

Wilson v Five Star Holdings, LLC
2015 NY Slip Op 32969(U)
June 15, 2015
Supreme Court, Bronx County
Docket Number: 22892/2012E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

KEVIN WILSON,

X

Plaintiff,

DECISION/ORDER

-against-

Index No.: 22892/2012E

FIVE STAR HOLDINGS, LLC.,

Defendants.

X

The following papers numbered 1 to 7 read on the below motions noticed on January 6, 2015 and duly submitted on the Part IA15 Motion calendar of **March 2, 2015**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. SJ Motion, Affirmation in Support of Motion, with Exhibits	1,2
Pl.'s Affirmation in Opposition, Cross-Motion, with Exhibits	3,4
Def. Affirmation in Reply, Opposition to Cross-Motion, Exhibits.	5,6
Pl.'s Reply Affirmation	7

Upon the foregoing papers, defendant Five Star Holdings, LLC. ("Defendant"), moves for summary judgment, dismissing the complaint of the plaintiff Kevin Wilson ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion and cross-moves for summary judgment against Defendant on the issue of liability. Defendant opposes the cross-motion.

I. Background

This action arises out an alleged incident that occurred inside of the Plaintiff's apartment located at 361 East 188th Street, Bronx, New York. At his deposition, Plaintiff testified that he was taking a shower in his apartment on August 2, 2012, when the bathroom ceiling collapsed, causing injury. Plaintiff testified that approximately one year prior to the collapse, he had cracks and leaks in the ceiling. The cracks were located near a light fixture. On one occasion, water had leaked into the cover of the light fixture. Prior to the alleged collapse, Plaintiff had complained to the landlord of water inside of the light fixture. In response, Defendant had sent a

worker to replace and repair the light fixture. At the same time the light fixture was replaced, the ceiling in the bathroom was repaired and plastered. Plaintiff testified that there were no other leaks besides this occasion with the light fixture prior to this incident. Plaintiff also related that the tenant in the apartment located directly above his had several family members and a large dog.

Omid Cohen testified on behalf of Five Star Holdings and Properties Corp., the building's property manager. Mr. Cohen confirmed that in 2011 or 2012, he was notified that there was a leak in Plaintiff's apartment. When he visited the apartment after returning from vacation, he saw that repair work had already been done. He testified that the repairs were certified by the New York City Department of Housing Preservation and Development ("HPD"), and there were no further complaints after the repairs were done. In August 2012, Mr. Cohen received notice that there was a leak in the apartment. After an investigation, he determined that the cause of the leak was the tenants in the above apartment allowing water to leak onto the floor when they washed their dogs. The family in that apartment eventually were evicted.

Defendant now moves for summary judgment, since Plaintiff has failed to establish that it created, or had actual or constructive notice of this allegedly defective condition. In the alternative, the actions of the upstairs neighbors constitutes a superceding, intervening and unforeseeable cause of this accident. The actions of the upstairs tenants constitutes an "extraordinary occurrence" that Defendant could not have possibly foreseen or guarded against.

Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability. Plaintiff notes that he moved into the building on April 1, 2010. His lease had a "no pets" policy. Nevertheless, immediately after moving in, Plaintiff and his wife noticed that the tenants in the apartment directly above theirs had large dogs. Plaintiff and his wife complained to the landlord and called 311, but nothing was done. In August 2011, Plaintiff first noticed cracks and leaking in the bathroom ceiling. He complained to his landlord for several months, but nothing was done. In September 2011, in response to an anonymous 311 call, Defendant received written warning from the Department of Health and Mental Hygiene that a tenant in its building had two large dogs running around unleashed. Defendant was instructed to correct the situation. In March 2012, Plaintiff took Defendant to Civil Court, to demand that problems with

the bathroom be fixed, including the ceiling. Defendant sent a superintendent to correct the problems in the bathroom and to plaster the ceiling. The superintendent allegedly discovered in March 2012 that the upstairs tenants were causing the leak by washing their dog in the bathroom tub and allowing water to accumulate on the floor. In April 2012, Plaintiff again noticed cracks in the ceiling and complained to his landlord and 311. The landlord did not fix the condition. In August 2012, this incident allegedly occurred.

