Morales v Nep W. 119th St. L.P.
2016 NY Slip Op 31097(U)
June 15, 2016
Supreme Court, New York County
Docket Number: 158507/13
Judge: Cynthia S. Kern
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------X

NORBERTA IBER MORALES,

Index No. 158507/13

Plaintiff,

-against-

DECISION/ORDER

NEP WEST 119TH STREET L.P.,

Defendant.

----------X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Norberta Iber Morales commenced the instant action to recover damages for injuries she allegedly sustained when her foot came in contact with very hot water while she was bathing. Defendant Nep West 119th Street L.P. now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint. For the reasons set forth below, defendant's motion is granted.

The relevant facts are as follows. Plaintiff is a tenant at 69 West 118th Street, Apt. 3W, New York, New York (the "Apartment") and resides there with a number of her adult children and sometimes her husband. Plaintiff alleges that on or about December 23, 2012, she was burned on a portion of her right foot while she was taking a bath in the Apartment. Specifically, she alleges that the bathtub contains one single handle that controls the flow of the water and that moving the lever to the right adds hot water while moving the lever to the left adds cold water.

Plaintiff testified that she opened the faucet to the bathtub and turned the lever to the right in order to make the water hot but that she could not be sure how far to the right she turned the lever. She further testified that she felt the water and did not need to make any adjustments to the lever after which she got into the bathtub and sat down with her feet under the faucet. Plaintiff testified that about ten seconds after she got into the bathtub, the water coming out of the faucet got very hot and burned a portion of her foot, causing her to sustain injuries (the "accident").

Alfredo Rodriguez, plaintiff's son, testified that at some point in early 2011 he complained to the building's then-superintendent, Jose Fuentes, that the water in the Apartment went from warm to scalding hot very quickly. Mr. Rodriguez further testified that when the problem was not fixed, he called 3-1-1 to report the problem and complained to the Department of Housing Preservation and Development ("HPD"). Thereafter, on or about March 6, 2011, HPD sent an inspector to the Apartment who, according to Mr. Rodriguez's testimony, tested the temperature of the water coming out of the faucet in the kitchen of the Apartment and found it to be 150 degrees. The HPD inspector then issued the building a violation and ordered that the building owner "abate the nuisance consisting of scalding hot water at faucet 150 degrees in the kitchen."

Thereafter, in April 2011, defendant hired Wynne Plumbing and Heating Corp. ("Wynne") to remedy the hot water issue in the building. Bryan Kaplan, President of Wynne, testified that after visiting the building on April 12, 2011, on or about April 13, 2011, an employee of Wynne shut and drained the boiler and hot water system to replace the pressure relief valve, the fittings and a two-inch section of pipe leading into the expansion tank.

Additionally, Mr. Kaplan testified that the Wynne employee turned both systems back on to check for leaks and they tested okay. After the April 2011 visits, Wynne was again contacted by defendant to come back to the building because the water was too cold and the super reported to Wynne that he had to reset the boiler every two hours in order to produce hot water. Mr. Kaplan testified that in June 2011, an employee of Wynne again visited the building and found that the aquastat, which regulates the temperature of the hot water in the building, needed to be replaced. Mr. Kaplan further testified that after said employee replaced the aquastat, he checked the boiler, adjusted the aquastat and tested the temperature of the hot water which was between 135 and 140 degrees. Plaintiff's accident occurred approximately a year and a half later, in December 2012.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances." *Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238, 240 (1st Dept 2004). In a premises liability case, a landlord will be entitled to summary judgment if it establishes that it did not create the allegedly dangerous condition and that it did not have actual or constructive

notice of the allegedly dangerous condition. *See id.* The First Department has held that evidence that a building's hot water temperature was set at 140 degrees and that the actual temperature of the water sometimes ranged above that setting does not establish a violation of the landlord's common law standard of care. *See Williams v. Jeffmar Mft. Corp.*, 31 A.D.3d 344 (1st Dept 2006), *lv. Denied*, 7 N.Y.3d 718 (2006). Specifically, in *Williams,* a case which was brought against a landlord on behalf of an infant who was allegedly burned by excessively hot bath water, the court held as follows:

> Nothing in plaintiff's submissions permits a finding that...a maximum setting of 140 degrees is unsafe. A building's maximum hot water is not intended to be at a temperature appropriate for bathing...Moreover, a certain amount of temperature fluctuation must be expected. Just as it would be unreasonable for a tenant to assume that the temperature of water emerging from the hot water tap alone is safe for bathing, so would it be unreasonable to assume that the water's temperature upon first turning the taps will remain unchanged a minute or two later. People using hot water...must be expected to monitor the mixture of hot and cold water to ensure a temperature that is safe for bathing. A landlord cannot be required to adjust the hot water temperature in order to protect [such tenants]. *Id.*

In the instant action, defendant has established its *prima facie* right to summary judgment dismissing plaintiff's complaint on the ground that it did not create the allegedly dangerous condition and that it did not have actual or constructive notice of the allegedly dangerous condition. Initially, defendant has established that it did not create the excessively hot water in the Apartment as defendant remedied the condition in June 2011 when it hired Wynne to replace the aquastat and make sure the water was the appropriate temperature. As in Williams, defendant has established that the temperature of the hot water in the building was between 135 and 140 degrees and there is no evidence that the temperature of the hot water was any higher

than that at the time of plaintiff's accident. Further, defendant has established that it did not have notice, actual or constructive, of the excessively hot water in the Apartment. Although defendant had notice of the condition in early 2011, defendant established that it remedied the condition in June 2011 and that it had no notice since then of any issues with the hot water in the Apartment or the building. Indeed, Jose Vargas, the building's superintendent, testified that since he began working as the superintendent in the building in May 2012, he never received any complaints regarding the hot water in the Apartment or in the building. Moreover, Mr. Rodriguez, plaintiff's son, testified that he did not complain to the superintendent about the issues with the hot water in the Apartment after it was remedied in June 2011.

In opposition, plaintiff has failed to raise an issue of fact sufficient to defeat defendant's motion. To the extent plaintiff asserts that defendant's motion should be denied on the ground that this court cannot rely on Mr. Kaplan's testimony regarding the work performed by Wynne in the building because his testimony is merely hearsay as he was not the person who actually made the repairs in the building, such assertion is without merit. Mr. Kaplan is the President of Wynne; he has been in the business of plumbing and heating for over thirty-two years; and he testified as to the work performed by his employees in the building based on his review of work orders and invoices which have been provided to the court and which he testified are prepared and maintained in the regular course of business by his company. Thus, his testimony is not hearsay.

Further, to the extent plaintiff asserts that defendant's motion should be denied on the ground that plaintiff complained to defendant about issues with the hot water after June 2011, such assertion is without merit. In support of such assertion, plaintiff relies on her deposition

transcript which she alleges establishes that such complaints were made. However, plaintiff fails to point to any portion of her testimony where she testified that she complained to the superintendent regarding the hot water issues after June 2011. Further, such assertion is belied by a reading of plaintiff's deposition transcript in which plaintiff testified that she did not even experience issues with the hot water after June 2011 until her accident occurred in December 2012. Specifically, plaintiff testified as follows:

> Q: When was the last time that the water suddenly became hot before your accident?
> A: Well, when my son called to complain[], it was in 2011, he called to report that the water was coming out hot, hot, very hot.
> Q: Is that the last time that you recall the water becoming very hot before your incident?
> A: Yes

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted. This constitutes the decision and order of the court.

Dated: 6/15/16

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.