

Sylvester v New York City Hous. Auth.

2015 NY Slip Op 30369(U)

February 10, 2015

Supreme Court, Bronx County

Docket Number: 350179/2012

Judge: Alison Y. Tuitt

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

PART IA - 5

TRIAN SYLVESTER, an infant under the age of eighteen, by his mother and natural guardian, TAWANA GRAY, and TAWANA GRAY, individually,

INDEX NUMBER: 350179/2012

Plaintiffs,

-against-

Present:
HON. ALISON Y. TUITT
Justice

NEW YORK CITY HOUSING AUTHORITY,

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 10/15/14

Notice of Motion -Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is granted for the reasons set forth herein.

The within is an action to recover for personal injuries which were sustained on January 24, 2012, when the infant plaintiff, then four years old, fell onto the horizontal steam pipe between plaintiff's bed and the bedroom wall, resulting in serious burns. Plaintiff alleges that the infant-plaintiff fell onto the pipes leading to the radiator and that the pipes were scalding hot. Plaintiff testified that she had never complained to defendant about the radiators or the steam heating pipes in her apartment during the winter of 2012. She further testified that she made complaints that the subject radiator was leaking and emitting steam in the winter of 2011

and someone from defendant came to the apartment and fixed it. In the same year, plaintiff also complained that the subject radiator was too hot and she was told by the housing assistant of defendant Ms. Norman that defendant was not responsible to cover the pipes in the radiator. Plaintiff further alleges that defendant violated §27-809 of the Administrative Code of the City of New York which requires that all accessible piping in habitable and occupiable rooms carrying water, steam or other fluids at temperatures exceeding 165 degrees be insulated. It further provides that where accessible piping carries a fluid not exceeding 250 degrees and insulation would interfere with the functioning of the system, such piping may be uninsulated provided sufficient clearance is maintained from the combustible construction so that the 235 degrees was not exceeded and all uninsulated piping be provided with at least one half inch clearance from combustible materials.

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.

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 an owner of a premises has 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 landlord 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 of Natural History, 67 N.Y.2d 836, 837 (1986).

Defendant moves for summary judgment on the grounds that the subject premises was in compliance with the New York City Building Code of 1938 which was the Code applicable at the time of construction of the subject building. Defendant further argues that even if §27-809 applied, the steam inside the subject radiator did not exceed 250 degrees; insulating the heating pipes would interfere with the functional utility of the heating system; and there was no combustible construction material near the heating pipes.

Summary judgment must be granted to defendant. As landlord, defendant did not owe a duty to its tenants to provide a cover for the radiator to prevent a tenant’s young children from coming into contact with it. Rivera v. Nelson Realty, LLC, 7 N.Y.3d 530 (2006). In Rivera, the Court of Appeals held that where a radiator did not need repair or did not malfunction in any way, an uncovered radiator did not constitute the type of hazardous condition of which actual or constructive notice would expose a landlord to common-law liability or liability pursuant to the Multiple Dwelling Law. Id. In addition, the Court held that any duty to protect children from uncovered radiators remains that of the tenant, unless some other statute or regulation imposes it on the landlord. Id. Moreover, also directly on point is the case of Rodriguez v. City of New York, 799 N.Y.S.2d 195 (1st Dept. 2005), where the First Department dismissed infant plaintiff’s complaint. In Rodriguez, the Court held that landlord’s failure to provide a cover for a cast iron radiator in a single room apartment in a homeless shelter was not actionable negligence in an action where the tenant’s infant child was severely burned by coming into contact with the radiator. Id. The First Department held that there was no evidence that the radiator was malfunctioning or that it was improperly installed, and the building code did not require covering for that type of radiator. Id.

In the instant matter, the subject premises was in compliance with the New York City Building Code of 1938 which was the applicable code when the building was constructed in 1954. At the time the building was constructed in 1954, the Building Code did not require that heating pipes be insulated or covered. Accordingly, pursuant to the relevant caselaw, this Court is left with no alternative but to grant defendant's motion for summary judgment and dismiss plaintiffs' complaint.

The Court has considered plaintiffs' remaining arguments and finds them unavailing.

This constitutes the decision and order of this Court.

Dated: 2/10/15

A handwritten signature in cursive script, appearing to read "A. Y. Tuitt", is written over a horizontal line.

Hon. Alison Y. Tuitt