Vasquez v Fieldstone Plaza Condominium

2014 NY Slip Op 32648(U)

September 3, 2014

Supreme Court, Bronx County

Docket Number: 307311/2010

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

RENZO VASQUEZ,

Plaintiff,

-against-

FIELDSTONE PLAZA CONDOMINIUM and VERITAS PROPERTY MANAGEMENT, LLC,

Defendants.

INDEX NUMBER: **307311/2010**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 5,

Read on this Defendant Veritas Property Management LLC's Motion for Summary Judgment

On Calendar of **4/28/14**

Notice of Motion-Exhibits and Affirmation	1
Affirmations in Opposition	2, 3
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Upon the foregoing papers, defendant Veritas Property Management, LLC's (hereinafter "Veritas") motion for summary judgment is granted for the reasons set forth herein.

The within action involves plaintiff's claim that he was injured on January 5, 2009 at approximately 3:00 p.m. while delivering mail to the condominium building located at 445 West 240th Street, Bronx New York. The building was owned by defendant Fieldstone Plaza Condominium (hereinafter "Fieldstone") and managed by defendant Veritas. At the time of the accident, plaintiff was employed as a mail carrier by the United States Postal Service. Plaintiff claims that his accident occurred when he slipped and fell off a ramp at the entranceway to the premises. Plaintiff described the front of the building as having a short ramp, about three feet wide and six feet long, which descended toward the entrance of the building, and is

adjoined by two steps. There is a black, metal railing located on the left hand side of the ramp as one heads down the ramp, but the railing did not extend though the length of the ramp. Plaintiff had been delivering mail to the subject building for three years, five to six days a week Plaintiff used a cart which contained the mail during his deliveries and he used the ramp to get the cart into the building. Plaintiff testified that his accident occurred on the ramp while he was headed toward the building to deliver the mail. "I made a left turn into the ramp. As I passed the two feet of railing, I'm coming down and like the cart like kind of pushed me and I lost my balance. When I lost my balance I fell to the right of the - - past the steps." Immediately before his fall, he had been holding the handle of the mail cart with his right hand. He had traveled on the ramp, past the railing on his left, at the time of his fall. There was no other railing. The area described by plaintiff is depicted in photographs that were marked as exhibits at plaintiff's deposition. Plaintiff identified the photographs and testified that they fairly and accurately depicted the entrance, ramp, stairs and railing at the subject building at the time of the accident.

Michael Dailey, President of the Board of Managers at Fieldstone, testified at a deposition regarding the management agreement between Fieldstone and Veritas. Mr. Dailey signed the agreement on behalf of Fieldstone and Carl Bornstein signed it on behalf of Veritas. He testified that as the managing agent, Veritas deals with the day-to-day affairs of running the building. Mr. Dailey testified that Veritas generally had to get Board approval to do any work in the building or on the common property outside of the building. Vertias needed the Board's approval to hire anyone to perform work on the premises. Veritas also needed Board approval to pay for work that was performed. Any repairs or alterations to be performed on the premises required Board approval. Mr. Dailey further testified that the common areas of the property outside of the building are known as "common elements" and are owned by the corporation. The area of the ramp and stairs where plaintiff's accident occurred is a common element of the building. The building employed a superintendent who lived on the premises as well as a porter. It was the managing agent's responsibility to supervise the superintendent. With respect to the subject railing, he testified that it was the only railing at the ramp at the time of the accident. The building never had a hand railing on the right side of the ramp until after plaintiff's accident. Subsequent to plaintiff's accident, there was a Board meeting and it was decided that a new hand railing be installed on the right side of the ramp, as well as replacing the hand railing on the left side of the ramp as one descended towards the building. The Board of Managers, through its managing agent Veritas,

contracted to have the work performed. Prior to plaintiff's accidents, there had been no complaints regarding the ramp or railing.

