Zabawa v Sky Mgt. Corp.
2019 NY Slip Op 32415(U)
August 12, 2019
Supreme Court, New York County
Docket Number: 162795/2014
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. 162795/2014

KATARZYNA ZABAWA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

SKY MANAGEMENT CORP. and MMM ASSOCIATES LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Katarzyna Zabawa, defendants Sky Management Corp. ("Sky") and MMM Associates LLC ("MMM") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Defendants oppose the motion and cross-move, pursuant to CPLR 3126, for discovery sanctions against plaintiff. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On October 26, 2013, plaintiff was injured when she fainted while exiting the shower in the bathroom of the home of her then-boyfriend Kevin Mulligan at 204 West 81st Street ("the building"), Apartment 24 ("the premises"), New York, New York. Doc. 1. When she fainted, plaintiff fell and her left thigh came into contact with a hot pipe, also known as a riser, causing her

to be burned. Doc. 1. The premises were owned by MMM and managed by Sky. Doc. 43 at 12, 15-16. Mulligan rented the apartment from MMM for a term beginning August 1, 2013 and expiring on June 30, 2014. Doc. 44.

Plaintiff commenced the captioned action against Sky by filing a summons and verified complaint on December 30, 2014. Doc. 1. As a first cause of action, plaintiff alleged that Sky violated New York City Administrative Code ("NYCAC") § 27-809 ("NYCAC 27-809") by failing to insulate and/or cover the pipe. Doc. 1 at pars. 17-19. As a second cause of action, plaintiff alleged that Sky negligently failed to maintain the premises in a safe and habitable condition. Doc. 1 at par. 21. Specifically, plaintiff alleged that Sky knew or should have known that the pipe was not insulated and that it reached temperatures capable of causing burns. Doc. 1 at pars. 22-23.

Sky joined issue by its verified answer filed June 24, 2015. Doc. 2.

In her verified bill of particulars against Sky dated July 27, 2015, plaintiff alleged, inter alia, that, while getting out of the shower, she became lightheaded and fell to the floor, at which time her left thigh came into contact with a "scalding hot [s]team-pipe." Doc. 38 at par. 4.[1] She alleged that Sky was negligent in failing to insulate or cover the pipe and that it had actual notice of the condition since it renovated the premises in 2013; "several tenants" had notified Sky about the exposed steam pipe; and Sky had performed maintenance on the system. Doc. 38 at par. 6. Plaintiff further alleged that Sky violated NYCAC 27-809. Doc. 38 at par. 16.

By order entered November 16, 2016, plaintiff was granted leave to amend the complaint to name MMM as a defendant. Doc. 20. Plaintiff filed an amended summons and complaint on

[1] Plaintiff never amended the bill of particulars to set forth allegations against MMM. Nor did it serve a separate bill of particulars setting forth allegations against MMM.

November 18, 2016. Doc. 23. Sky and MMM filed an answer to the amended complaint on December 20, 2016. Doc. 24.

At her deposition on March 9, 2018, plaintiff testified, inter alia, that she fainted suddenly and did not know how long she was unconscious, how long she was on the floor, or how long her leg was in contact with the pipe. Doc. 41 at 25, 31, 33. She was not aware of any complaints regarding the pipe made prior to the incident. Doc. 41 at 39-40. When asked whether she knew the pipe was hot, she replied that she "assumed" that it was. Doc. 41 at 53.

Fidan Shala, the superintendent at the premises, appeared for a deposition on behalf of Sky on September 5, 2018. Doc. 42 at 1, 7-8. During the 10-11 years he had worked for Sky, he had never heard of anyone being burned by a steam pipe. Doc. 42 at 16, Doc. 58. The purpose of the pipe was to provide heat, and every bathroom at the premises was heated in such fashion. Doc. 42 at 23, 26.

Andrew Dushey, Director of Property Management for Sky, appeared for deposition on behalf of that entity on March 12, 2018. Doc. 43 at 1, 12. He testified, inter alia, that he has been property manager for the premises since 2009, that the building was owned by MMM, and that Shala was the building's superintendent. Doc. 43 at 15-16, 19. Mulligan, the tenant of apartment 24, never complained to Dushey about the pipe. Doc. 43 at 19-20. He estimated that there were 20 units in the building. Doc. 43 at 24-25. He was not certain when the building was built. Doc. 43 at 25. Although Dushey testified that pipes could be used to heat a room, he was not certain whether Mulligan's bathroom was heated in this manner. Doc. 43 at 28, 54.

On or about July 18, 2018, plaintiff disclosed as an expert witness engineer George Gianforcaro, who represented that defendants violated New York City Building Code ("NYCBC") sections 28-301.1 (owner's responsibilities), 120.1 (scope of hydronic piping), 1202.1 (piping),

204.1 (insulation characteristics), and 1204.2 (required thickness). Doc. 46. He also represented that defendants violated the following sections of the New York City Energy Code ("NYCEC"): Chapter 4 (residential energy efficiency), 401.1 (scope), and 401.2 (compliance) and 405.5.2 (specifications for the standard reference and proposed designs). Doc. 46. However, Gianforcaro did not opine that defendants violated NYCAC 27-809, despite the fact that plaintiff made this claim in her bill of particulars. Doc. 38 at par. 16.

