

Turner v Desai

2019 NY Slip Op 31968(U)

July 9, 2019

Supreme Court, New York County

Docket Number: 160410/2015

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 160410/2015

JORDAN TERNER,

Plaintiff,

MOTION SEQ. NO. 001

- v -

AMI DESAI, NEHA DESAI, 149 WEST 12TH STREET, LLC, VIJAY DESAI as Trustee of the SURBHI DESAI TRUST DATED MARCH 18, 2005, CENTRENTSET CORP., BUCHBINDER & WARREN LLC, CREATIVE DEVELOPMENT, L.L.C., TAKOS & K ELECTRIC INC., and E & M ELECTRICAL NY CORP.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for SUMMARY JUDGMENT

In this negligence action, arising from an incident on February 13, 2014 in which plaintiff Jordan Turner was allegedly injured when he sustained an electric shock from an outlet in a cooperative apartment located at 149 West 12th Street, unit 6-1, New York, New York ("the unit" or "the apartment"), defendants Ami Desai, Neha Desai and 149 West 12th Street, LLC ("149 West 12th") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff and defendants Centrentset Corp. ("Centrentset"), Buchbinder & Warren LLC ("Buchbinder"), and Creative Development, L.L.C. ("Creative") oppose the motion in part. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about August 6, 2013, Andrew Damhuis, now plaintiff's husband, entered into a sublease with 149 West 12th, the sole proprietary leaseholder of 390 cooperative shares allocated to the apartment, pursuant to which he was to take possession of the unit for a one-year term running from September 1, 2013 until August 31, 2014. Doc. 86 at 100; Doc. 87 at 17-18; Doc. 89. Ami Desai and her sister Neha Desai each owned 50% of 149 West 12th, a limited liability company ("LLC"). Doc. 87 at 19. Ami Desai executed the lease with Damhuis on behalf of 149 West 12th. Doc. 89.

Before 149 West 12th owned the shares of the unit, they were owned by the Surbhi Desai Trust dated March 18, 2005 from 2009 or 2010 until 2012. Doc. 87 at 22, 31. Before the shares were owned by the trust, they were owned by Ami Desai individually beginning in or about 2006. Doc. 89 at 30-32.

On the morning of February 13, 2014, plaintiff took a shower and, after he dried off, he dropped baby powder which he had started to put on his body. Doc. 86 at 16-17, 23. He then went to get a vacuum cleaner to clean up the spilled powder. Doc. 86 at 22-23. After retrieving the vacuum cleaner, he plugged it into the electrical outlet ("the outlet") in the bathroom and, as he did so, he was immediately electrocuted. Doc. 86 at 37-38. He maintained that he had no prior problems with the vacuum (Doc. 86 at 23) or with the outlet. Doc. 86 at 27-28.

After the incident, plaintiff contacted defendant Ami Desai, a member of 149 West 12th, to tell her about his injury. Doc. 87 at 8-9, 16. Ami Desai knew of no prior problems with the outlet. Doc. 87 at 38-39. Nor did plaintiff or Damhuis ever complain to her about the outlet. Doc. 87 at 38-39. After speaking with plaintiff, Ami Desai had the management company, Buchbinder, go to the apartment to inspect the outlet. Doc. 87 at 14-15. Buchbinder, in turn, had defendant Takos

& K Electric Inc. ("Takos"), an electrical contractor, upgrade the outlets for the kitchen and the bathroom in the apartment. Doc. 87 at 14-15, 46-47; Doc. 88 at 55-56, 62-63.

Ronald Correa, the building's superintendent for 23 years, testified on behalf of defendants Centrentset, the owner of the building; Buchbinder, the managing agent of the building; and Creative, the owner of the proprietary shares of several apartments in the building. Doc. 88 at 6-10; Doc. 97. After learning of plaintiff's accident, Correa notified the building's managing agent and then went to the apartment to check the outlet. Doc. 88 at 41-42. His inspection of the outlet showed that it was working. Doc. 88 at 41. He noted that the outlet in the bathroom was "regular" and not a GFI (ground fault interrupter) outlet, which was one with a "circuit breaker built into it, like a reset button" to prevent electrocution or fire. Doc. 88 at 39-42. Correa maintained that there were no complaints about the apartment during the two-year period preceding the accident and he could not recall any electrical work being performed in the unit prior to plaintiff's accident. Doc. 88 at 43-44. Although he recalled that the apartment was renovated, he maintained that the renovation occurred before Ami Desai owned the unit. Doc. 88 at 58-59.

