

Silvers v Silbert

2018 NY Slip Op 32520(U)

October 2, 2018

Supreme Court, New York County

Docket Number: 159086/2013

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29**

-----X
DAVID SILVERS AND PATRICIA SILVERS,

Index No.: 159086/2013

Plaintiffs,

-against-

TERRY SILBERT, AS EXECUTRIX OF THE ESTATE OF
RAMIE SILBERT,

Defendant,
-----X

Kalish, J.

This is an action to recover damages for injury to property allegedly caused by two separate water leaks, both of which originated from the same apartment on the twelfth floor of a residential co-op building located at 25 East 86th Street (the Building), causing damage to an apartment on the eleventh floor.

Defendant Terry Silbert, as executrix of the estate of Ramie Silbert, moves for summary judgment dismissing the complaint.

Plaintiffs David Silvers and Patricia Silvers cross-move for summary judgment in their favor on the complaint.

BACKGROUND

The Building is a residential cooperative apartment building built in 1926. At all times relevant to this action, Ramie Silbert (Ramie) was the owner of the shares appurtenant to apartment 12B, and Patricia Silvers was the owner of the shares appurtenant to apartment 11B.

This action involves two separate and unrelated water leaks from apartment 12B to apartment 11B. The first leak, which was caused by a burst pipe located inside a bathroom wall in apartment 12B (the Premises), occurred on October 8, 2010 (the Bathroom Leak). The second

leak, which was caused by an overflowing kitchen sink in the Premises, occurred on October 23, 2010 (the Kitchen Leak and, collectively with the Bathroom Leak, the Leaks).

Defendant's Deposition Testimony

Terry Silbert (Terry) testified that Ramie, her mother, passed away in 2013. At the time of the Leaks, Ramie lived at the Premises. She and her family had moved in approximately 45 years earlier. Terry, however, only lived at the Premises until 1970, but she visited once a week.

Terry testified that at some time in the late 1970s, the subject bathroom was renovated to include a “[n]ew sink, toilet and bathtub” (defendant’s tr at 21). These new fixtures were installed in the same places as the original fixtures. Terry was unaware of any subsequent renovation to the subject bathroom.

Terry also testified that, prior to the commencement of the instant action, she was not aware of either the Bathroom Leak or the Kitchen Leak.

Deposition Testimony of Zeljan Ugarkovic (Owner of Non-Party Adriatic Plumbing, Inc.)

Zeljan Ugarkovic testified that, on the day of the Bathroom Leak, Adriatic Plumbing & Heating Corp. (Adriatic) was hired by Orsid Management, the Building’s managing agent, to repair a leak at the Premises. As the owner of the company, Ugarkovic did not perform the repairs personally but did inspect the repair work upon completion (Ugarkovic tr at 26).

Ugarkovic explained that when Adriatic arrived at the Premises, the Bathroom Leak was still active. His workers located the source of the Bathroom Leak inside a wall in defendant’s bathroom. They then turned off the water to the affected part of the Building and opened a hole in the bathroom wall in order to access the riser and the branch lines. Ugarkovic further explained that the riser is a vertical pipe that carries water between the floors, while a branch line is a horizontal pipe that extends from the riser, through the apartment wall, into the apartment.

At his deposition, Ugarkovic was provided with a copy of Adriatic's invoice for services provided at the Premises (the Invoice), which described the work Adriatic performed at the Premises. Specifically, the Invoice stated:

"Locate and repair leak/inspected apartment 12B in order to locate the active leak. The leak was located on the riser. . . . Cut out and remove the defective section of the water riser, supplied and installed new section of the riser, supplied and installed new hot and cold water branch valves. Reconnected the existing hot and cold water branch lines."

(Gollihue affirmation, exhibit H).

Despite the description in the Invoice, Ugarkovic testified that the leak originated from a pipe on the "branch line off the riser," specifically "[o]n the cold water line" (Ugarkovic tr at 27). In addition, he stated that Adriatic "did not replace the riser there[,] [w]e replaced the branch line" (Ugarkovic tr at 29). Further, he explained that the branch line that Adriatic replaced in the subject bathroom "wasn't original" (*id.* at 41).

Finally, Ugarkovic reviewed a water damage report prepared by the Building's resident manager, which stated that "the branch valve failed" (*id.* at 47). Though he did not witness the actual leak, Ugarkovic concurred with this assessment.

