

Abdullah v Shafi

2019 NY Slip Op 31890(U)

May 7, 2019

Supreme Court, Queens County

Docket Number: 707647/2017

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

FILED
MAY 21 2019
COUNTY CLERK
QUEENS COUNTY

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

MOHAMMED ABDULLAH, Index No.: 707647/2017
Plaintiff, Motion Date: 5/2/19
- against - Motion No.: 1
MOHAMMED SHAFI, Motion Seq.: 1
Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant MOHAMMED SHAFI for an Order pursuant to CPLR 3212, granting summary judgment to defendant, dismissing the complaint; and on this cross-motion by plaintiff MOHAMMED ABDULLAH for an Order directing that upon the trial of this action, the jury receives a charge of spoliation of evidence against defendant:

Table with 2 columns: Document Name and Papers Numbered. Includes entries for Notice of Motion-Affirmation-Exhibits, Notice of Cross-Motion-Affirmation-Exhibits, Affirmation in Opposition-Exhibits, Affirmation in Reply to Motion, and Reply Affirmation.

This is an action to recover damages for personal injuries sustained by plaintiff on May 2, 2017 at the premises located at 87-55 14th Street, Richmond Hill, New York when the bathroom floor collapsed, causing him to fall through the floor board.

Plaintiff commenced this action on June 2, 2017 by filing a summons and verified complaint. Defendant joined issue by service of an answer with cross-claim dated July 12, 2017. Defendant now moves for summary judgment on the ground that he cannot be liable for the occurrence of the incident. Plaintiff cross-moves for a charge of spoliation as the subject floor board was destroyed.

Plaintiff appeared for an examination before trial on August 16, 2018 and testified that on May 2, 2017 between 7:00 a.m. and 8:00 a.m., he was involved in an incident while present in the bathroom of the premises located at 87-55 14th Street, Richmond Hill, New York. His friend and business partner, Eayad Malek, was a tenant at the subject premises. Immediately prior to the incident, he took a shower in the bathroom, stepped out of the shower, and the floor collapsed under him. After he took the shower, he stepped out of the shower with one foot. Then he put his second foot down. Fifteen seconds later, the incident occurred. The tiles next to the shower were dry. He became stuck in the floor up to his waist. After his fall, he noticed that the wood under the floor tiles was rotten. He had been in the bathroom on previous occasions. He previously observed problems with the ceiling in the bathroom. He never observed problems with the floor tiles. Prior to the incident, Mr. Malek did not warn him that there were any problems with the floor tiles in the bathroom. Mr. Malek never complained to his landlord about the floor tiles in the bathroom. At his deposition, he was shown photographs, which he indicated depicted the hole in the floor that he fell through.

Defendant appeared for an examination before trial on August 16, 2018 and testified that he is the owner of the subject premises. He has owned the subject premises since February 2011. The building has four apartments. He does not have a managing agent for the premises. He manages the premises himself. Mr. Malek moved into Apartment 1L during the first quarter of 2012. In May 2017, he was present at the premises at least three or four times a week. When he went to the premises, he checked to see that the sidewalk was clean, made sure the trash was cleared, turned off the hallway lights, and made sure the stairs were clean. He also inspected the interior of the apartments when he had access to do so. In the twelve month period prior to May 2, 2017, when he inspected Apartment 1L, he did not recall seeing any water leak conditions. In February 2015, he renovated the bathroom in Apartment 1L, including putting in a new faucet, replacing the bathtub, and replacing wall tiles and studs. He hired a plumber to replace the faucet, but did all of the other work himself. When he installed the bathtub, he placed steel studs on the floor and parallel steel studs and enforced the beams. Then he put the bathtub down. After the bathtub was put in place, he caulked around the bottom and made sure the knobs were not leaking. He then went to the basement in the area under Apartment 1L to make sure the bathtub was not dripping. From the time he installed the bathtub until the date of the subject incident, he checked the basement ceiling and floor to ascertain whether there was any dripping every time he went to the

building. From the time he installed the bathtub to the date of the subject incident, he never observed any water dripping in the basement. When he installed the bathtub in Apartment 1L, he observed that the wood beams under the bathtub were healthy, but he also reinforced them with steel studs. He also replaced the plywood and one line of tiles in the area surrounding the bathtub. On the morning of the incident, his tenant advised him that there was damage to the bathroom so he went to look at it. He observed that two tiles were loose and there was a twelve by twelve hole in the plywood. When he observed the hole, it did not appear to be decayed. It looked broken. There was a missing piece of plywood where the hole was, but he never found it. Prior to November 2016, he never received a complaint about the bathroom or the bathroom floor in Apartment 1L. After the incident, he asked his tenant if he ever observed any problems with the tiles in the bathroom. The tenant said no.