Amy Desai maintained that, at no point during its ownership of the cooperative shares for the unit did 149 West 12th remodel or renovate the apartment, including electrical work. Doc. 87 at 37, 52-53. However, after plaintiff's accident, Buchbinder called in Takos to replace the outlets in the apartment with GFI outlets. Doc. 88 at 42.

Plaintiff commenced the captioned action by filing a summons and verified complaint on October 11, 2015. Doc. 2. In the complaint, plaintiff alleged that he was injured on February 13, 2014 when he sustained an electrical shock at the apartment. Plaintiff alleged that he was injured as a result of the negligence of the defendants Ami Desai, Neha Desai, 149 West 12th, Vijay Desai, Centrentset, Buchbinder, Takos, and E & M Electrical NY Corp. ("E&M"), which, he claimed,

owned, controlled, maintained, repaired, renovated and/or inspected the electrical system in the unit. Doc. 2.

Defendants Ami Desai, Neha Desai and 149 West 12th joined issue by their verified answer filed December 7, 2015. Doc. 21. Ami, Neha and 149 West 12th asserted several affirmative defenses and cross-claimed for contribution and common-law indemnification against defendants Vijay Desai, Centrentset, Buchbinder, Takos, and E&M. Doc. 21.

Takos joined issue by its answer filed January 5, 2016. Doc. 26.

On March 17, 2016, plaintiff filed a supplemental summons and amended complaint naming defendant Vijay Desai as Trustee of the Surbhi Desai Trust dated March 18, 2005 and naming Creative as a defendant. Doc. 32.

Defendant Vijay Desai as Trustee of the Surbhi Desai Trust dated March 18, 2005 filed his answer to the amended complaint on May 13, 2016. Doc. 42.

Defendants Centrentset, Buchbinder, and Creative filed their answer to the amended complaint on May 16, 2016. Docs. 44, 83. In their amended answer, said defendants cross-claimed against Ami Desai, Neha Desai and 149 West 12th for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Id.

Ami Desai, Neha Desai and 149 West 12th filed their answer to the amended complaint on May 18, 2016. Doc. 45.

In his bill of particulars against Ami Desai, Neha Desai, and 149 West 12th, plaintiff alleged, inter alia, that his injuries were caused by the negligence of defendants in the “ownership, operation, management, maintenance, supervision, control, design, inspection and repair of the premises”, including “installing and maintaining a defective and improper electrical outlet and/or

components . . . which was unsafe and not fit for use by plaintiff” and in failing to rectify a dangerous condition about which it had notice. Doc. 85 at par. 13.

On January 10, 2018, plaintiff discontinued his claims against Vijay Desai as Trustee of the Surbhi Desai Trust dated March 18, 2006. Docs. 64-66.

Plaintiff filed a note of issue and certificate of readiness on December 5, 2018. Doc. 70.

Plaintiff discontinued his claims as against defendant Takos on February 11, 2019. Doc. 92.

Ami Desai, Neha Desai and 149 West 12th now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 71. In support of the motion, Ami Desai and Neha Desai argue that they are entitled to summary judgment because they cannot be held personally liable for any wrongdoing by 149 West 12th, the LLC in which they are members. Ami Desai, Neha Desai, and 149 West 12th also assert that they are entitled to summary judgment because they did not breach any duty to plaintiff and had no notice of any defect in the outlet.

Plaintiff does not oppose that branch of the motion seeking dismissal of the complaint as against Ami Desai and Neha Desai, since they are members of the LLC which owns the unit and thus cannot be sued individually. Doc. 94. However, plaintiff does oppose the dismissal of the complaint as against 149 West 12th on the ground that an issue of fact exists regarding whether that entity had notice of the allegedly dangerous condition. Doc. 94. Specifically, argues plaintiff, 149 West 12th had actual notice of the allegedly defective condition since Ami Desai lived in the apartment for four years before the accident (Doc. 87 at 33) and therefore knew that the outlet was improper.

