Bergere v Westbeth Corp. Hous. Dev. Fund Co., Inc.
2015 NY Slip Op 32086(U)
October 13, 2015
Supreme Court, New York County
Docket Number: 112351/08
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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PRESENT: HON. PAUL WOOTEN PART 7
Justice

GRACE SIMONE BERGERE, and infant, by her father and natural guardian, STEPHEN M. BERGER and STEPHEN M. BERGER,

Plaintiffs,

- against -

WESTBETH CORP. HOUSING DEVELOPMENT FUND COMPANY, INC. and PHIPPS HOUSES SERVICES, INC.,

Defendants.

INDEX NO. 112351/08

MOTION SEQ. NO. 006

The following papers were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

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This is an action commenced by Stephen M. Bergere (Stephen Bergere), both individually and on behalf of his daughter and infant plaintiff, Grace Simone Bergere (Bergere or infant plaintiff) (collectively, plaintiffs) against Westbeth Corp. Housing Development Fund Company, Inc. (Westbeth) and Phipps Houses Services, In c. (Phipps) (collectively, defendants) to recover damages for personal injuries suffered by the infant plaintiff as a result of falling down a chimney at the premises located at 463 West Street, New York, New York (the premises) . Before the Court is a motion by defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. Plaintiffs are in opposition to the motion. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

This action arises out of an incident that occurred on the roof deck of the premises at or around 10:00 p.m. on the evening of July 31, 2008. At that time, the then twelve-year-old infant plaintiff fell approximately 150 feet down a chimney on defendants' property and was injured (affirmation of plaintiff's counsel at 1). Westbeth is the owner of the premises and Phipps is the managing agent. Both plaintiffs are tenants of the premises. The buildings and chimneys on the premises were originally constructed for the Bell Telephone Company between the years of 1899 and 1920. In the 1960s, the buildings were converted by Housing & Urban Development into residential apartments and commercial space (affirmation of defendants' counsel ¶ 25). The defendants' property consists of nine separate divisions designated as buildings A, B, C, D, G, H, I, N and L (plaintiffs' exhibit B ¶ 18). There are multiple alternative addresses for the property including 55 Bethune Street, which functions as the main entrance to the property. The buildings that make up the defendants' property encompass an entire city block bounded by West Street on the west, Bethune Street on the north, Washington Street on the east and Bank Street on the south (*id.*). There are two chimneys attached to the property. Only one chimney remains in use and serves as a vent for smoke created by the boilers, which heat the buildings. In 1998, a roof deck was fashioned on top of Building C and was made accessible to the tenants of 463 West Street (affirmation of defendants' counsel ¶ 28). According to the Roof Deck Rules, which are circulated to tenants and posted on the door providing access to the roof, tenants should not be on the roof after dusk (Notice of Motion, exhibit H). When the roof access door is opened a small alarm sounds. However, aside from this temporary local alarm, there is nothing to indicate to the building's security that the roof has been accessed. The access door was not locked on the night of the incident (Russas EBT tr, Notice of Motion, exhibit F).

On the night of the incident, Bergere entered the roof deck of building C with her cousin. Bergere then decided to climb the top of the subject chimney in order to get a better view of the Hudson River (Bergere EBT tr, Notice of Motion, exhibit C). Using a 4-foot-high parapet railing as footing, Bergere climbed to the roof of a 9-foot-high material shed. From the roof of the shed she was able to access a metal ladder affixed to the adjacent chimney, which stands approximately 3-4 feet away from the material shed. After climbing to the top of the chimney, Bergere leaned in to inspect the surface, lost her footing, and fell into the opening, falling approximately 150 feet to the bottom of the chimney (affirmation of plaintiff's counsel at 1). The fall was broken by ash and other debris which had accumulated in the chimney (*id.* at 2). Plaintiff s subsequently commenced this action to recover damages on the ground that defendants failed to maintain the property in a safe condition, which resulted in the infant plaintiff's injuries. Stephen Bergere asserts a derivative claim on the basis that he has been deprived of the services, society, and companionship of his daughter (Amended Complaint, ¶¶ 45, 4 9).

Defendants now move for summary judgment dismissing the complaint in its entirety, as a matter of law, on the basis that they had no duty to protect or warn against open and obvious conditions that are not inherently dangerous. In the alternative, defendants argue that even assuming a duty existed, the chain of events leading to the accident were so extraordinary that the defendants' duty did not extend to preventing Bergere's accident.

In support of their motion, defendants submit color photographs depicting the subject premises roof deck and chimney configuration, the posted "Roof Deck Rules", the transcripts of the examinations before trial (EBT) of each plaintiff, the EBT transcript of defendant Westbeth Corporation through its Executive Director and board member, Steven Neil, and the EBT

transcript of defendant Phipps Houses, through its building manager Matthew Russas (Notice of Motion, exhibits C – H).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). "[M]ere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York* , 49 NY2d 557, 562 [1980]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

It is well-settled that, as landowners, defendants have "a duty to exercise reasonable care in maintaining [their] . . . property in a reasonably safe condition under the circumstances" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). A landowner has a duty to maintain his premises in a reasonably safe condition to prevent foreseeable injuries (*Sarbak v Sementilli*, 51 AD3d 1001, 1002 [2d Dept 2008]). "The scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition" (*Cupo v Karfunkel*, 1 AD3d 48, 51 [2d Dept 2003]). A landlord typically has no duty to warn against an open and obvious condition that is not inherently dangerous (*Boyd v New York City Hous. Auth.*, 105 AD3d 542 [1st Dept 2013]; *Garrido v City of New York*, 9 AD3d 267 [1st Dept 2004]). An open and obvious condition has been defined as one plainly observable to someone making reasonable use of his or her senses (*see e.g. Buccino v City of New York*, 84 AD3d 670 [1st Dept 2011]; *Rivera v City of New York*, 57 AD3d 281 [1st Dept 2008]).

