

B.J. v Kingsbridge Ct. Hous. Dev. Fund Corp.

2019 NY Slip Op 32244(U)

March 5, 2019

Supreme Court, Bronx County

Docket Number: 26325/2017E

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

B.J., an infant by his father and natural guardian,
CARL BOUTON, CARL BOUTON, individually
and CHRISTINA GARCIA,

INDEX NUMBER: 26325/2017E

Plaintiffs,

-against-

Present:
HON. ALISON Y. TUITT
Justice

**KINGSBRIDGE COURT HOUSING
DEVELOPMENT FUND CORPORATION
and KINGSBRIDGE COURT OWNERS LLC,**

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 4/23/18

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

The within personal injury action arises from three incidents involving rodent bites suffered by plaintiffs in apartment 1F of the premises located at 2730 Sedgwick Avenue, Bronx, New York. Plaintiff J.B., infant, was allegedly bitten on December 4, 2016 while sleeping on his top bunk bed, causing him to fall to the floor and sustain injuries. Plaintiff Carl Bouton was allegedly bitten on his index finger on February 16, 2017. Plaintiff Christina Garcia was allegedly attacked by a rat on February 9, 2017, causing her to fall and sustain injuries. Plaintiffs allege that a dangerous rodent infestation was allowed to exist in the premises where they

resided. Plaintiff commenced this action by filing a Summons and Complaint on July 13, 2017. On or about September 18, 2017, defendants interposed a Verified Answer and asserted affirmative defenses, including that plaintiffs' claims are barred as plaintiffs continually denied defendants access to the subject apartment. Defendants move for summary judgment arguing that plaintiffs denied them entry to the premises to remedy the rodent condition prior to the dates of incident.

Defendants submit the affidavit of Mehmed Milius, the property manager for the subject premises since 2007. Mr. Milius states that he is responsible for overseeing the maintenance and operation of the subject building, including pest management and control. Target Exterminating, Inc. ("Target") was hired to provide pest and rodent control to every apartment unit on a monthly basis. Mr. Milius states that plaintiffs have a history of denying access to the apartment in question for necessary repairs. Prior to the dates of the alleged rodent bites, December 4, 2016 and February 9, 2017, on November 7, 2016 plaintiffs refused defendants access to the apartment for routine repairs and maintenance. On November 28, 2016, a follow up letter was sent to plaintiffs requesting a time for access to the apartment for repairs and plaintiffs failed to respond. Defendants submit a copy of an unsigned letter on Target letterhead dated February 27, 2017 from "Alex Kopelowitz" to "Toporovsky & Sons Realty" "RE: 2710-2730 Sedgwick Ave #1F" wherein it states that on February 23, 2017, a field supervisor went to the premises and performed rodent control and abatement. The letter notes that there is a lot across the street that is under construction and rats were seen coming from this lot to the subject building. "It is evident that this lot is a cause of any rodent activity." The letter also states that holes were treated and sealed in the courtyard outside the bedroom window of #1F and there were holes found in the apartment as well. The master bedroom had holes on the sides of the radiator, and a wall void where they were able to remove the sheetrock and found droppings, was treated and sealed. A hole was found in the kids' bedroom and behind the stove which were treated and sealed. The letter further provides "[w]e would also like to note that according to our records, Apartment #1F has not accepted any of the regular pest control services that we provide to the building on a regular basis in at least 6 months."

Plaintiff Carl Bouton submits an affidavit wherein he disputes defendants' allegation that they were denied entry into the premises to address the rodent condition. Mr. Bouton claims that the exterminator only provided ineffective glue traps to deal with the rodent infestation. In addition, the landlord's employees

were permitted access to the apartment “at least 40 times” in the three years prior to these incidents, so that they could repair the holes caused by rats chewing through the walls and floors of their apartment. After the holes were fixed, the rats would break through again and create holes in the walls, floors and baseboard moldings. They could not even use their oven because the rats were living inside. Bouton states he and his family provided fully cooperated with the building’s exterminator, with the exterminator having been in the apartment repeatedly over the years to spray for roaches and provide glue traps for the rats and mice. The glue traps were not effective against the rat infestation. Mr. Bouton further states that over the last three years, there have been approximately 100 rat holes in the apartment. The rodent problem became dire and he contacted the Department of Housing Preservation and Development shortly after the rat infestation problem began in 2014 and on many other occasions to report the problem. The rat infestation was also reported to local councilman Fernando Cabrera, who went to the apartment to witness the problem. The rat problem was also observed in January 2017 by Good Shepherd Services which Mr. Bouton states is a homemaking service that helps with the children in the home.

Plaintiffs submit a copy of a letter from “Good Shepherd Services” dated January 13, 2017 to “To Whom It May Concern” which provides in part “[t]here are rats living in the bottom floor of the home. These rats come out in the vicinity of where the children are either sleeping or playing. There have been a few encounters with the rodent and the children.” Plaintiffs also submit a copy of a letter from “The Children’s Aid Society” dated January 31, 2017 to “To Whom It May Concern” which states that there is a rat infestation in the home, with holes in the walls throughout the apartment, and rats climbing on the children’s beds and playpens. Finally, plaintiff submits a copy of a petition that was purportedly signed by most of the building’s residents in February 2017 regarding the rat infestation.

The court’s function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film

Corp., supra.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a “...reasonably safe condition, considering all of the circumstances including the purposes of the person’s presence and the likelihood of injury...” Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

The motion for summary judgment must be denied as defendants fail to meet their prima facie burden. Defendants argue that they are entitled to summary judgment because they were denied entry to the apartment. However, the evidence they provided is not in admissible form. Specifically, the letter from the exterminators Target, regarding plaintiffs allegedly not accepting exterminating services for six months, and the numerous copies of notes and letters from the defendants’ files on the plaintiffs/tenants. These records are not authenticated in any manner. Even if the Court found that defendants met their prima facie burden with the affidavit of Mr. Milius, Mr. Bouton’s affidavit raises issues of fact that preclude summary judgment as Mr. Bouton squarely contradicts defendants’ contention that plaintiffs failed to provide access to the apartment for rodent abatement. Mr. Bouton states that the landlord’s employees were granted access to the apartment at least 40 times in the three years preceding the incidents herein to deal with the rat infestation problem. Thus, these

differing positions raise a question of fact as to whether defendants were denied access to the subject premises prior to the incidents.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 3/15/19



Hon. Alison Y. Tuitt