DeRosa v Giordanella
2019 NY Slip Op 32191(U)
July 26, 2019
Supreme Court, Suffolk County
Docket Number: 15-8629
Judge: David T. Reilly
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SHORT FORM ORDER

COPY

INDEX No. 15-8629

CAL. No. 18-00761OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 9-26-18
ADJ. DATE 12-5-18
Mot. Seq. # 005 - MD

DANIEL DEROSA,

Plaintiff,

- against -

JOSEPH GIORDANELLA, DONNA GIORDANELLA, JODO REALTY, LLC., 4 M.G., INC., d/b/a KNOCKOUTS, JOE'S SIRLOIN BURGER & GRILL, INC., ERIC MUSIAL & STEPHEN GRAYDON,

Defendants.

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment: Notice of Motion and supporting papers 1- 13; Answering Affidavits and supporting papers 14-23; 24-27; Replying Affidavits and supporting papers 28-29 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendants Joseph Giordanella, Donna Giordanella and Jodo Realty, LLC, for, *inter alia*, summary judgment dismissing the complaint and the cross-claims against them is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on November 8, 2013 from a fall that occurred on an interior staircase at the premises he rented from defendants Joseph Giordanella, Donna Giordanella and Jodo Realty, LLC, located at 1400 Lakeland Avenue, Bohemia, New York. By stipulation dated January 7, 2016, plaintiff discontinued his cause of action against defendant Joe's Sirloin Burger & Grill, Inc., and on August 26, 2016, Justice Daniel Martin granted plaintiff's motion for a default judgment against defendants Eric Musial and Stephen Graydon. The bill of particulars alleges that plaintiff was caused to fall down a staircase while evacuating his apartment due to a fire that originated on the ground floor of the building. Plaintiff alleges that the thick smoke created by the fire obscured his vision, causing him to misstep and fall down the stairs. It is alleged that defendants were negligent in hiring a worker who negligently operated a MAPP gas torch while performing plumbing services, in failing to supervise the work, in failing to take proper safety precautions, and in allowing a dangerous condition to exist on the subject premises.

Defendants Joseph Giordanella, Donna Giordanella and Jodo Realty (hereinafter the Giordanella defendants) now move for summary judgment dismissing the complaint and the cross-claims against them on the grounds that they are out-of-possession landlords and did not owe a duty of care to plaintiff. The Giordanella defendants further argue that they did not create the alleged dangerous condition, and that such condition was not caused by any structural or design defect. In support of the motion, the Giordanella defendants submit copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, a copy of a lease agreement with defendant 4 M.G., Inc., and a copy of a certified police incident report.

Plaintiff testified that he rented a room on the second floor of a two-story building that was owned by Joseph Giordanella and Donna Giordanella. He testified that "Joe" owned and operated a tavern on the ground floor of the building known as Knockouts. He testified that he was a month-to-month tenant, and that he initially made the rent payments to Joe, but shortly after he moved in, he was told to pay the rent to John Suter, who became the new operator of Knockouts. He testified further that one month before the subject fire, Suter informed him that he was no longer his landlord and that Joe was returning and he should make rent payments to him. Plaintiff testified that Suter moved out of the premises, and that Joe moved back in and closed Knockouts for approximately two weeks to perform renovations.

Plaintiff testified that on the date of the incident, he woke up at 8:00 a.m., and that while he was getting ready to go out for the day, he heard someone yell "fire," but he thought it was a joke. He testified that he heard the scream again and opened his door to the hallway which was filled with smoke. He testified that he approached the top of the staircase and immediately fell down the stairs, as he was unable to see through the smoke. Plaintiff testified that he slid down the wooden staircase on his backside, and that when he reached the bottom of the staircase he stood up and was assisted by neighbors who live across the street from the subject building. He testified that there were no smoke alarms or sprinklers in the area of the staircase, and that he does not recall if it had a handrail.

John Suter testified that in 2009 he signed a lease agreement on behalf of 4 M.G., Inc., and rented the first floor of the subject building from Joe Giordanella, who owned the building, and that he purchased the tavern known as Knockouts. He testified that his two friends, Stephon Graydon and Eric Musial, worked at the bar in exchange for room and board, and that they collected rent from the tenants who rented rooms on the second floor as a favor to Joe. He testified that he closed the bar in September of 2013 and vacated the premises, and that Joe asked him to perform some work in the bar, including remove a knee wall in the kitchen, in exchange for terminating the lease early. He testified that he agreed to remove the wall, and that the work was performed by Graydon and Musial.