In opposing the motion, plaintiff relies, in part, on the report of his expert, Mauricio Cueva-Eguiguren, P.E., a licensed professional engineer. Doc. 95. Cueva-Eguiguren opines, inter alia,

that the outlet was in violation of the 2016 New York City Electrical Code and the 2008 National Electrical Code, Article 210.8(A)(1), which require that electrical outlets in bathrooms be built with a GFI or a ground fault circuit interrupter ("GFCI").

Centrentset, Buchbinder, and Creative oppose 149 West 12th Street's motion in part as well, essentially adopting the arguments made by plaintiff. Doc. 97.

In reply, the movants substantially reiterate their argument that they neither created nor had notice of the alleged defect.

LEGAL CONCLUSIONS:

Initially, since Ami Desai and Neha Desai were members of 149 West 12th, an LLC, they are entitled to dismissal of the complaint against them in their individual capacities. See Limited Liability Company Law § 609; *B & C Realty Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 655 (1st Dept 2013). Additionally, 149 West 12th is entitled to dismissal.

In order to make out a prima facie case of negligence in cases involving defective or dangerous conditions present on property, a plaintiff must "demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it" (*Leo v Mt. St. Michael Academy*, 272 AD2d 145, 146 [2000]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Where a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition (*see Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [2001]).

Mitchell v City of NY, 29 AD3d 372, 374 (1st Dept 2006).

Here, 149 West 12th met its burden of demonstrating that it neither created nor had actual or constructive notice of the alleged danger prior to the accident. Until the accident occurred, the outlet did not malfunction or present any danger. Ami Desai testified that, prior to the accident, she was not aware of any problem with the outlet and used the receptacle, without incident, to operate her hair dryer. Doc. 87 at 38. She further stated that neither Damhuis nor plaintiff ever complained about the outlet. Doc. 87 at 38-39. Further, Correa testified that he knew of no complaints about the apartment during the two-year period preceding the accident and knew of no renovations to the premises during the time Ami Desai owned them. Thus, 149 West 12th Street established its prima facie entitlement to summary judgment.

In opposition, plaintiff has failed to raise a triable issue of fact. Indeed, at his deposition, he conceded that, prior to the accident, he never had any problem with the outlet. Doc. 86 at 27-28.

Although 149 West 12th admits that GFCI outlets would have been required under the 2008 New York City Electrical Code if the apartment were renovated, Ami Desai testified that, during the four years prior to the accident, during which she lived in the unit, no such renovations were performed. Doc. 87 at 29-33.

Additionally, the report of Cueva-Eguiguren fails to raise an issue of fact. In his report, he admits that an x-ray of the outlet did not reveal any defect. He also stated that, although the circuit breaker used in the apartment was not a GFIC circuit breaker, it still functioned properly when tested. *See Lasky v Ford*, 194 AD2d 978, 980 (3d Dept 1993). Further, he claims that Ami Desai, Neha Desai, and 149 West 12th violated the 2016 New York City Electrical Code despite the fact that plaintiff's accident occurred in 2014. Finally, since he fails to address the issue of

whether any renovations had been made in the apartment, he fails to establish that 149 West 12th was required by code to install a GFIC outlet in the bathroom of the unit.

Given the above, the motion is granted and all claims asserted by plaintiff against Ami Desai, Neha Desai, and 149 West 12th are dismissed. However, since the movants did not seek dismissal of the remaining cross claims asserted against them by Centrenset, Buchbinder and Creative, those cross claims remain viable.

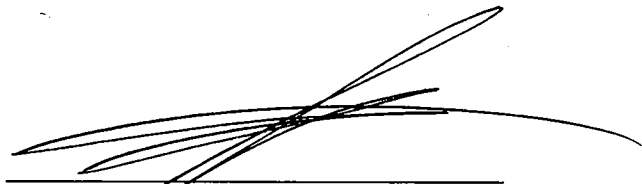
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Ami Desai, Neha Desai and 149 West 12th Street, LLC for summary judgment dismissing all claims asserted against them in the complaint is granted; and it is further

ORDERED that the cross claims asserted against defendants Ami Desai, Neha Desai and 149 West 12th Street, LLC are severed and shall continue; and it is further

ORDERED that this constitutes the decision and order of this Court.

7/9/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: