

Montilla v BPIV-90 Ellwood Street Owner, LLC

2015 NY Slip Op 30209(U)

January 23, 2015

Supreme Court, Bronx County

Docket Number: 309258/2009

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

SOWANY MONTILLA,

Plaintiff,

-against-

Index No. 309258/2009

DECISION AND ORDER

BPIV-90 ELLWOOD STREET OWNER, LLC,
VANTAGE PROPERTIES, LLC, CITIWIDE
COMMUNICATIONS, INC. and V-TECH
CONSTRUCTION SERVICES, LLC,
Defendants.

HON. SHARON A. M. AARONS, J.S.C.:

Defendant Citiwide Communications, Inc. (Citiwide) moves for summary judgment dismissing the complaint against it pursuant to CPLR 3212. Plaintiff submits written opposition. BPIV-90 Ellwood Street Owner, LLC (Ellwood), Vantage Properties, LLC (Vantage), and V-Tech Construction Services, LLC (V-Tech), represented by the same counsel, also submit written opposition. The motion is granted.

Plaintiff was allegedly injured at approximately midnight on the evening of September 25, 2008, when she received an electric shock when she placed her key into the front entry door of a multiple dwelling located at 90 Ellwood Street in New York County. At the time of the accident, the plaintiff was temporarily residing with her mother, who is a tenant of the building. The plaintiff allegedly observed numerous exposed wires originating from the intercom panel located immediately adjacent to the metal frame of the front entry door. The moving defendant, Citiwide, had contracted to install a new intercom system at the time of the accident.

In support of the motion, defendant Citiwide submits the pleadings; the verified bill of particulars;

the note of issue; the certified, unsworn¹ deposition testimony of the plaintiff; the certified, unsworn deposition testimony of the plaintiff's mother, Adaligisa Montilla, with notice of service; the sworn, certified deposition testimony of Perry Sontag, defendant Citiwide's witness; the certified, unsworn deposition testimony of the Ray Camacho, for Defendant Vantage Properties, LLC, with notice of service; the certified, sworn deposition testimony of the Halit Shalva, for AEC Electronics, Inc.,² with notice of service; and various work orders.

It is not disputed that Citiwide contracted with AEC to perform an inspection, estimate the price of the contract, and perform the actual work. Mr. Shalva of AEC testified at his deposition that he performed an on-site inspection on August 7, 2008, approximately two months prior to the incident. He stated that he did not have to remove the intercom panel to perform his inspection, and would not have left the intercom panel off of the underlying "box" which holds it in place. Further, AEC was not authorized to commence the work until September 29, and did not actually begin any work until October 13, 2008, after the alleged incident.

It is undisputed that a contractor unrelated to Citiwide was, at the time of the accident, installing an electronic key entry system. At her deposition, plaintiff testified that she did not observe the numerous wires extending from the intercom box until the time of her accident. She further testified that she had observed workers performing repairs in and around the front door for several weeks prior to the incident. Plaintiff's mother testified at her deposition that no work had been performed on the intercoms

¹No party has raised any argument with respect to the admissibility of the deposition transcripts herein. A deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]).

²Defendant Citiwide had commenced, and then discontinued, a third-party action against AEC Electronics, Inc. (AEC.)

prior to the incident. She further stated that she first observed that the intercom panel had been removed, and that the wires were exposed, some two weeks prior to September 25. She observed workers performing work in the area of the front entry door for several weeks prior to the incident, installing a magnetic key system. The system, when completed, involved the installation of a metal plate in the same "box" as the intercom system, to which a magnetic key would be placed to unlock the front entry door.

In opposition, plaintiff submits the deposition testimony of Alba Delgado, an employee of defendant Vantage, who testified that defendant Ellwood was the owner of the premises, and Vantage was the managing agent. Plaintiff does not dispute that Mr. Shalva inspected the intercom system on August 7, or that he stated that he did not remove the panel. Plaintiff nevertheless argues that Mr. Shalva may have removed the panel, contrary to his testimony. Defendants Ellwood, Vantage and V-Tech similarly argue that questions of fact exist as to whether defendant Citiwide was working on the premises at the time of the accident.

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, 144 N.E.2d 387, 165 N.Y.S.2d 49 [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, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) 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, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404).

Plaintiff, as the opponent of summary judgment, "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief." (*American Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 897 [1st Dept. 1984]; see also, *Armstrong v.*

Sensormatic/ADT, 100 A.D.3d 492, 954 N.Y.S.2d 53 [1st Dept. 2012]).

Defendant has met its burden of establishing prima facie that it did not cause or create the alleged exposed wiring. It is undisputed that the inspection performed by Mr. Shalva took place some two months prior to the incident. He denied having removed the panel, and there is nothing in the record to indicate that he did so. The argument that he removed the panel at his initial inspection is based on sheer speculation. In that regard, it is significant to note that neither plaintiff or her mother testified that the panel was removed and the wires exposed for two months prior to the incident. In fact, plaintiff did not observe the wires until the day of the accident, and plaintiff's mother observed the exposed wires initially about two weeks prior to the incident. This testimony refutes the speculation that Mr. Shalva removed the panel at the time of his initial inspection some two months prior to the incident.

There is also no evidence in the record to suggest that Citiwide commenced the actual work (as opposed to the initial inspection) prior to the incident – in fact, plaintiff's mother confirmed that no work was performed on the intercom system prior to the accident. Lastly, as the magnetic key system was ostensibly routed through the same "box" as the intercom system, there is a rational basis to infer that the panel may have been removed in connection with the installation of the magnetic key system.

The motion is granted. It is accordingly

ORDERED that the complaint is dismissed as against defendant Citiwide Communications, Inc. only, and it is

ORDERED that defendant Citiwide Communications, Inc. shall serve a copy of this ORDER on all parties with Notice of Entry thereon.

Dated: January 23, 2015


SHARON A. M. AARONS, J.S.C.