Morgan v 675 Walton Ave. Owners Corp.
2014 NY Slip Op 33255(U)
November 17, 2014
Supreme Court, Bronx County
Docket Number: 300881/11
Judge: Mark Friedlander
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[* 1] FILED Nov 19 2014 Bronx County Clerk

NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

YETTIE MORGAN and DAVID WHITE, JR.,

Plaintiffs,

-against

675 WALTON AVENUE OWNERS CORP.,

Defendants.

MEMORANDUM DECISION/ORDER
Index No. 300881/11

HON. MARK FRIEDLANDER

Defendant, 675 Walton Avenue Owners Corp. ("Walton"), moves for an order: (1) pursuant to CPLR§3212, dismissing plaintiffs' complaint on the ground that the subject fire was caused by plaintiff, David White, Jr. ("White"), who negligently left a burning incense stick unattended; (2) dismissing the complaint on the ground that the subject fire was not caused by the electrical wiring or outlet in plaintiffs' apartment; (3) dismissing the complaint on the ground that plaintiff, Yettie Morgan ("Morgan"), was responsible pursuant to her proprietary lease to maintain the electrical outlets and wiring in her apartment; and (4) dismissing the complaint on the ground that defendant Walton was "out-of-possession" of plaintiffs' apartment and did not control plaintiffs' apartment and so was not obligated to maintain it. The motion is decided as hereinafter indicated.

This is an action by plaintiffs, Morgan and White, to recover monetary damages resulting from a fire on December 7, 2009, in Morgan's residential cooperative apartment, A2, at 675 Walton Avenue, Bronx, New York, allegedly caused by a defective outlet in the apartment.

In support of the motion, Walton submits, *inter alia*, a copy of the pleadings, transcripts

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of the deposition testimony of plaintiffs, Morgan and White, the affidavits of Miguel Nieves ("Nieves"), Konstantina Thiakodemitis ("Thiakodemitis") and Gary Persichetti ("Persichetti"), a retired New York City Fire Marshal, the proprietary lease between Walton and Morgan, and a certified copy of the Fire Incident Report of the Bureau of Fire Investigation, FDNY, In opposition to the motion, plaintiffs submit, *inter alia*, a copy of the Fire Incident Report of the Bureau of Fire Investigation, FDNY, the affidavit of plaintiff Morgan, various unauthenticated photographs, a copy of the proprietary lease between Walton and Morgan, and a Stipulation Discontinuing Action With Prejudice in an action between Strathmore Insurance Company, as subrogee of 675 Walton Avenue, Inc., as plaintiff, against Morgan and White, as defendants, Supreme Court, New York County Index No. 106016/2010.

The facts, as culled from the pleadings, deposition transcripts, affidavits and exhibits, are as follows: Walton, a cooperative corporation, is the owner of the land and of a cooperative residential apartment building located at 675 Walton Avenue, Bronx, New York. Morgan is the owner of 200 shares of Walton, and was allocated apartment 2A, as well as a proprietary lease for such unit, for a term commencing October 20, 1985 through December 31, 2084. White, the grandson of Morgan, also occupied Morgan's apartment. According to plaintiffs' bill of particulars, one of the electrical outlets in their apartment was defective and dangerous, in that the electrical outlet and wires were exposed. This "exposure" allegedly caused a fire in their apartment, which resulted in physical damage to their personal property. Plaintiffs further allege that Walton had actual and constructive notice of this defective condition.

Walton asserts that: (1) the subject fire was caused by White, who left a burning incense stick unattended; (2) the subject fire was not caused by the electrical wiring or outlet in plaintiffs'

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apartment; (3) pursuant to the proprietary lease, Morgan was responsible for the maintenance of the electrical outlets and wiring in her apartment; (4) Walton was out-of-possession of plaintiffs' apartment, did not control plaintiffs' apartment, and was not obligated to maintain it; and (5) it did not have actual or constructive notice of the alleged defective condition.