At his deposition, Plaintiff testified *inter alia* that he had complained to his landlord about cracks in the bathroom ceiling. These cracks eventually reappeared even after the landlord sent someone to plaster over them. While it is true that Plaintiff didn't see actual water leaking from the cracks, he did testify that he repeatedly reported the cracks. Mr. Cohen's testimony was "wildly inconsistent," as he frequently changed his answers. He initially claimed that he was unaware of the ceiling collapse. He only remembered the collapse after being taken outside by his attorney, and after being shown photographs of the collapsed ceiling. At that point, Mr. Cohen testified that he only inspected the apartment after repairs were completed and he had been away for a week on a business trip. He later testified that he was unaware if anyone on his staff ever went to the upstairs apartment to see whether water was being thrown onto the floor. He then stated that an individual from the building investigated after the "first leak" in the ceiling and discovered that it was due to the upstairs neighbors washing their dogs in bathroom and allowing water to spill onto the floor. Plaintiff contends that Mr. Cohen's inconsistent testimony reveals that he is not a credible witness. Nevertheless, Mr. Cohen indeed testified that the building knew the cause of the leak prior to this incident but did nothing to address it.

In further opposition to the Defendant's motion, and in support of their cross-motion, Plaintiff submits an affidavit from his wife, Natalia Berrios, who asserts *inter alia*, that the building knew about continuous problems with the bathroom ceiling and knew that the upstairs neighbors had dogs, in violation of their lease. Further, in March 2012, an individual from the building told Ms. Berrios that the leak was being caused by the tenants above washing their dogs in the bathtub. Still, Defendant did nothing to either evict the tenants or ensure removal of their dogs until after the ceiling collapsed. In view of this evidence, Plaintiff argues that it is entitled to summary judgment on the issue of liability.

Defendant opposes the cross-motion. Defendant argues that even assuming that they had notice of dogs living in the upstairs apartment, in violation of the lease, the existence of those dogs did not cause Plaintiff's ceiling leak and collapse. Rather, it was the actions of a third party, over which Defendant's had no control, that led to this incident. The tenants' actions of washing their dogs and allowing water to spill onto the floor in the upstairs bathroom constituted a superceding, intervening, and unforeseeable occurrence, which then caused this collapse. Defendant urges that Mr. Cohen's testimony established that they only had notice of the upstairs tenants' actions after this incident occurred, and not before. Counsel states that her mid-deposition conferences with Mr. Cohen were not improper. Further, Defendant submits a 2008 letter it sent to the upstairs tenant demanding that they remove their dogs from the apartment. Defendant argues that this letter is evidence that they took steps to remove the dogs from the building. In any event, the mere presence of the dogs did not cause the leak and subsequent ceiling collapse in Plaintiff's bathroom.

Defendant contends that Plaintiff's affidavit submitted in support of the cross-motion contradicts his deposition testimony. At deposition, he testified that no one from the building ever told him what caused the leak into the light fixture, or the cracks in the ceiling. In his affidavit, Plaintiff states that his fiancé, Natalia Berrios, was told by a building representative that the leak was caused by the upstairs neighbors' dogs. This contradictory testimony is improper and raises only a feigned issue of fact. Defendant argues that the affidavit of Natalia Berrios must be disregarded since this witness was not previously disclosed. In any event, the affidavit fails to place evidence in the record regarding notice to Defendant as to the causation of this incident. Ms. Berrios only states that Defendant had notice that there were dogs in the upstairs apartment and in the building. Defendant argues that the dogs' existence in the building did not cause the Plaintiff's ceiling to leak and collapse.

Regarding Plaintiff's cross-motion for summary judgment, Defendant argues, *inter alia*, that the deposition testimony has established that Defendant had no control over the upstairs neighbors, and sought every remedy available to evict the upstairs tenants and was eventually successful in doing so.

In reply, Plaintiff asserts that Defendant in fact knew, prior to the incident, that the leak in the ceiling was caused by the dog owners in the upstairs apartment, but did nothing to remedy the situation. A proper reading of Mr. Cohen's testimony reveals this fact. Plaintiff contends that counsel for Defendant acted improperly in conducting private conferences with her client during his deposition. The evidence produced in opposition to the cross-motion reveals that Defendant in fact admits that they had notice of the dog in the apartment in 2008 but did nothing to remove the tenant. Plaintiff also notes that his affidavit does not contradict earlier deposition testimony. Plaintiff was never asked at deposition whether he ever learned of the cause of the ceiling leak before this accident. Instead, he was only asked if anyone from the building said anything *to him* regarding the cause, to which he replied, "no." In his affidavit, Plaintiff explains that while the building never told him about the cause, the building told his fiancé Natalita Berrios that the dogs were causing the leak. Plaintiff also argues that the affidavit of Ms. Berrios is properly before the Court, since Plaintiff identified her at his deposition. Finally, the evidence reveals that Plaintiff is entitled to summary judgment on the issue of liability, due to Defendant's violations of Multiple Dwelling Law §§78 and 174.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide

issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

The common law dictates that a landowner is duty bound to maintain his or her property in a reasonably safe condition (*Basso v. Miller*, 40 N.Y.2d 253 [1976]). Logically, the law dictates that reasonable care be utilized in the maintenance of the property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*Id.*) No liability will be found absent proof that a defendant actually created the dangerous condition or alternatively, had actual or constructive notice of the same (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]).

With respect to the Defendant's motion, there are clear issues of material fact as to whether it had actual or constructive notice of a defective condition in the ceiling prior to this incident. While it is evident that the light fixture condition was eventually remedied and the ceiling plastered, Plaintiff testified that new cracks formed in the ceiling in the following months and he reported this to the landlord and to 311. Defendant's moving papers do not conclusively establish that these cracks were not related to the specific defective condition that allegedly caused this collapse (*see Piacquadio v. Recine Realty*, 84 N.Y.2d at 969; *Negroni v. Langsam Property Services Corp.*, 124 A.D.3d 565 [1st Dept. 2015]).

This Court also rejects Defendant's contention that the actions of the upstairs neighbors constituted an intervening, superceding, and unforeseeable occurrence that severed any connection between their conduct in allowing dogs to remain on the premises, and the Plaintiff's injuries.

Mr. Cohen testified that in March 2012, he sent an individual named Emilio to address the HPD violations that had been issued to this apartment. The repairs to the bathroom ceiling were completed by the beginning of May 2012. Mr. Cohen was then asked if he knew whether

Emilio ever found out the cause of the leak. Mr. Cohen responded that Emilio told him there was nothing wrong with the pipes, so “you need to throw water on the floor and that would cause the leak.” The water would have to come from “Apartment 17, the apartment above.” Mr. Cohen then testified that neither himself nor Emilio ever went into Apartment 17 to investigate. At first, he testified that he was unaware if another building employee, “Alonzo,” ever entered Apartment 17. He later testified that Alonzo did, in fact, enter that apartment, and found out that the upstairs residents were cleaning their dogs in the bathroom. Alonzo apparently told the tenants to “stop washing the dogs and the water go down.” The timing of these alleged inspections and interactions with Plaintiff’s upstairs neighbors is unclear, however, and the Court is unwilling to accept Defendant’s contention that Mr. Cohen only inspected Apartment 17 after this incident occurred. Moreover, Plaintiff’s wife, Natalia Berrios, states in her affidavit that “the man that the building sent to plaster our ceiling in March of 2012 told me that the leak was caused by dogs...” The affidavit of Ms. Berrios may be considered because the Plaintiff identified her as a potential notice witness at his deposition, and there is therefore no prejudice to Defendant (*see Palomo v. 175th Street Realty Corp.*, 101 A.D.3d 579 [1st Dept. 2012]). Contrary to Defendant’s assertions, the contentions found in Plaintiff’s own affidavit may be considered since they do not contradict his deposition testimony.

Even without considering the affidavits, and allowing Plaintiff all favorable inferences, Mr. Cohen’s testimony gives rise to an issue of fact as to whether, prior to this incident, Defendant had notice that these tenants were causing or exacerbating a defective condition in Plaintiff’s ceiling, and whether Defendant had a reasonable opportunity to correct the problem. It therefore cannot be said as a matter of law that the upstairs tenants’ actions were extraordinary under the circumstances (*see Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308 [1980]), or that their actions and the subsequent ceiling collapse were unforeseeable consequences of Defendant’s failure to remove the upstairs tenants’ dogs from the building or otherwise address the situation (*Id.*, citing *Parvi v. City of New York*, 41 N.Y.2d 553, 560 [1977], Restatement of Torts, 2d, §§443, 449).

Plaintiff, however, is not entitled to judgment against Defendant on the issue of liability. The ambiguities in Mr. Cohen’s deposition testimony create an issue of fact as to whether the

Defendant had notice of the upstairs tenant's conduct that was allegedly contributing to the hazardous condition that resulted in this incident. Such notice is required before an owner may be found liable under Multiple Dwelling Law (*see Becker v. Manufacturer Trust Co.*, 262 A.D. 525 [1st Dept. 1941]). Issues of Mr. Cohen's credibility must be resolved by a jury (*see Best v. 1482 Montgomery Estates, LLC.*, 114 A.D.3d 555 [1st Dept. 2014]).

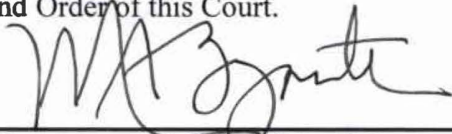
IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion, and Plaintiff's cross-motion for summary judgment are both denied.

This constitutes the Decision and Order of this Court.

Dated: 6/15, 2015



Hon. Mary Ann Brigantti, J.S.C.