Carl Bornstein, President of Veritas, testified at a deposition that Veritas is the property manager for Fieldstone. In general, Vertias responsibilities included helping supervise the condominium staff, billing and collections, accounts payable, monthly management reports, obtaining estimates from contractors when requested to do so, attend board meetings and handle tenant/owner complaints and problems. The two condominium employees consist of a live-in superintendent and porter. Veritas does not have authority over those employees but ensures that they perform their duties. The superintendent was expected to keep the building clean, conduct repairs and to report any problems to Veritas. Prior to plaintiff's accident, there were no complaints about the ramp or lack of handrails, or any complaints that it was unsafe. Mr. Bornstein testified that after plaintiff's accident, there was a Board meeting to discuss the handrails to make the ramp safer. Veritas was asked by the Board to obtain quotes and requested that they find a company to put up another hand railing. Mr. Bornstein obtained quotes which he presented to Mr. Dailey and the Board decided which company they were going to retain to perform the work. Mr. Bornstein worked with the company and the superintendent and supervised the installation of the two hand rails on either side of the ramp. Fieldstone paid for the work performed. Mr. Bornstein also testified that if there was something that needed repair, Veritas would need the permission of the Board and Veritas would then act on the direction of the Board. If a safety issue arose, Mr. Bornstein would bring it to the attention of the Board.

The management agreement between Fieldstone and Veritas provided that "[i]t is understood by the parties to this Agreement that the Condominium is responsible only for the repair and maintenance of the common elements and limited common elements ("Common Elements") in the buildings and on the premises...". The agreement also provided that Veritas had the authority to hire contractors upon approval of Firestone, and

> 2(e) Cause all required repairs and alterations of the Common Elements, including, but not limited to, electrical, plumbing, steamfitting, carpentry, masonry, subject only to the limitations contained in this Agreement or in the By-Laws of the Condominium. Repairs or alterations involving expenditure in excess of Three Thousand ($3,000) Dollars for any one item... shall be made only with the prior approval of the Condominium, but emergency repairs (ie., those immediately necessary for the preservation or safety of the building or for the safety of unit owners, or other persons, or required to avoid the suspension of any necessary service in the

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> building) may be made by the Agent irrespective of the cost thereof, without the prior approval of the Condominium, after consultation with the President, Vice President or Treasurer of the Condominium (in the order given), or on the sole authority of the Agent, if none of the aforementioned officers are available and the Agent shall reasonably determine that immediate action is required.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that the defendant had a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury...". Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the defendant created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum

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of Natural History, 67 N.Y.2d 836, 837 (1986).

Defendant Veritas motion for summary judgment must be granted. Defendant Fieldstone is the owner of the premises and has a non-delegable duty to maintain its premises in a reasonably safe manner ensuring that the general public has a safe means of ingress and egress. Backiel v. Citibank, N.A., 751 N.Y.S.2d 492 (2d Dept. 2002). A condominium complex owner has a duty to repair and maintain the "common elements" of the condominium building and owes a non-delegable duty to maintain the premises in good repair. See, Onetti v. Gatsby Condominium, 975 N.Y.S.2d 27 (1st Dept. 2013). In Pekelnaya v. Allyn, 808 N.Y.S.2d 590 (1st Dept. 2005), the First Department noted that the condominium common elements are solely under the control of the board of managers. The Court further noted that the Condominium Act provides that the cost of materials and labor incurred in connection with the common elements is payable out of common charges and implicit in the statutory requirement that work on the common elements be performed "at the express request or with the consent of the ... board of managers" is the recognition that the board exercises exclusive control over the common elements. Plaintiff's accident occurred on the common elements of the Fieldstone building.

