances here that include an early-morning fire in a first floor apartment that generated smoke in the basement as well as in the alleyway, and necessitated a building-wide evacuation, there are material issues of fact as to whether plaintiff's reaction to the emergency by attempting to get out of the enclosed alleyway reasonably could have been foreseen as a consequence of defendant's failure to provide him with an unobstructed means of egress from the basement apartment to a public way.

There are significant questions surrounding the evacuation, including the presence of other tenants in the alleyway; whether plaintiff was directed not to attempt the climb, but to wait until the fire escapes had been lowered, as well as the chronology and timing of the events, that would have to be resolved by the triers of fact before it could be determined whether plaintiff's actions "were of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant." (Kush v. City of Buffalo, 59 NY2d 26,33, 449 N.E.2d 725 [1983]).

Accordingly, it is ORDERED that the motion be and hereby is denied.

This constitutes the decision and order of this court.

Dated: July 7, 2014

Howard H. Sherman