Based upon the submitted evidence, counsel for defendant contends that summary judgment is warranted as there no evidence that defendant created the alleged dangerous condition or had any notice of the alleged condition and failed to remedy such.

In opposition, plaintiff submits photographs and an expert affidavit from professional engineer James Pugh, Ph.D., P.E. Mr. Pugh affirms, inter alia, that the renovations should have resulted in a change in the occupancy or use of the premises, yet a new Certificate of Occupancy was never issued and there is no record of any permits for the subject renovations. Mr. Pugh further affirms that the very fact that a piece of plywood was missing after the incident indicates that the repairs were defective and prone to failure. Mr. Pugh concludes that the conditions at the time of the incident were unsafe and proximate causes of the subject incident, and that the premises violated code requirements.

Counsel for plaintiff contends that questions of fact preclude summary judgment, including, inter alia, whether defendant was negligent in the performance of the renovation, whether defendant had constructive notice of the deteriorating wood, and whether defendant performed negligent inspections.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see Zuckerman v City of N.Y., 49 NY2d 557 [1980]).

To be entitled to summary judgment, the premises owner must show that he or she maintained the premises in a reasonably safe condition and that he or she did not have notice of or create a dangerous condition (see Etminan v Esposito, 126 AD3d 854 [2d Dept. 2015]; Early v Hilton Hotels Corp., 73 AD3d 559 [1st Dept. 2010]).

Here, defendant failed to prove, prima facie, that he was free from fault as he failed to establish that he did not create the alleged dangerous condition. The only evidence submitted to show that defendant performed the bathroom renovations in a non-negligent manner is his own testimony. Such self-serving testimony is insufficient to grant summary judgment, especially when defendant testified that he is not a licensed plumber and had hired Angel to do the repair work with him even though he does not know Angel's qualifications. As this Court finds that issues of fact exist as to whether defendant created the alleged dangerous condition, the Court need not address whether defendant had notice of such condition. Moreover, where a party fails to satisfy its prima facie burden, as here, the papers submitted in opposition need not be considered (see Midfirst Bank v Agho, 121 AD3d 343 [2d Dept. 2014]).

Regarding the cross-motion, plaintiff contends that because defendant failed to preserve the wood, an adverse inference charge should be given at trial. In support of the cross-motion, plaintiff submits defendant's testimony that to repair the hole in the bathroom floor, he had to remove the wood around the hole back to the floor beams. The wood he removed showed no signs of being rotted. He threw out the wood.

Based on defendant's testimony that he threw away the evidence, plaintiff's counsel contends that such intentional destruction warrants an adverse inference charge at trial.

In opposition to the cross-motion, defendant contends that as plaintiff filed his note of issue, plaintiff is not entitled to a spoliation charge. Additionally, defendant testified that his tenant told him that they were not going to litigate this incident. Based on such testimony, defendant's counsel contends that there is no proof that the wood was deliberately or intentionally discarded.

Here, this Court finds that there is no evidence to establish that defendant was aware of his need to retain the wood from the bathroom floor. Thus, there is no proof that the wood was "deliberately and intentionally discarded or destroyed" sufficient to warrant the imposition of a sanction (see Goens v

Vogelstein, 146 AD2d 606 [2d Dept. 1989]; Berwecky v Montgomery Ward, Inc., 214 AD2d 936 [3d Dept. 1995]). Additionally, plaintiff failed to establish that the destruction of the wood floor would leave him unable to pursue this action (see Cameron v Nissan 112 Sales Corp., 10 AD3d 591 [2d Dept. 2004]; Melcher v Apollo Medical Fund Management, LLC, 52 AD3d 244 [1st Dept. 2008] [finding that spoliation sanction was not warranted where plaintiff failed to establish that without the evidence he would be unable to prove his case]).

Accordingly, and based upon the above reasons, it is hereby

ORDERED, that the summary judgment motion by defendant MOHAMMED SHAFI is denied; and it is further

ORDERED, that the cross-motion by plaintiff MOHAMMED ABDULLAH for sanctions is denied.

Dated: May 7, 2019
Long Island City, N.Y.

FILED
MAY 21 2019
COUNTY CLERK
QUEENS COUNTY



ROBERT J. MCDONALD
J.S.C.