The proprietary lease between Walton and Morgan contains the following lease provision:

> "24. LESSEES OBLIGATION TO MAINTAIN THE UNIT. The *Lessee* shall keep the interior of the unit (including walls, floors and ceilings, and including windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames and saddles) in good repair, shall do all of the painting and decorating of the unit and *shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and exposed gas, steam and water pipes and any special pipes under the floors, but shall not include gas, steam water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment. The Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances and equipment and all meters, fuses boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's unit.* Any ventilator or air conditioning device which shall be visible from the outside of the building shall at all times be painted by the Lessee in a standard color which Lessor may select for the building." (*Italics added*).

This proprietary lease provision clearly places responsibility for the outlet and electrical wiring on the lessee (Morgan). The Court notes that there is a specific exclusion for "gas, steam water or other pipes or conduits *within the walls*." No such exclusion applies for the electrical equipment and wiring, which could readily been included, had it been the intention of the parties to place responsibility on the lessor (Walton).

Assuming arguendo that Walton was responsible for the maintenance of the electrical outlets and wiring in plaintiffs' apartment, Walton has demonstrated a lack of actual or constructive notice through the affidavits of Nieves (Walton's superintendent from 1982 through

December 31, 2009) and Thiakodemitis (Walton's assistant property manager from 2002 through 2010), that they received no complaints regarding the electrical service, wiring or any outlet in plaintiffs' apartment, and that Walton performed no work on the electrical service, wiring outlets, circuit breakers or any part of the electrical system in plaintiffs' apartment prior to the fire on December 7, 2009. Morgan's deposition testimony demonstrates that she never personally reported the alleged defective condition to Walton, and had no first hand knowledge that her husband or anyone else ever reported it to Walton. Morgan's affidavit in opposition contradicts her prior sworn deposition testimony and creates only a feigned issue of fact which is insufficient to defeat a motion for summary judgment. *Garber v. Stevens,* 94 A.D.3d 426 (1st Dept. 2012).

The Report of Fire Marshall Thomas Brusca, Jr. ("Brusca") states, in relevant part, as follows:

ORIGIN AND EXTENSION

> Examination showed fire originated in the subject premises, on the second floor, in apartment 2a, in the south east bedroom, approximately three feet north of the south interior wall, approximately ten feet west of the east interior wall, approximately one foot above floor level, in combustible material, (plastic garbage can, clothes), in heat from fallen incense. Fire extended to four walls, ceiling, floor and contents throughout. Fire was thereto confined and extinguished.

Marshal Brusca's report further states on the Face Sheet ,that the cause of fire was "Open Flame." However, on page 3 of his report, he makes entries indicating that the heat source was under investigation, that the item which first ignited was "Undetermined," and that the factor contributing to ignition was "Undetermined."

Persichetti states in his affidavit that he inspected plaintiffs' apartment on December 14, 2009, seven days after the fire. He made the following observations:

(1) the duplex electrical outlet on the wall of White's bedroom had no devices plugged into it;

(2) the branch wiring servicing the outlet was in good condition and did not cause the fire. The electrical outlet was examined and showed no physical evidence of abnormal electrical activity in it or in the attached branch circuit wiring. The heat and flame patterns extended towards the outlet, not away from it, indicating that the fire originated in neither the outlet nor its wiring. Further, there was no sign of beading of the wiring servicing the outlet and so there was no abnormal electrical activity in the wiring which could have caused the fire;

(3) no electrical wiring or devices were found in the area of origin.

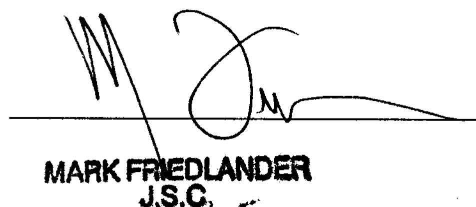
Persichetti stated, to a reasonable degree of certainty, based upon accepted standards of professional fire investigation, that there was no evidence that the fire was caused by the electrical wiring and outlet servicing the bedroom. Persichetti further opined that the fire was caused by White's leaving a lighted incense stick unattended when he exited the apartment.

White admits that he was burning incense on the day of the fire, but testified that he had extinguished the incense prior to his leaving the apartment. Irrespective of whether the incense was the cause of the fire, plaintiffs have submitted no expert testimony to refute Persichetti's expert opinion that the fire was not electrical in origin.

Based upon the foregoing, defendant's motion for summary judgment is granted, and plaintiffs' complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: 11/17/14



MARK FRIEDLANDER
J.S.C.