Tyra v Kramer
2019 NY Slip Op 34669(U)
August 20, 2019
Supreme Court, Putnam County
Docket Number: Index No. 500077/2018
Judge: Thomas P. Zugibe

To commence the statutory period for appeals as of right under 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
PUTNAM COUNTY

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BERNADETTE TYRA, Index No. 500077/2018

Plaintiff,

-against- DECISION AND ORDER

MICHAEL KRAMER and PHILLIP McMURRAY,

Defendants.

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Zugibe, J.

Upon considering the papers filed in this case in defendants' respective motions for summary judgment: Owner Kramer (Motion Sequence 001, Documents 13-23, 48-59) and lessee McMurray (Motion Sequence 002, Documents 24-47, 60), the Court denies all the motions as questions of fact remain regarding defendants' liability in the stairway fall case.

Very briefly, plaintiff performed housekeeping services for McMurray, who rented a cottage on Kramer's property. There is no doubt that Kramer was an out-of-possession landlord, and that by (since lost) written agreement, McMurray was required to repair and upkeep on the cottage.

Plaintiff did McMurray's laundry as part of her housekeeping duties. The laundry facilities were in the basement of the cottage. A stairway with no handrails led to the basement from the main floor. On the day she fell, plaintiff was using a laundry basket with a loose and

partially torn handle. She loaded the basket with a lot of laundry, about 50 pounds worth,[1] and climbed the stairs.

Suddenly, when she reached the second-to-top stair, the loose handle broke. As plaintiff began to fall, she instinctively reached for the handrail that was not there. She then tumbled down the stairs, sustaining personal injuries.

In her complaint and Bill of Particulars, plaintiff alleged unspecified code violations: "a stairway lacking any and/or proper handrails all in violation of codes, regulations and statutes...." Complaint ¶34, Repeated in BOP ¶4. In addition, BOP ¶7 states that plaintiff was relying on "all of the statutes, rules and regulations applicable hereto all of which the Court will take judicial notice of at the time of trial of the within matter. Plaintiff reserves the right to supplement this response upon completion of discovery."

At a court conference in early 2019, the Court demanded that plaintiff file a Note of Issue. As the Court specifically recalls, plaintiff demurred because she had not conducted an on-site inspection so that her engineer could determine what violations there were. The Court ordered plaintiff to file the Note of Issue and allowed the on-site inspection – and, by necessity, the engineer's conclusions and report – to take place after the Note of Issue date.

Defendants filed their summary judgment motions within the period the Court's rules allow. As a result, the motions and plaintiff's inspection and engineer's report crossed.

The Court first addresses defendants' claims that it cannot consider the expert reports or plaintiff's post-summary-judgment-motions contention that defendants violated certain building code provisions for failing to provide a handrail on the basement staircase. It is true that, under usual circumstances, a plaintiff may not raise building code violations for the first time when

[1] The Court suspects that this is an overestimation, given the size of the laundry basket. Nevertheless, plaintiff's testimony is the only evidence in the record regarding how much he laundry weighed.

opposing a motion for summary judgment. *Fox v. Saloon*, 166 A.D.3d 950, 950-951 (2d Dep't 2018). However, contrary to defendants' claims, the circumstances here are not usual. First, plaintiff placed defendants on notice that they were relying on code violations. Second, plaintiff reserved the right to supplement this after discovery was completed. Third, the Court specifically allowed post-Note-of-Issue discovery, on the very inspection and expert report issue that defendants now seek to use as a sword against plaintiff. The Court put plaintiff in what, in hindsight, was an untenable position. The Court will not prejudice plaintiff for the Court's own actions. The cases defendants cite are thus inapposite. The Court will therefore consider plaintiff's expert affidavit when deciding this motion.

The Court denies defendant Kramer's motion for summary judgment. He is, without a doubt, an out-of-possession landlord. To demonstrate a prima facie case for summary judgment, an out-of-possession landlord must demonstrate that it has no right to reenter the premises to inspect and/or make repairs. *Vasquez v. RVA Garage*, 238 A.D.2d 407, 408 (2d Dep't 1997). Here, both defendants testified there was a written agreement to that effect. The problem is that neither defendant can produce the written agreement. While parole evidence may be allowed under such circumstances, the Court finds that "[w]ithout producing the written lease or other acceptable documentation indicating this lack of control, [defendant Kramer] failed, prima facie, to demonstrate its entitlement to judgment as a matter of law." *Kreimer v. Rockefeller Group, Inc.*, 2 A.D.3d 407, 408 (2d Dep't 2003). As such, on this motion the Court considers defendant Kramer to have retained the right to reenter and make repairs.

With defendant Kramer prevented from shielding himself as an out-of-possession landlord without reentry rights, his other arguments quickly fall away. Defendant Kramer admitted that he had actual notice, at least at the summary judgment phase, by stating "I think"

the staircase lacked a handrail dating back to when he purchased the property. He therefore failed prima facie to establish lack of actual notice. *Kimen v. False Alarm, Ltd.*, 69 A.D.3d 579, 580 (2d Dep't 2010).

Further, Defendant Kramer's claim that plaintiff is solely at fault here also fails. To establish a prima facie case, a defendant in cases of this kind must establish that any code violation did not proximately cause the accident. *Horowitz v. 763 E. Assoc., LLC*, 125 A.D.3d 808, 810 (2d Dep't 2015). Here, plaintiff admittedly filled a defective laundry basket provided by her employer with a significant amount of laundry and climbed the stairs. She also testified that when the handle on the laundry basket failed and she began to fall, she reached for the handrail that should have been there. Thus, whatever contribution she and the tenant made to the accident, Defendant Kramer did not present a prima facie case that the lack of a handrail had no contributory cause to plaintiff's fall down the flight of stairs. *Velez v. 955 Tenants Stockholders, Inc.*, 66 A.D.3d 1005, 1006 (2d Dep't 2009); *Rivera v. Americo*, 9 A.D.3d 356, 357 (2d Dep't 2004) (court erred in failing to charge jury with handrail code violation because it "would have helped the plaintiff to maintain balance" when stair collapsed); c.f. *Luna v. CEC Entertainment, Inc.*, 159 A.D.3d 445, 446 (1s t Dep't 2018) (lack of a handrail not proximate cause where plaintiff never stated she reached for the absent handrail). Here, plaintiff testified at her deposition that she reached for handrail even though she knew it wasn't there – an instinctive act that might have saved her from falling if a handrail had been present. Thus, neither defendant Kramer nor the Court can say with legal certainty that the lack of a handrail did not proximately cause the accident.

It is true that perhaps both plaintiff and defendant McMurray bear some responsibility for this accident. However, "there may be more than one proximate cause" for an accident.

Burlington Ins. Co. v NYC Tr. Auth., 29 N.Y.3d 313, 322 (2017); *Gray v. Air Excel Serv. Corp.*, 171 A.D.3d 1026, 1028 (2d Dep't 2019). The Court cannot say that any other parties' fault so overwhelms the lack of a handrail as to warrant granting defendant Kramer summary judgment.

As to defendant McMurray, the tenant, he can also not escape liability here. If a factfinder determines that he, and not defendant Kramer, was responsible for keeping the property in good repair, then defendant McMurrray must be charged with the lack of a handrail. The fact that defendant Kramer added the handrail after the accident may well be evidence upon the trial that he had access to the property for repair purposes, but cannot result in summary judgment to anyone at this time.

Further, defendant McMurray provided the laundry basket that broke when plaintiff used it to carry his laundry up the stairs in the cottage he rented. It appears that he would therefore be at least partially liable for the resulting laundry-basket break and subsequent fall. *See Salvieterra v. Havekotte*, 273 A.D.2d 218, 219 (2d Dep't 2000) (defendants responsible for giving plaintiff housekeeper defective gloves and "Easy Off" oven cleaner to manually clean oven). The Court rejects defendant McMurray's claim that the defect only existed in the instant the handle actually broke, and so notice was not established. Indeed, the laundry basket was defective as a matter of law when the handle tore partially, causing it to be "jiggy."

The Court notes that defendant McMurray admitted to sometimes doing the laundry himself, although he denied knowing the handle was defective. He also regularly placed his laundry into the basket, and this demonstrates, at the summary judgment phase, that he knew or should have known the handle was defective. In addition, plaintiff stated that she did not recall the handle being an issue until the day she fell. This leaves questions of fact and credibility that must be resolved at the trial. Thus, summary judgment would be improper.

It appears to the Court that a fact finder must review the evidence in this case to determine relative fault of all the parties to this personal injury case. Thus, summary judgment would not be appropriate at this time.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 20, 2019
New City, New York

ENTER

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