Plaintiff and defendant Fieldstone have failed to raise any issues of fact regarding Veritas alleged negligence. Fieldstone argues that Veritas was the exclusive managing agent for the premises and it was required to hire, pay and supervise all persons necessary to properly maintain and operate the building and the premises and had the authority to hire contractors to effect repairs and alterations to the common elements of the condominium. However, contrary to Fieldstone's contention, Veritas did not have any independent obligation to install a railing on the subject ramp "due to its unsafe condition". There is no evidence that Veritas had actual or constructive notice that there was a defective condition on the premises which required Veritas to bring it to the Board's attention and seek the Board's approval for the installation of another handrail. A defendant who moves for summary judgment has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Rodriguez v. 705–7 E. 179th St. Housing Development Fund Corp., 913 N.Y.S.2d 189 (1st Dept. 2010). To prevail on a motion for summary judgment for lack of notice, defendant is required to make a prima facie showing which affirmatively establishes the absence of notice as a matter of law. Fox v. Kamal Corp., 706 N.Y.S.2d 142 (2d Dept. 2000). There had been no prior complaints to Veritas regarding the subject ramp and the absence of a handrail on one side.

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It is axiomatic that "before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability". Pulka v. Edelman, 40 N.Y.2d 781 (1976). "[L]iability for a dangerous or defective condition on [real] property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property". Turrisi v. Ponderosa, Inc., 578 N.Y.S.2d 724 (3rd Dept. 1992). A duty of care on the part of the managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner which displaces the owner's duty to safely maintain the premises. Roveccio v. Ry Management Co., Inc., 816 N.Y.S.2d 114 (2d Dept. 2006). As the agent for the condominium, defendant Veritas is liable to third persons only for affirmative acts of negligence. Newman v. Upton, Cohen & Slamowitz, 781 N.Y.S.2d 508 (1st Dept. 2004) citing Jones v. Archibald, 360 N.Y.S.2d 119 (4th Dept. 1974)(An agent who has undertaken no individual responsibility, nor expressly obligated himself in a contractual relationship with a third party cannot be held liable for nonfeasance only); Greco v. Levy, 12 N.Y.S.2d 470 (1st Dept. 1939), aff'd., 282 N.Y. 575. Liability can not be based upon an allegation that amounts to mere nonfeasance unless plaintiff establishes, as a matter of law, that the managing agent was in complete and exclusive control of the premises. See, Howard v. Alexandra Restaurant, 922 N.Y.S.2d 386 (1st Dept. 2011); Mangual v. U.S.A. Realty Corp., 880 N.Y.S.2d 637 (1st Dept. 2009); Hakim v. 65 Eighth Ave., LLC, 840 N.Y.S.2d 323 (1st Dept. 2007); Dempsey v. Mt. Ebo Associates, Inc., 692 N.Y.S.2d 344 (1st Dept. 1999); Hagen v. Gilman Management Corp., 770 N.Y.S.2d 890 (2d Dept. 2004); Ioannidou v. Kingswood Management Corp., 610 N.Y.S.2d 277 (2d Dept. 1994). In Gardner v. 1111 Corp., 141 N.Y.S.2d 552 (1st Dept. 1955), aff'd., 1 N.Y.2d 758 (1956), plaintiff claimed that the accident occurred because of the failure of the defendant managing agent to inspect and repair an elevator. Thus, the claim is one for nonfeasance. The First Department held that where a managing agent has complete and exclusive control of the management and operation of the building, in other words where he stands in the owner's shoes so to speak, he is liable for negligence just as the owner would be and cannot be excused by claiming that he was guilty only of nonfeasance. The Court noted that if the defendant were not in complete and exclusive control then there would be no liability on its part since a managing agent not in complete control is not liable for mere nonfeasance. Similar to the facts of the instant

matter, the contract in Gardner between owner of building and managing agent provided that the managing agent had authority to make necessary repairs and alterations, except that alteration of capital nature in excess of $2,500 would require owner's approval, and had power to supervise, hire and discharge employees but with understanding that all such employees were in employ of owner and not of managing agent.

