Heaney v 337 Mansion Ave., LLC
2019 NY Slip Op 34370(U)
March 6, 2019
Supreme Court, Putnam County
Docket Number: Index No.800002/2017
Judge: Victor G. Grossman
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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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ROSALINDA HEANEY,

Plaintiff,

-against -

337 MANSION AVE., LLC, 337 MANSION CORP., MATTHEW N.L. ROACH, VICTORIA A. ROACH, DUTCHESS COUNTY ASSETS LLC and ANAN ALZOGHAR,

Defendants.

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AMENDED DECISION & ORDER

Index No. 800002/2017

Sequence No. 1
Motion Date: 2/28/2019

GROSSMAN, J.S.C.

The following papers, numbered 1 to 31, were considered in connection with Defendants Anan Alzogheir and Dutchess County Assets LLC's Notice of Motion, dated December 7, 2018, seeking an Order: a) pursuant to CPLR §§2001 and 5019(a), *inter alia*, amending the within caption *nunc pro tunc* to reflect Anan Elzogheir, not Anan Alzoghar, as the properly-named individual defendant herein; b) pursuant to CPLR §3212, *inter alia*, granting moving Defendants summary judgment, dismissing the within Amended Complaint and cross-claim against them because neither of the moving Defendants owned the property where the subject accident allegedly occurred herein, because Defendant Anan Elzogheir did not otherwise have any individual obligation with respect to the property where the accident allegedly occurred, and because neither of the moving Defendants owed Plaintiff a duty of care to remedy an alleged design defect in an angled staircase constructed in the 100-year-old building where the accident occurred herein, among other things; and c) granting such other and further relief as this Court shall deem to be just, proper and equitable in the circumstances herein.

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support/Affidavit in Support/ Exhs. A-K	1-13
Memorandum of Law	14
Affirmation in Opposition/Exhs. A-F	15-21
Reply Affirmation in Further Support/Affidavit (Loedy)/ Reply Affidavit (Elzogheir)/Exhs. L-R	22-31

This is an action for damages for personal injuries sustained by Plaintiff Rosalinda Heaney on February 27, 2016, on the stairway in the premises located at 337 Mansion Avenue, Poughkeepsie, New York (the "premises"). While ascending the stairs, she approached a step that had been narrowed due to the winding stairway design and, upon placing her foot on the step, she fell backwards and was injured.

On September 6, 2016, Plaintiff filed a Summons and Complaint. On October 7, 2016, she filed a Supplemental Summons and Amended Complaint, alleging that Defendants were negligent in that they owned, managed, operated, maintained and repaired the premises, causing Plaintiff to fall and sustain injuries (Notice of Motion, Exh. A). On or about October 21, 2016, Defendants 337 Mansion Ave. LLC, Matthew N.L. Roach, and Victoria A. Roach joined issue with the filing of their Answers (Notice of Motion, Exh. B). On or about June 3, 2017, Defendants Dutchess County Assets LLC and Anan Elzogheir filed a Verified Answer with Cross Claims against the other Defendants (Notice of Motion, Exh. C).

The Amended Complaint alleges that:

> "Defendants maintained and repaired the aforesaid premises as a two-family residence.
>
> That upon information and belief, and at all times herein mentioned, and more specifically on February 27, 2016, and for a long time prior thereto, the aforesaid defendants rented the units of the aforesaid premises to residential tenants; * * * each of the defendants exercised dominion and control over the aforesaid premises; * * * each of the defendants was under a duty to own, provide, inspect, control, operate, supervise, manage, maintain and repair the aforesaid premises, including the entrance stairway to the second floor rental unit, in a safe and non-hazardous condition so that persons present threat may be there in reasonable safety; * * * the entrance stairway to the second floor rental unit of the aforesaid premises was in a dangerous, defective and hazardous condition; * * *

> each of the defendants herein and/or their agents, servants and/or employees, knew, or in the exercise of reasonable care, should have known of the aforesaid dangerous, defective and hazardous condition; * * * each of the defendants herein and/or their agents, and/or employees, caused, created and/or contributed to the aforesaid dangerous, defective and hazardous condition; * * * each of the defendants herein and/or their agents, servants and/or employees, owned, provided, inspected, controlled, operated, supervised, managed, maintained the aforesaid premises in a careless, negligent and unreasonable manner."

Plaintiff does not oppose the first request for relief, and the motion to amend the caption to reflect Anan Alzogheir as the properly named Defendant is granted.

However, Plaintiff opposes the second request for relief, seeking summary judgment, arguing that there are triable issues of material fact, and proffering: (1) the Equity Lease Agreement, dated November 1, 2015, between 337 Mansion Ave., LLC and Dutchess County Assets, LLC; (2) the Affidavit of Robert Fuchs, PE; (3) the Examination Before Trial of Anon Elzogheir; and (4) photographs. Plaintiff argues that Defendants Elzogheir and Dutchess County Assets, LLC were the lessees and managing agents of the premises, and they were obligated to maintain it as if they owned it. Defendants Elzogheir and Dutchess County Assets, LLC argue, *inter alia*, that there is no opposition from the cross-claiming Defendant, and Plaintiff has not taken a position on the dismissal of the cross-claims. Therefore, according to Defendants, there is no opposition and the motion should be granted.

Defendant 337 Mansion Avenue LLC is the titled owner of the premises. Its members are Defendant Matthew N.L. Roach and Defendant Victoria A. Roach. Defendant Dutchess County Assets, LLC is the Lessee under a "Equity Lease" Agreement, which, by its terms, provides Defendant Dutchess County Assets, LLC with the option to purchase the premises, based on the payment of $15,000.00 at the time of the lease, and an allocation of the principal portion of

monthly rental payments pursuant to an amortization schedule. At his deposition, Defendant Roach asserted that the obligation of Defendant Dutchess County Assets, LLC was to maintain the building "as if they were the owners," although it had no ownership interest (Notice of Motion, Exhibit F at 13-15). Defendant Elzogheir acknowledged the responsibility to maintain the property. Morever, the Lease contains specific paragraphs regarding maintenance responsibilities (Exhibit G at ¶¶9-10), as well as the Lessee's responsibility to "defend, indemnify and hold the owner other premises and Lessor...harmless from any claims or suits." The interactions among the members of 337 Mansion Ave., LLC and Defendant Dutchess County Assets, LLC included a verbal agreement regarding insurance that differed from the obligations in the Equity Lease Agreement as Mr. Elzogheir testified (Elzogheir EBT at 25, 28-29):

Q. In your agreement, were you supposed to pay for insurance?

A. Well, yes, but we – me and Mr. Roach have a verbal agreement on the phone. He said I have my insurance on the property and it's – I get a good price. You just have to reimburse me for the insurance.

Q. Okay.

A. And I was reimbursing him for insurance.

* * *

Q. This equity lease agreement that is Plaintiff's [Notice of Motion, Ex. G] here today, it obligated you to purchase a separate and distinct policy of liability insurance in favor of the building, correct?

A. Correct.

* * *

Q. And you never did so did you? * * * Just yes or no.

A. I did, yes.

Q. You did purchase a liability policy?

A. [Yes, after the date of Plaintiff's accident].

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits. See Millerton Agway Coop. v. Briarcliff Farms, 17 N.Y.2d 57, 61 (1966); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Initially, "the proponent... 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 issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers. Id.; see also Fabbricatore v. Lindenhurst Union Free School Dist., 259 A.D.2d 659 (2d Dept. 1999).

"While a property owner has a duty to maintain its property in a reasonably safe condition, it has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous." Calandrino v. Town of Babylon, 95 A.D.3d 1054, 1055 (2d Dept. 2012). "'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances.'" Id., quoting Atehortua v. Lewin, 90 A.D.3d 794 (2d Dept. 2011) (internal quotation marks omitted). "'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted.'" Calandrino, supra, quoting Katz v. Westchester County

Healthcare Corp., 82 A.D.3d 712, 713 (2d Dept. 2011).

A property owner has a duty to maintain his property "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 the risk." Basso v. Miller, 40 N.Y.2d 233, 241 (1976), quoting Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100 (DC Cir. 1972). Whether a dangerous condition exists "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury." Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997). Furthermore, "[t]o establish a prima facie case of negligence in a premises liability case, a plaintiff must demonstrate the existence of a dangerous or defective condition that caused his or her injuries, and that the defendant either created or had actual notice or constructive notice of the condition." Robert v. Mahopac Cent. School Dist., 38 A.D.3d 514, 515 (2d Dept. 2007).

By its terms in Paragraphs 9 and 10, the Equity Lease Agreement establishes, as Elzogheir concedes, his obligation to maintain the building and its apartments (Elzogheir EBT at 26). Notably, the structure and condition of the stairs and handrail at the time of purchase of the premises, or the date of the lease, is not disputed. The handrail design and its impact on events, as well as the stair tread and design, are questions of fact for the jury. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66 (2015). The jury will have to consider the condition of the stairway and tread. The jurors also will have to consider Defendants' knowledge of the condition, and whether they took the proper actions to address it.

The failure of Defendant Dutchess County Assets, LLC to carry insurance at the time of the incident creates a series of issues in the event the liability of Defendant 337 Mansion Ave., LLC, or Dutchess County Assets, LLC, is established. If Defendant 337 Mansion Ave., LLC is

found liable for the accident, there is no indemnification available, contrary to the agreement. If Dutchess County Assets, LLC is found liable, there are no assets or insurance available to meet its obligations, also contrary to the agreement.

Under these circumstances, the possibility of piercing the corporate veil is apparent. The criteria for piercing the corporate veil requires a showing that: (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) such dominion and control was used to commit a fraud or wrong against a plaintiff which resulted in that plaintiff's injury. Mtr. of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135 (1993); Seuter v. Lieberman, 229 A.D.2d 386 (2nd Dept. 1996). Whether or not the wrongful act in not providing insurance is present, the potential impact cannot be determined until a verdict is returned. CPLR §3212(f). "Veil-piercing is a fact laden claim that is not well suited for summary judgment resolution." First Bank of Ams. v. Motor Car Funding, 257 A.D.2d 287, 294 (1st Dept. 1999).

Accordingly, it is hereby

ORDERED that Defendant Elzogheir's motion is granted, the caption is amended, and the remaining branch of the motion seeking summary judgment is denied; and it is further

ORDERED that the parties are to file their Requests to Charge, Proposed Verdict Sheets and Trial Memoranda on or before April 19, 2019; and it is further

ORDERED that the parties are reminded that they are to appear before the undersigned, as previously scheduled, on Thursday, March 14, 2019 at 9:30 a.m. for a pre-trial conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
March 6, 2019

HON. VICTOR G. GROSSMAN, J.S.C.

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