A finding of an open and obvious condition merely negates the duty to warn not the duty of the landowner to maintain its premises in a reasonably safe condition for those who use it (*id.*

at 48; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]). If it can reasonably be argued that a dangerous condition existed on the property that the landowner was under a duty to remedy, then a finding of open and obvious does not preclude a finding of liability against the landowner (*Cupo*, 1 AD3d at 52). "This duty includes consideration of the known propensities of children to roam, climb, and play, often in ways that imperil their safety" (*Sarbak*, 51 AD3d at 1002; *Collentine v New York*, 279 NY 119 [1938]; *Mendez v Goroff*, 25 Misc 2d 1013, 1019 [Sup Ct Kings County 1960]).

In their motion papers, defendants argue that the structures on the roof were functional, clearly observable and, not inherently dangerous to one making reasonable use of his or her senses, and in support of this contention attach photos of the roof and the chimney. Defendants analogize this case to the matter of *Boyd v New York City Housing Authority* wherein the First Department granted the defendant's motion for summary judgment because the photographs showed the unlocked gate that allegedly caused the plaintiff to injure himself was open and obvious and not inherently dangerous (*Boyd v New York City Hous. Auth.*, 105 AD3d 542 [1st Dept 2013]). The Court finds that defendants have met their initial burden of demonstrating that the condition that caused the infant plaintiff to sustain injury was open and obvious, to wit, readily observable by the plaintiff employing the reasonable use of her senses. As in *Boyd*, the photographs here provided by the defendants show the chimney was "plainly observable" and not "obscured by other people or objects, or by its location" (*id.* at 543). Additionally, there is nothing inherently dangerous about a large functional structure like a chimney.

However, finding that the condition was open and obvious and not inherently dangerous as a matter of law does not preclude a finding of liability against a landowner who failed to maintain its premises in a reasonably safe condition (*see Westbrook*, 5 AD3d at 70 [1st Dept

2004]; *Cupo*, 1AD3d 48). Here, it can reasonably be argued that there was a dangerous condition on the property that the landowner had a duty to remedy because the plaintiff was able to access the roof and the chimney at dusk. The defendants made the roof accessible to the tenants during the day but did not ensure the doors leading to the roof were closed or locked after dusk or that the alarms on the push bars sounded and alerted building security when the doors to the roof were opened. Though the Roof Deck Rules prohibit tenants from being on the roof after dusk, there was no mechanism in place on the date of the infant plaintiff's accident to enforce said Rules.

Defendants also argue that assuming they had a duty to the plaintiff, such duty did not extend to preventing the infant plaintiff's accident because the chain of events leading to the accident were so extraordinary. Defendants claim that the inaccessibility of the chimney opening at the top of a 40-foot ladder coupled with the affirmations and deposition testimony of the defendants' witnesses that they had no notice of anyone accessing the chimney ladder before the infant plaintiff's accident entitle them to summary judgment. However, a landowner has a duty to maintain its premises in a reasonably safe condition to prevent foreseeable injuries and the precise manner in which the harm was inflicted on the plaintiff need not be predicted for the injury to be foreseeable (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). It is sufficient that the risk of some injury from defendants' conduct was foreseeable (*id.*).

Defendants have failed to meet their burden of establishing prima facie that it was unforeseeable that leaving the roof deck and the area where the chimney is located readily accessible at dusk would lead to one of their tenants sustaining injuries. This is especially so given the infant plaintiff's age (*see Collentine*, 279 NY 119; *Diven v Village of Hastings-On-*

Hudson, 156 AD2d 538, 539 [2d Dept 1989] [it is well established that it is foreseeable children will enter premises and climb about and play in ways that imperil their safety]). The infant plaintiff's misuse of the chimney would not preclude a finding of liability (*see Cruz v New York City Tr. Auth.*, 136 AD2d 196, 200-01 [2d Dept 1988]). Moreover and most significantly, defendants concede that they had knowledge of tenants accessing the roof at dusk and in particular accessing the area where the chimney is located. Thus, it cannot be said that no triable issues of fact exist regarding whether the infant plaintiff accessing the ladder affixed to the chimney and sustaining injuries was foreseeable. Accordingly, defendants' motion for summary judgment must be denied, and the Court need not address plaintiffs' papers in opposition *(see Smalls,* 10 NY3d at 735)..

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CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion pursuant to CPLR 3212, seeking summary judgment dismissing of the complaint is denied; and it is further,

ORDERED that counsel for plaintiffs is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/13/15 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
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