In the instant matter, Veritas did not have a management agreement that put it in exclusive and complete control over the condominium. Veritas did not have any independent authority to act to hire a contractor to perform work on the premises. Pursuant to the testimony of Fieldstone's President of the Board of Managers, Mr. Dailey, Veritas generally had to obtain Board approval to do any work at Fieldstone and Vertias needed the Board's approval to hire anyone to perform any repairs or alterations on the premises. Veritas could not cause repairs or alterations to be performed involving expenditures in excess of $3,000 without Board approval. Any emergency repairs, regardless of cost, could be made without Board approval but required consultation with an Officer of the Board unless one was not available. Under these circumstances, it cannot be said that Veritas had exclusive control over the management and operations of the building. See, Davis v. Prestige Management Inc., 951 N.Y.S.2d 147 (1st Dept. 2012)(Managing agent was not in complete and exclusive control of the premises since it could not make repairs costing more than $2,000 or sue delinquent unit owners for overdue common charges without the condominium's authorization, and all repairs and lawsuits were at the condominium's expense); Vushaj v. Insignia Residential Group, Inc., 855 N.Y.S.2d 117 (1st Dept. 2008)(Management company did not owe duty to handyman employed by building owner where management company's agreement with owner granted it broad authority to make repairs costing less than $2,500, there was no evidence that, under terms of agreement or in actual practice, management company's duties included making periodic inspections and ensuring that building was maintained in good repair); Guerrero v. Djuko Realty, Inc., 752 N.Y.S.2d 694 (2d Dept. 2002)(Apartment manager was jointly and severally liable for injuries sustained by child who suffered from lead poisoning as a result of child's exposure to lead-based paint, since, as managing agent, manager was in complete and exclusive control of the management and operations of the apartment building).

In Lennon v. Oakhurst Gardens Corp., 645 N.Y.S.2d 652 (3rd Dept. 1996), the Fourth Department addressed a case with similar facts to the case herein. In Lennon, defendant Platzner Management Inc. had contracted with defendant Oakhurst Gardens Corporation to manage an apartment complex owned by

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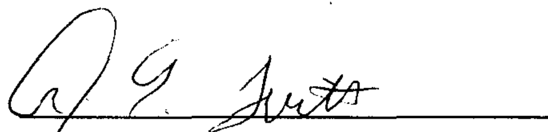
Oakhurst. Plaintiff, a resident of the complex, allegedly slipped and fell while she was exiting her building and was forced to walk through a large puddle of water that had accumulated near the door of the building. Platzner moved for summary judgment on the grounds that it was serving as an agent for a disclosed principal and that it had not contracted to provide caretaking services of the grounds. Supreme Court denied the motion and Platzner appeals. The Third Department reversed noting that plaintiff had asserted a claim based on nonfeasance and, as a general rule, an agent is liable to third persons only for affirmative acts of negligence. The Court further noted that a managing agent of a building may nevertheless be subject to liability for nonfeasance where it has complete and exclusive control of the management and operation of the building. The Court held that the written agreement reveals that Platzner (the agent) did not have control of the property to the exclusion of Oakhurst (the owner) and that Oakhurst reserved to itself a certain amount of control in the agreement. The court noted that, "[f]or instance, although the agreement stated that Platzner was responsible to 'cause the common elements of the Property to be maintained', it was required to do so '[s]ubject to the direction' of Oakhurst's board of directors. In addition, while Platzner was responsible for hiring employees to maintain the property, the contract provided that '[a]ll such personnel shall be employees of [Oakhurst] and not of [Platzner]'. The contract also prohibited Platzner from making any unbudgeted expenditures exceeding $5,000 without Oakhurst's prior consent, except under emergency conditions." The Third Department held that given these contractual provisions, Platzner lacked the requisite exclusive control over the property necessary to be liable for nonfeasance. Oakhurst, "having reserved some control, the ultimate obligation for inspecting and repairing remained with it, and in that respect it alone would be responsible for negligence". Id. quoting Gardner, *supra*. There was nothing in the record to show that Platzner assumed authority or responsibility, "as if [it was] acting on [its] own account". Id. citing Jones, *supra*.

Accordingly, defendant Veritas' motion for summary judgment is granted and the complaint and cross claims against it are dismissed.

This constitutes the decision and Order of this Court.

Dated: 9/3/14



Hon. Alison Y. Tuitt