

Hernandez v Los Sures Sip Hous. Dev. Fund Corp.

2018 NY Slip Op 30998(U)

May 14, 2018

Supreme Court, Kings County

Docket Number: 500187/12

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 14th day of May 2018

PRESENT:

HON. CAROLYN E. WADE,

Justice

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K.E.S., an infant under the age Fourteen (14) years, by her mother and natural Guardian, THERESA HERNANDEZ, THERESA HERNANDEZ, individually,

Plaintiffs,

Index No. 500187/12

-against-

DECISION and ORDER

LOS SURES SIP HOUSING DEVELOPMENT FUND CORPORATION, SOUTHSIDE UNITED HOUSING DEVELOPMENT FUND CORPORATION, 120 GERRY STREET HOUSING DEVELOPMENT FUND CORPORATION, LOS SURES MANAGEMENT COMPANY, INC., and 120 GERRY STREET STREET LIMITED PARTNERSHIP,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendants' Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	2 _____
Answering Affidavits/Affirmations.....	3 _____
Reply Affidavits/Affirmations.....	_____
Memorandum of Law.....	_____

Upon the foregoing cited papers and after oral argument, defendants LOS SURES SIP HOUSING DEVELOPMENT FUND CORPORATION, SOUTHSIDE UNITED HOUSING DEVELOPMENT FUND CORPORATION, 120 GERRY STREET HOUSING DEVELOPMENT FUND CORPORATION (“120 GERRY”), and LOS SURES MANAGEMENT COMPANY, INC. (“LOS SURES MGMT”)(collectively “Defendants”) move for leave to reargue and/or modify the branch of this Court’s August 24, 2016 Decision and Order, which partially granted Plaintiffs’ underlying cross-motion for summary judgment.

The underlying action was commenced by K.E.S., an infant under the age of fourteen (14) years, by her mother and natural guardian, THERESA HERNANDEZ, and THERESA HERNANDEZ, individually (collectively “Plaintiffs”) for injuries allegedly sustained by the three year old child, in her family’s apartment located at 106 Gerry Street, Apt. 6H, Brooklyn, New York. It is alleged that on October 11, 2011, the infant tore the globe of her right eye on a metal latch that was protruding from the back of a bi-fold closet door in her bedroom. The Verified Complaint alleges that the closet door was in disrepair, and off its tracks. Plaintiffs further claim that the injuries were caused by the negligence of the named defendants, which include 120 GERRY, the owner of the subject building, and LOS SURES MGMT., the management company.

By a Decision/Order, dated August 24, 2016, this Court denied Defendants' underlying motion for summary judgment, finding several triable issues of material fact, including: 1) whether the Defendants are responsible for the alleged defective condition of the closet door and metal latch; 2) whether the closet door was off its tracks at the time of the accident; and 3) whether the metal latch, missing pins and/or closet door being off the tracks were the proximate cause of the accident (Exhibit "A" of Defendants' motion). Plaintiffs' Cross-Motion for summary judgment was granted solely to the extent that Defendants had actual notice that the subject closet door had come off the tracks on various occasions, and were aware of the metal latch behind the door.

In support, Defendants argue, *inter alia*, that this Court partially granted Plaintiffs' cross-motion in error because the aforementioned findings do not resolve any of the causes of action, as several triable issues of material of fact are cited in the ruling.

Plaintiffs, in opposition, contend that Defendants have not established that the factual findings, which the court made in partially granting their cross-motion, are in dispute.

In rebuttal, Defendants acknowledge that this Court can make findings of fact that it determines are undisputed pursuant to CPLR § 3212(g). However, Defendants maintain that Plaintiffs' cross-motion should not have been partially granted because a judgment can only be rendered when the factual findings dispose of a claim or a cause of action in whole or in part [CPLR § 3212(b)].

This court will not consider Defendants' sur-reply, as it is not permitted by the CPLR.

CPLR § 2221(d)(2) provides that a motion to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion [...].

Moreover, CPLR § 3212(g) states:

g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

In the instant case, both parties acknowledge that CPLR § 3212(g) provides that the court can determine what facts are undisputed, and are deemed incontrovertible. This Court, in partially granting Plaintiffs' cross-motion, found that Defendants had actual notice that the subject closet door had come off the tracks on various occasions, and were aware of the metal latch behind the door. However, this court credits Defendants' contention that the ruling would conflict with the triable issues of material fact identified. In particular, the underlying Decision/Order provides that the trier of fact must determine whether the closet door was off its tracks at the time of the accident.

Accordingly, based upon the above, Defendants' Motion to Reargue is granted, and upon reargument, is **GRANTED**. Plaintiffs' underlying Cross-Motion for Summary Judgment is now DENIED. Furthermore, pursuant to CPLR § 3212(g), this court finds it undisputed and deemed established for all purposes in this action that: 1) Defendants had actual notice that the subject closet door had come off the tracks on various occasions; and 2) they were aware of the metal latch behind the door.

This constitutes the Decision/Order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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