Henry v Hamilton Equities, Inc.
2017 NY Slip Op 33112(U)
August 23, 2017
Supreme Court, Bronx County
Docket Number: 309820/11
Judge: Norma Ruiz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

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CAROL HENRY

Plaintiff,

- against -

Index No. 309820/11

HAMILTON EQUITIES, INC., HAMILTON EQUITIES COMPANY, SUZAN CHAIT-GRANDT, AS ADMINISTRATOR OF THE ESTATE OF JOEL CHAIT, CHAIT-HAMILTON MANAGEMENT CORPORATION, RAFAE CONSTRUCTION CORP., AP CONSTRUCTION, INC.

Defendants.

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Hon. Norma Ruiz

Upon the foregoing papers, defendant AP Construction, Inc. ("AP Construction") moves for an order to renew its prior summary judgment as to all claims and cross-claims. Separately, defendant Rafae Construction Corp. ("Rafae Construction") also seeks summary relief. Defendants Hamilton Equities, Inc., Hamilton Equities Company, Suzan Chait-Grandt (the "Hamilton defendants"), and Chait-Hamilton Management Corporation ("Chait-Hamilton") oppose the motions by AP Construction and Rafae Construction, and move for summary judgment as to plaintiff's claims. For the reasons stated herein, after due consideration of all submissions and respective oppositions submitted thereto, all defendants have demonstrated their entitlement to summary dismissal as a matter of law.

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FACTS & PROCEDURAL HISTORY

This matter arises from personal injuries plaintiff suffered as a result of a slip and fall at her place of employment, Grand Manor Nursing & Rehabilitation Center ("Grand Manor") in the Bronx. The physical property in which Grand Manor is housed is owned by the Hamilton defendants. In 1974, the Hamilton defendants entered into a regulatory agreement with the United States Department of Housing and Urban Development ("HUD"), through which HUD agreed to guarantee a mortgage on the property. As relevant here, the regulatory agreement requires the Hamilton defendants to "maintain the mortgaged premises . . . in good repair and condition."

The Hamilton defendants gave possession of the property to Grand Manor pursuant to a leasehold. The lease provides that the tenant, Grand Manor, is solely responsible for the maintenance and repair of the premises. Notwithstanding, the Hamilton defendants enjoy a right to re-enter the premises to make repairs resulting from Grand Manor's failure to perform same. Defendant Chait-Hamilton is a management entity responsible for the collection of rent.

Grand Manor contacted defendant AP Construction in 2009 about making repairs to the roof of the building. AP Construction inspected the roof and issued a proposal to Grand Manor with options for the roof to be replaced in part or in its entirety. Grand Manor declined to have any part of the roof replaced and, instead, hired AP Construction for the limited purpose of patching immediate leaks. As part of this work, AP Construction installed 300 square feet of roofing.

Sometime in 2011, Grand Manor contacted AP Construction to inspect the roof again. AP Construction issued another proposal, but Grand Manor elected to hire a different outfit, defendant Rafae Construction, to perform repairs. On May 4, 2011, Grand Manor entered into a contract with Rafae Construction for the replacement of the entire roof. On May 18, 2011, plaintiff, a licensed practical nurse, was assigned to the sixth floor of Grand Manor. Plaintiff testified that while she was

moving a patient's wheelchair down a hallway, she slipped on a puddle of water that had accumulated due to a leak in Grand Manor's roof. According to plaintiff, this leak in the roof was present for at least two years prior to her accident, and she recalled water would always accumulate on the floor when it rained.

Plaintiff commenced this action by summons and complaint on November 4, 2011. On September 18, 2013, plaintiff amended the complaint to add AP Construction as a defendant. AP Construction moved for summary judgment, which this Court denied as premature. AP Construction now moves to renew its motion. Contemporaneously, Rafae Construction, Chait-Hamilton and the Hamilton defendants moved for summary judgment. The motions are consolidated for disposition.