Plaintiff filed a note of issue on December 6, 2018. Doc. 39. The same day, defendants moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 33. In support of the motion, defendants argue that the first cause of action must be dismissed because NYCAC 27-809 does not apply herein and because the other code violations referenced in Gianforcaro's expert disclosure do not exist or are inapplicable herein. Docs. 34-35. Defendants maintain, inter alia, that, although the building was renovated, such renovations did not require it to comply with any sections of the NYCAC which became effective after the building was built, such as NYCAC 27-809. Doc. 34 at par. 28. They further assert that the second cause of action must be dismissed because they were not negligent. Docs. 34-35.

In support of the motion, defendants submit the affidavit of Andrew Yarmus, an engineer, who opines, inter alia, that NYCAC 27-809, which was enacted in 1968, is not applicable to the building, which was built in 1917. Doc. 45 at par. 5. Yarmus opines that the temperature of the pipe "could easily have been less than 165 [degrees Farenheit]." Doc. 45 at par. 4. He further represents that "[t]here is no evidence available in the New York City Department of Buildings records concerning this building that indicates that the structure as a whole, and/or the subject bathroom and/or steam pipe individually, were materially altered between the time of original

construction and [plaintiff's] accident" which would have required defendants to comply with any "code requirements promulgated after the original construction of the building." Doc. 45 at par. 5.

Defendants also submit an affidavit by Dushey, who states that "[i]n no 12 month period since [MMM bought the building in 1995] have defendants or anyone acting on their behalf expended as much as 30% of the value of the building [on] alterations and/or renovations." Doc. 47 at par. 2.

Plaintiff opposes the motion on the ground that a question of fact exists regarding whether defendants are protected by the grandfathering provisions of the NYCAC from liability pursuant to NYCAC 27-809. Doc. 52. In opposing the motion, plaintiff relies on an unsworn report written by Gianforcaro in which he states, inter alia, that plaintiff was injured due to defendants' violation of AC 27-809. Plaintiff further relies on the affidavit of Dr. Paul Rosenberg, a plastic surgeon, who opines that plaintiff would not have sustained third degree burns in less than 5 seconds if the pipe were not above 165 degrees. Doc. 56.

Additionally, plaintiff cross-moves, pursuant to CPLR 3126, to strike defendants' answer due to their willful failure to provide discovery. Doc. 52. In the alternative, plaintiff seeks to preclude defendants from introducing evidence of its defenses or to determine, as a matter of law, that NYCAC 27-809 applies to the premises. Doc. 52.

In an affirmation in opposition to the cross motion and in further support of their motion, defendants argue that the evidence submitted by plaintiff is in improper form and fails to raise an issue of fact. They further maintain that plaintiff's cross motion for sanctions is frivolous.

LEGAL CONSIDERATIONS:

Defendants' Motion for Summary Judgment

"[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.*, 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]). 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]).

Statutory Violations

NYCAC 27-809, which requires building owners to insulate heating pipes carrying steam, water or other fluids at temperatures exceeding 165 degrees Farenheit, was enacted in 1968. NYCAC 27-111 "provides that any lawful use and occupancy prior to its effective date is grandfathered unless a retroactive change is specifically required by the [NYCAC]." *Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 139 (1st Dept 2000). Since the building was constructed in 1917, it would not be governed by NYCAC 27-809 unless "a retroactive change [was] specifically required by the provisions of the [NYCAC]." NYCAC 27-111. Such a

"retroactive change" implicitly refers to, inter alia, NYCAC sections 27-115 and 27-116. *Pappalardo*, 279 AD2d at 139. NYCAC 27-115 provides that "[i]f the cost of making alterations in any twelve-month period shall exceed sixty percent of the value of the building, the entire building shall be made to comply with the requirements of [the 1968] code." NYCAC 27-116 provides that "[i]f the cost of making alterations in any twelve month period shall be between thirty percent and sixty percent of the value of the building, only those portions of the building altered shall be made to comply with the requirements of [the 1968] code."

In order to establish their entitlement to summary judgment, defendants have the burden of "submitting proof in admissible form eliminating any issue as to the applicability of the [NYCAC] to the building." *Pappalardo*, 279 AD2d at 140, citing *Lescovich v 180 Madison Ave. Corp.*, 185 AD2d 599, *revd* 81 NY2d 982 (1993). However, defendants have failed to meet this burden. In attempting to make this showing, defendants rely on the affidavit of Dushey, who states that "[i]n no 12 month period since [MMM bought the building in 1995] have defendants or anyone acting on their behalf expended as much as 30% of the value of the building [on] alterations and/or renovations." Doc. 47 at par. 2. However, the affidavit is conclusory, insofar as Dushey does not discuss the value of the building or of any repairs made. Additionally, although Dushey addresses alterations and/or renovations since 1995, his affidavit is silent regarding the years preceding that period, during which such improvements may have been made. Therefore, he has failed to establish as a matter of law that an exception to the grandfathering provision does not exist.