Suter testified that after Graydon and Musial removed the wall, they observed copper pipes, which he showed to Joe. According to Suter, Joe asked him if he could move the pipes, and he told him that he could and instructed Graydon and Musial to remove and reroute the pipes. He testified that he did not provide Graydon and Musial with tools, and that he was not present when they performed the work. He testified that Musial is a union plumber, but that he was not a licensed plumber. Suter testified that he was not on the premises on the date of the incident, and that he learned of the fire from Channel 12 News. He testified that he spoke to Graydon the following day, who told him that the fire started while he was soldering the pipes together, and that Musial was out getting breakfast when it happened.

Joseph Giordanella testified that he owned the subject building for 12 years, and that he operated a "business" for five years and then sold it. He testified that he entered into a written lease agreement with John Suter for a term of ten years, which commenced on December 1, 2009, and that Suter rented the entire building and took possession of the tavern known as Knockouts for approximately seven years. He testified that in November 2013 Suter informed him that he was closing Knockouts and vacating the premises, so Giordanella requested that Suter help him move equipment in the kitchen of Knockouts as a form of repayment.

Giordanella testified that he did not request that Suter perform any work in the kitchen, other than moving equipment, and that when he picked up rent at the premises on November 1, 2018, he did not inspect the premises and did not observe any work being performed. He testified that he became aware of the fire through a neighbor, and that he was told that the fire started when Stephen Graydon was "sweating the pipes" in the kitchen of the tavern.

A certified police report created by Detective Paul Waldvogel of the Suffolk County Police Department is submitted. In his report, Detective Waldvogel states that on November 8, 2013 he and four detectives arrived at the subject building at 11:15 a.m., and that they conducted a physical investigation of the premises and interviewed Stephen Graydon, Joseph Giordanella, Christopher McMahon, and Eric Musial. Detective Waldvogel states that Stephen Graydon told him that he was hired by the owner of the bar, John Suter, to perform work at the incident location, and that he had "gutted the kitchen" and removed a wall in the kitchen. He reported that he began the work one week prior to the date of the incident, and that at the time of the incident, he was in the process of rerouting pipes and was sweating elbow fittings onto some of the pipes using a MAPP gas torch. He told the detective that he went outside to retrieve some tools from his truck, and that when he returned he

observed smoke coming out of the building. According to the police report, Joseph Giordanella told the detective that he owns the subject building, that he leased it to John Suter, who operated Knockouts, and that Suter was in the process of moving the bar to a different location. The report states that "John Suter is behind one month's rent, which amounts to approximately $6,000.00 and to satisfy this debt he had hired workers to work on the structure." At his deposition, Giordanella testified that the statement regarding the amount of money owed is incorrect. The report indicates that the fire was accidental, and that it was caused "by the use of a MAPP gas torch which was used to sweat plumbing fixtures which subsequently ignited adjacent wood framing material which then spread to other combustible components of the structure."

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Generally, a property owner or a landlord has a duty to maintain the premises in a reasonably safe condition (***Kellman v 25 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). However, an out-of-possession landlord or owner which relinquishes control over the premises generally will not be responsible for injuries occurring on its premises unless it has a duty imposed by statute, or assumed by contract or a course of conduct (***Behluli v 228 Hotel Corp.***, 172 AD3d 1151, 98 NYS3d [2d Dept 2019]; ***Casson v McConnell***, 148 AD3d 863, 49 NYS3d 711 [2d Dept 2017]; ***Mendoza v Manila Bar & Restaurant Corp.***, 140 AD3d 934, 33 NYS3d 448 [2d Dept 2016]).

Here, plaintiff claims that use of a MAPP gas torch created a dangerous condition on the premises, and that defendants had actual and constructive notice of the condition. "[I]it is well settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law" (***Lombardi v Stout***, 80 NY2d 290, 295, 590 NYS2d 55 [1992]; *see also* ***Osorio v Kenart Realty, Inc.***, 42 Misc 3d 5, 977 NYS2d 553 [App Term, 2nd, 11th & 13th Jud Dists 2013]; *cf.* ***Slikas v Cyclone Realty, LLC***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]).

The general rule is that a party who retains an independent contractor is not liable for the independent contractor's negligent acts (***Brothers v New York State Elec. & Gas Corp.***, 11 NY3d 251898, 869 NYS2d 356 [2008]; ***Kleeman v Rheingold***, 81 NY2d 270, 598 NYS2d 149 [1993]; ***Nachman v Koureichi***, 165 AD3d 818, 85 NYS3d 185 [2d Dept 2018]). Where one has no control over the means or manner that another employs, it would be inequitable to impose the risk of loss on such person or entity (*see* ***Feliberty v Damon***, 72 NY2d 112, 531 NYS2d 778 [1988]; ***Begley v City of New York***, 111 AD3d 5, 972 NYS2d 48 [2d Dept 2013]). However, several exceptions to the general rule have developed. As relevant here, an owner or possessor of property may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's nondelegable duty to maintain the premises in a reasonably safe condition (*see* ***Pesante v Vertical Indus. Dev. Corp.***, 142 AD3d 656, 36 NYS3d 716 [2d Dept 2016]; ***Horowitz v 763 E. Assoc., LLC***, 125 AD3d 808, 5 NYS3d 118 [2d Dept 2015]; ***Olivieri v GM Realty Co., LLC***, 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]).

Further, one who hires an independent contractor may be liable if he or she was negligent in selecting, instructing, or supervising the contractor (***Brothers v New York State Elec. & Gas Corp.***, 11 NY3d 251898, 869 NYS2d). Hiring an unqualified contractor can impose liability on the hirer to an injured plaintiff if he or she was negligent in selecting a careless or incompetent person (*see* ***Nelson v E&M 2710 Clarendon LLC***, 129 AD3d 568, 12 NYS3d 51 [1st Dept 2015]). If the hirer knew, or could ascertain that the contractor was not properly qualified to undertake the work, he or she may be liable (*id.*)

Here, the conflicting deposition testimony creates triable issues of fact regarding, but not limited to, which party was in possession and control of the premises at the time of the fire, and would, thus, have a nondelegable duty to maintain the premises in a safe condition, whether the Giodanella defendants requested that the work be performed, whether 4 M.G., through its agents was negligent in conducting the work, whether the workers were competent to perform the services, and if not, whether whoever hired them had reason to know that they were not qualified. Additionally, triable issues of fact have not been eliminated regarding whether the work performed was a proximate cause of plaintiff's injuries. Consequently, the Giordanella defendants failed to establish their prima facie entitlement to summary judgment dismissing the complaint against them (*see* ***Bank of NY Mellon v Gordon***, 171 AD3d 197, 97 NYS3d 286 [2d Dept 2019]; ***Castlepoint Ins. Co. v Command Sec. Corp.***, 144 AD3d 731, 42 NYS3d 30 [2d Dept 2016]; ***Bonaventura v Galpin***, 119 AD3d 625, 988 NYS2d 886 [2d Dept 2014]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Accordingly, the branch of the motion for summary judgment dismissing the complaint and the cross claims against them is denied.

The branch of the Giordanella defendants' motion for summary judgment on their cross claims against co-defendant 4-M.G. for contractual indemnification and common law indemnification also is denied. A party seeking contractual indemnification "must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (***Jardin v A Very Special Place, Inc.***, 138 AD3d 927, 931, 30 NYS3d 270 [2d Dept 2016], quoting ***Arriola v City of New York***, 128 AD3d 747, 749, 9 NYS3d 344 [2d Dept 2015]; *see* ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009]). Regarding common-law indemnification, to establish prima facie entitlement to summary judgment, the Giordanella defendants must prove that 4

M.G. was negligent or that it had authority to direct, supervise, and control the work that allegedly caused plaintiff's injury (***McDonnell v Sandaro Realty, Inc.***, 165 AD3d 1090, 87 NYS3d 86 [2d Dept 2018]; ***Shaughnessy v Huntington Hosp. Assn.***, 147 AD3d 994, 47 NYS3d 121 [2d Dept 2017]).

Here, triable issues of fact regarding, among other things, the relationships of the parties and whose negligence, if any, caused plaintiff's accident have not been eliminated (*see* ***McAllister v Construction Consultants L.I., Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]). Accordingly, the branch of the Giordanella defendants' motion for summary judgment on their cross claims against 4 M.G. is denied as premature (***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 808, 888 NYS2d 81 [2d Dept 2009]).

Dated: July 26, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**