STANDARD OF REVIEW

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]). The party moving for summary judgment bears the burden of making a prima facie 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 Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; CPLR 3212 [b]). The 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]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY 2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). 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 issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION AND ANALYSIS

It is undisputed that the Hamilton defendants own the subject property but are not in possession of it. Generally, an out-of-possession landlord will not be "liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant" (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). There are two exceptions to this general rule and the Hamilton defendants have a prima facie burden of demonstrating that neither apply (*Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, 527 [1st Dept 2017]). The first exception applies where the out-of-possession landlord is "contractually obligated to make repairs and/or maintain the premises" (*id.*, citing *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996]). The second applies where the out-of-possession landlord maintains a "right to reenter, inspect and make needed repairs at the tenant's expense *and* liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Sapp*, 150 AD3d at 527 [emphasis added]).

In 1976, the Court of Appeals revisited the issue and held that a lessor may be held liable in negligence solely "based upon his contract to keep the premises in good repair," expressly overruling *Cullings* (*see Putnam v Stout*, 38 NY2d 607, 611 [1976]). There, the Court adopted the rule formulated by the Restatement (Second) of Torts, which provides that the out-of-possession landlord may be held liable if it "has contracted by a covenant in the lease or otherwise to keep the land in repair" (*id.* at 617 [citation omitted]). What follows pronouncement of the new rule is significant. Grounding their reasoning in public policy, the Court highlighted the reciprocal benefits that a contractual obligation to repair and maintain the premises affords both landlord and tenant. In particular, the Court noted that the existence of the contractual obligation may "induce the tenant to forego repair efforts which [the tenant] might have made," and social policy factors to be considered include that "tenants may often be financially unable to make repairs" (*id.*). These considerations naturally assume that the obligation is contractually owed to the tenant and the tenant is at least aware and relies on the landlord.

In the case at bar, there can be no reasonable argument that the HUD regulatory agreement was designed to afford Grand Manor, as tenant, the benefits discussed in *Putnam*. The purpose of the regulatory agreement is solely to protect HUD's interest in the financial integrity of the property, for which HUD has guaranteed a multi-million dollar mortgage. It is not alleged that Grand Manor, as tenant, was aware of the contractual obligation imposed by HUD or relied on it. Of course, such reliance would be unreasonable given Grand Manor's assent to be solely responsible for repairs. As Grand Manor would not be heard to rely on this agreement, plaintiff certainly cannot. Accordingly, the court finds the regulatory agreement does not impose a "contractual obligation" on the Hamilton defendants sufficient to trigger this exception to the well-settled out-of-possession landlord doctrine.

Turning to the second exception, the Hamilton defendants argue that despite their limited right to re-enter the premises, the roof condition is not a "structural or design defect that is contrary to a specific statutory safety provision" (*Sapp*, 150 AD3d at 527). For her part, aside from conclusory allegations in the complaint that allege the Hamilton defendants violated 24 CFR §§ 5.701 and 5.703 (a) and (b),[1] plaintiff utterly fails to raise a triable issue of fact as to whether the condition complained of, i.e. the leaky roof, is a significant structural design or defect that violated a specific statutory provision. Plaintiff appears to rest all her eggs in one basket, asserting only that the first exception to the general rule applies, seemingly abandoning the latter. Assuming plaintiff did assert 24 CFR §§ 5.701 and 5.703 (a) and (b) as grounds for applying the second exception, which she does not allege in her opposition, the court finds these regulations to be "general safety provisions" that will not suffice to defeat summary judgment (*see Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [1st Dept 2005]; *Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66, 67 [1st Dept 1998]). As neither exception applies, the Hamilton defendants have established prima facie their entitlement to summary judgment as to plaintiff's claims.

CONCLUSION

The Hamilton defendants' motion for summary judgment is granted. Defendant AP Construction's motion to renew is granted within the sound discretion of this court (*see* CPLR § 2221) and upon renewal, their motion for summary judgment is granted with no opposition from plaintiff submitted thereto. Similarly, Chait-Hamilton and Rafae Construction's motions for summary

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[1]Sections 5.701 and 5.703 (a) and (b) are HUD regulations applicable to housing with mortgages secured by HUD. In relevant part, Section 5.703 (b) provides that the building's "doors, fire escapes, foundations, lighting, roofs, walls, and windows, where applicable, must be free of health and safety hazards, operable, and in good repair."

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judgment as to plaintiff's claims are also granted, with no opposition from plaintiff. All claims and cross-claims are hereby dismissed.

Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied. This constitutes the decision and order of the court.

Dated: August 23, 2017

E N T E R,

Norma Ruiz, J.S.C.