The Water Damage Report

The water damage report (the Report), dated October 26, 2010 was prepared by Patrick Mitchell, the resident manager of the Building (DeMartino affirmation, exhibit M). It states:

"On October 9, 2010, in Mrs. Silbert's apartment 12B, the branch valve failed and leaked into the following apartments . . .

"In 11b, caused water damage to the wall, wall unit and carpet. The leak was cause[d] due to the fitting between the branch valve and riser corroding. Owner renovated over 20 years ago (no dielectric fitting between 2 different materials, copper and galvanized)."

The Proprietary Leases

Ownership of an apartment in the Building is governed by a proprietary lease. The original lease for the Building, approved in 1967 (the 1967 Lease), provides:

“The Lessee . . . shall be solely responsible for the maintenance and replacement of plumbing Plumbing . . . shall include gas, steam and water pipes and the fixtures and equipment to which they are attached from the point where such pipes, fixtures or equipment extend into the interior of the rooms in the apartment from the surface of the wall . . . and any special pipes or equipment which the Lessee may, with the consent of the Lessor, install within the wall”

(DeMartino affirmation, exhibit H, ¶ 19).¹

A subsequent proprietary lease, approved in 2009 (the 2009 Lease), provides:

“Any alterations . . . made to an Apartment shall remain the responsibility of the Lessee who made or installed same . . . until the lease has been assigned or transferred and thereafter by a subsequent transferee or assignee (who shall likewise be responsible).”

(DeMartino affirmation, exhibit I, § 21).²

DISCUSSION

“[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*,

¹ The copy of the 1967 Lease provided to the court has “EXAMPLE” stamped on each page. Due to the stamp, the document is partially illegible. That said, defendant does not challenge the recitation of the relevant lease provision that is found in plaintiffs’ affirmation.

² The copy of the 2009 Lease provided to the court is undated and unsigned. However, according to a November 2, 2016 letter from the Building’s management company, the 2009 Lease was approved by the Building’s board on January 24, 2009 (DeMartino affirmation, exhibit O).

68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]).

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. 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 fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Timeliness of the Cross Motion

Initially, plaintiffs do not deny that their cross motion was filed nearly four months after the expiration of the court's 60-day period. Rather, they argue that the court should consider the cross motion in full, as it is addressed to the issues raised in defendants' timely motion.

“A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross motion. . . . The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion.”

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]).

Here, while defendant's motion technically seeks the relief of dismissal of the complaint, defendant only raises issues related to the Bathroom Leak and, otherwise, is silent with respect to the Kitchen Leak. In fact, counsel for defendant states in her affirmation in support of defendant's motion that "[t]he instant motion is for a dismissal of claims pertaining to the incident of October 8, 2010" – the date of the Bathroom Leak (defendant's affirmation in support, ¶ 4). Therefore, the sole issue that is the subject of the defendant's timely motion is the Bathroom Leak. Accordingly, as the issue of the Kitchen Leak was not raised in defendant's motion, that part of the cross motion that seeks relief with respect to the Kitchen Leak is untimely. In addition, plaintiffs have not shown good cause for their four-month delay in filing a summary judgment motion with respect to the Kitchen Leak.

Thus, the part of plaintiffs' cross motion that seeks summary judgment in their favor with respect to the Kitchen Leak is denied.

The Bathroom Leak

Defendant moves for summary judgment dismissing that part of the complaint relating to the Bathroom Leak. Plaintiffs cross-move for summary judgment in their favor on the same.

“To impose liability on a defendant as a result of an allegedly dangerous condition on the premises, there must be evidence that the dangerous condition existed and that the defendant either created the condition, or had actual or constructive notice of it and failed to remedy it within a reasonable time. A defendant has constructive notice of a dangerous condition when it is visible and apparent, and existed for a sufficient length of time before the accident such that it could have been discovered and corrected”

(*Melo v LaGuardia Fitness Ctr. Corp.*, 72 AD3d 761, 762 [2d Dept 2010] [internal quotation marks and citation omitted]).

Defendant's Motion

In her papers and at oral argument, which was held on May 22, 2018, defendant argues that Ramie had no notice of any defective condition with the plumbing, as the pipe that leaked was enclosed within the wall. In support of this position, defendant relies on the Invoice for the proposition that the leak emanated from the riser located within the bathroom wall. Defendant also points to a lack of testimony that would establish actual or constructive notice of any condition within the wall. Given the foregoing, defendant has sufficiently established that Ramie did not have actual or constructive notice of the condition that led to the flooding.

Defendant further argues that she did not create the condition which caused the Bathroom Leak. Defendant argues that it was the riser that burst which is a pipe common to multiple apartments and not the responsibility of defendant. That said, and as discussed more fully below, defendant does not put forth any evidence, nor is any submitted on this motion, that would establish, as a matter of law, that Ramie did not create the condition. Accordingly, defendant has not met her prima facie burden for entitlement to summary judgment dismissing that part of the complaint relating to the Bathroom Leak, and her motion for summary judgment must be denied.

Plaintiff's Cross Motion

Plaintiffs argues that: (1) Ramie renovated her bathroom and replaced the pipes that failed and created the first flood; (2) pursuant to the 2009 Lease, Ramie assumed the duty for the proper function and safety of the pipes at issue; (3) when the pipes failed, the incompatible materials of the pipes, and the absence of a necessary coupling to join the pipes in the renovation, were identified as the cause of the pipe failure; and (4) the cost of the repair of the failed pipe was charged to, and paid by, Ramie.

At oral argument, plaintiffs effectively conceded that defendant did not have any notice of the Bathroom Leak. Instead, plaintiffs focused on the argument that the Silberts created the hazard that ultimately caused the leak when they renovated the bathroom (*Salvador v New York Botanical Garden*, 74 AD3d 540, 541 [1st Dept 2010] [“If [defendant] caused or created the condition . . . a showing of notice was not required”]). In support of their argument, plaintiffs rely on Terry’s testimony that the subject bathroom had been renovated in the 1970s, supported by the Report which notes the same, and Ugarkovic’s testimony that the pipe that his company repaired and replaced “wasn’t original” (Ugarkovic tr at 41).

That said, the evidence presented by plaintiffs does not, as a matter of law, establish that the Silberts created the condition that ultimately caused the leak when they renovated the subject bathroom in the 1970s.

Initially, plaintiffs have not established that the subject pipe was, in fact, the cause of the leak, as the Invoice and the Report describe different leak sources. That Ugarkovic disputes the accuracy of his own company’s Invoice and agrees with the Report only serves to underscore the unresolved factual issue before the court.

In addition, even if the subject pipe was the source of the leak, there remains a question of fact as to whether the Silberts, rather than a prior owner, installed the pipe, which created the condition.³ The record available on these motions establishes that the Silberts renovated the subject bathroom in the late 1970s. However, the record is silent as to whether the Silberts installed the subject pipe (or, in fact, any pipe) during that renovation. Accordingly, there is no evidence that the Silberts, in fact, created the alleged condition.

³ The court notes that, at the time the Silberts purchased the Premises, the Building was approximately 40 years old.

Plaintiffs argue that it should not matter whether the Silberts or a prior owner installed the defective pipe, because the 2009 Lease explicitly sets forth that any plumbing alterations in the apartment would be “the responsibility of the Lessee who made or installed same . . . until the lease has been assigned or transferred and thereafter by a subsequent transferee or assignee (who shall likewise be responsible)” (notice of motion, exhibit I, the 2009 Lease, § 21). While this lease provision appears to transfer to new owners the liability for alterations made to apartments by prior owners, plaintiffs do not establish that the 2009 Lease applies retroactively to alterations that occurred prior to the 2009 Lease’s approval.

Given the foregoing, because issues of fact remain as to (1) the source of the leak, and (2) whether the Silberts installed the pipe that caused the leak, plaintiffs are not entitled to summary judgment in their favor on their claim for relief with respect to the Bathroom Leak.

The court has examined the parties’ other arguments and finds them to be unavailing.

CONCLUSION AND ORDER

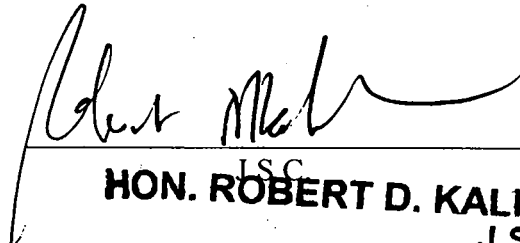
For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Terry Silbert, as executrix of the estate of Ramie Silbert, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against her is denied; and it is further

ORDERED that the cross motion of plaintiffs David and Patricia Silvers, pursuant to CPLR 3212, for summary judgment in their favor on the complaint is denied.

Dated: Oct 21, 2018

ENTER:



HON. ROBERT D. KALISH
J.S.C.
J.S.C.