Negligence

Similarly, defendants failed to establish their entitlement to summary judgment on plaintiff's negligence claim.

> A landowner has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding risk" (*Solomon v Prainito*, 52 AD3d 803, 804-805 [2nd Dept 2010], quoting *Basso v Miller*, 40 NY2d 233, 241 [1976]). The general rule is that a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair the premises is imposed by statute, by regulation or by contract (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]). One exception is Multiple Dwelling Law § 78[1], which holds that every Multiple Dwelling shall "be kept in good repair" and that the "owner shall be responsible for compliance" with that obligation (Multiple Dwelling Law § 78[1]; *Rivera*, 7 NY3d at 535). Thus, the Multiple Dwelling Law extended the landlord's duty to repair, limited at common law to those areas of the leased property over which it retained control, to all parts of the demised premises (*id.; Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643 [1996]).

Anderson v Trustees of Columbia Univ. in the City of NY, 2013 NY Slip Op 33316[U], *4-5 (Sup Ct, New York County 2013).

Contrary to their contention, defendants failed to establish that they were not negligent as a matter of law in maintaining the building. In support of the branch of their motion seeking dismissal of the negligence claim, they rely, inter alia, on *White v New York City Hous. Auth.*, 139 AD3d 579 (1st Dept 2016). However, defendant's expert engineer in that case

> determined, based on boiler room records, deposition testimony, and an inspection of the heating elements at the building and the apartment [in opining] that [defendant's] maintenance and operation of the heating pipes in the bedroom conformed to common and accepted practice, that the heating elements were functioning properly at the time of the accident, and that the steam pressure in the system was at an acceptable level at [the time of the alleged incident]."

White, 139 AD3d at 580.

Defendants further rely on *Bruno v City of New York*, 21 AD3d 760 (1st Dept 2005). In *Bruno*, defendant was granted summary judgment on plaintiff's negligence claim where its expert concluded that "the temperature of the heating pipe was appropriate, based on the evidence that the condensate temperature was 100 degrees Farenheit and the hot water temperature was 140 degrees Farenheit." *Bruno*, 21 AD3d at 761. Thus, reasoned the Appellate Division, "[i]n the absence of competent evidence showing that the heating pipes were permitted to reach an unreasonably high temperature, there [were] no triable issues of material fact as to defendant's negligence." Id. (citations omitted).

In the captioned action, however, no such detailed showing was made by defendants' expert engineer Yarmus. In his affidavit in support of the motion, Yarmus does not state that he made any inspection of the pipe or the building's heating system. Doc. 45. Nor does he refer to any records he reviewed which established that the pipe and/or heating system was in proper working order and/or operated in accordance with accepted practice at the time of plaintiff's injury. Id. On the contrary, Yarmus merely states that the temperature of the pipe "could easily have been less than 165 [degrees Farenheit]." Doc. 45 at par. 4. Summary judgment clearly cannot be predicated on such a speculative and conclusory opinion. *See Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564 (1stDept 2011); *Roques v Noble*, 73 AD3d 204 (1st Dept 2010); *R.A.B. Constrs., Inc. v Stillman*, 299 AD2d 165 (1st Dept 2002). Since *White* and *Bruno* are clearly distinguishable herein, defendants are not entitled to summary judgment as a matter of law dismissing plaintiff's negligence claim.

Plaintiff's Cross Motion for Discovery Sanctions

Plaintiff's cross motion for discovery sanctions is denied. Initially, although not raised by defendants, plaintiff's counsel has failed to submit an affirmation of good faith in support of the cross motion, as required by 22 NYCRR 202.7, setting forth in detail "the time, place, and nature of the consultations" that counsel for the parties had "to try to resolve the issues raised by the motion." *Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 (1st Dept 2019). Additionally, as defendants assert (Doc. 67 at pars. 74-75), plaintiff does not specify precisely what discovery is allegedly owed by defendants. Further, as defendants also maintain, plaintiff fails to set forth any explanation as to why she filed the note of issue if she was owed further discovery or, if plaintiff learned that there was outstanding discovery after filing the note of issue, why she did not withdraw the same. Doc. 67 at par. 76. Therefore, plaintiff is not entitled to relief pursuant to CPLR 3126.

The parties' remaining contentions are without merit or need not be addressed given the conclusions above.

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

ORDERED that the motion by defendants Sky Management Corp. and MMM Associates LLC for summary judgment pursuant to CPLR 3212 is denied in all respects; and it is further

ORDERED that the cross motion by plaintiff Katarzyna Zabawa for discovery sanctions pursuant to CPLR 3126 is denied; and it is further

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

8/12/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE