

Arroyo v 345 Park Ave., LP

2016 NY Slip Op 30239(U)

January 6, 2016

Supreme Court, Bronx County

Docket Number: 301344/2009

Judge: Jr., Kenneth L. Thompson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

A Motion + Plf Cross Denied

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
JOANN ARROYO,

Index No: 301344/2009

Plaintiff,

-against-

DECISION AND ORDER

345 PARK AVENUE., LP, TRIANGLE SERVICES, INC.,
and RUDIN MANAGEMENT CO., INC.,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants. X

The following papers numbered 1 to 6 read on this motion for summary judgment

No	On Calendar of October 15, 2015	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1, 3</u>
	Answering Affidavit and Exhibits-----	<u>4, 5</u>
	Replying Affidavit and Exhibits-----	<u>6</u>
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Memorandum of Law-----	<u>2</u>
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, 345 Park Ave., LP, (Park), Triangle Services, Inc., (Triangle), Rudin Management Co. Inc., (Rudin), and move pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff in a slip and fall in a building owned by Park and managed by Rudin. Triangle provided janitorial services. Plaintiff cross-moves to strike defendants' answer on grounds that defendants spoliated evidence, namely a surveillance video of the area where plaintiff fell.

Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data (see *Pension Comm. of Univ. of Montreal Pension Plan*, 685 F Supp 2d at 473).² Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee.

(*VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 41 [1st Dept 2012]).

In response to receiving a report of plaintiff's fall, Eugene Simmons, (Simmons), Rudin's Building Manager, avers that on the day after plaintiff's fall he reviewed the video of the area where plaintiff fell. He further avers that the footage he reviewed, ten minutes before and ten minutes after the recorded time of plaintiff's fall on the report, did not reveal any fall nor did it depict anyone performing work on the lobby floor. Furthermore, Simmons did not receive any requests to preserve video footage. The video footage from the 129 cameras in the building are overwritten approximately every 25 days.

In terms of whether defendants should have reasonably anticipated litigation and searched more thoroughly for pertinent video, it is undisputed that plaintiff did not request any surveillance footage prior to litigation. The first demand for surveillance video came 15 months after the accident occurred. Moreover, plaintiff refused medical attention when she fell, making the prospect of litigation more remote than if she had sought medical attention when she fell.

Accordingly, plaintiff's cross-motion is denied.

With respect to defendants' motion, as an independent contractor, Triangle can be held liable under only three distinct circumstances:

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Moch*, 247 NY at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks*, 76 NY2d at 226) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka*, 83 NY2d at 589).

(*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140 [2002]).

At the time and place of plaintiff's fall, plaintiff and her daughter noticed wetness around her. There is testimony someone was cleaning or buffing the floor and that the floor smelled of cleaning solution. Furthermore, there is testimony that a caution sign was located in another part of the lobby.

[Defendant] correctly points out that there is no direct evidence that it caused or created the condition. No witness observed its employees actually mopping the stairs shortly before [plaintiff's] fall. Nevertheless, a plaintiff may prove the claim that a defendant is responsible for the condition that caused him to slip without direct evidence. Such claims may be substantiated with circumstantial evidence sufficient to create an issue of fact as to whether the defendant created the condition. "[I]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744, quoting *Ingersoll v Liberty Bank*, 278 NY 1, 7).

(*Healy v. ARP Cable, Inc.*, 299 A.D.2d 152, 154 [1st Dept 2002]).

Therefore, there is an issue of fact as to whether an employee of Triangle created the alleged hazard upon which plaintiff slipped.

With respect to the potential liability of Park and Rudin for plaintiff's injuries, such liability may be vicarious.

The allegedly defective condition in this case was created by an independent contractor and the well-settled general rule provides that a party who retains an independent contractor is not liable for the negligence of the independent contractor because it has no right to supervise or control the work (*see Kleeman v Rheingold*, 81 NY2d 270, 273; *Mercado v Slope Assoc.*, 246 AD2d 581). An exception to this general rule is the nondelegable duty exception, which is applicable where the party "is under a duty to keep premises safe" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668). Where, for example, premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress (*see Thomassen v J & K Diner*, 152 AD2d 421; *June v Zikakis Chevrolet*, 199 AD2d 907; *see also* Restatement of Torts § 425). This duty may not be delegated by the owner to its agents or employees or to an independent contractor (*Thomassen v J & K Diner*, *supra* at 424-425).

(*Backiel v. Citibank, N.A.*, 299 A.D.2d 504, 505 [2nd Dept 2002]).


Accordingly, defendants' motion is denied.

CONCLUSION

Defendants' motion for summary judgment and plaintiff's cross-motion to strike defendants' answer are denied.

The foregoing shall constitute the decision and order of the Court.

Dated JAN 06 2016


KENNETH L. THOMPSON, JR. J.S.C.