

Tower Natl. Ins. Co. v Lugo

2020 NY Slip Op 31026(U)

April 21, 2020

Supreme Court, New York County

Docket Number: 160305/2018

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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TOWER NATIONAL INSURANCE COMPANY, as subrogee of ONEWORLD WIRELESS INC, a/k/a VERIZON, subrogor,

Plaintiff,

- v -

JOSEPH A. LUGO, MICHAEL LARSON, KEITH KANCAR, and ABBY MARTINEZ,

Defendants.

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INDEX NO. 160305/2018
MOTION DATE
MOTION SEQ. NO. 001
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11-35 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Tower National Insurance Company commenced this subrogation action on behalf of its insured, Oneworld Wireless Inc., to recover for property damage to the insured's Verizon store on November 7, 2015, from a water leak from the kitchen sink in the unit above the store. Defendants Joseph A. Lugo and Michael Larson are the owners of the unit and sublet it to defendants Keith Kancar and Abby Martinez. Prior to the commencement of this action, the insured-subrogor, Oneworld Wireless filed its own negligence action against defendant Lugo in New York County (Oneworld Wireless Inc v. Joseph Lugo, Index No. 157460/2016). By order dated November 13, 2019, the court in the Oneworld action granted defendant Lugo's motion for summary judgment dismissing the action, finding that defendant Lugo lacked actual and constructive notice of the defect and thus could not be held liable for negligence. Defendant-owners Lugo and Larson now move pursuant to CPLR 3212 for summary judgment seeking dismissal of the complaint. Plaintiff opposes the motion and cross-moves to compel a response to its document demands.

In their summary judgment motion, defendants Lugo and Larson first argue that plaintiff's negligence claim is barred under the law of the case doctrine since a court of coordinate jurisdiction already decided in a related case that they did not have notice of the alleged defect. The law of the case doctrine addresses the potential preclusive effect of judicial determinations made by courts of coordinate jurisdiction before final judgment and in the course of a single litigation. *People v. Evans*, 94 N.Y.2d 499, 502 (2000). "Accordingly, law of the case has been aptly characterized as a kind of intra-action res judicata." *Id.* (internal citation and quotations omitted). Here, the court in the *Oneworld* action denied the motion to consolidate with this case and the two actions remain separate lawsuits. Thus, the doctrine of law of the case is inapplicable as the determination was made in a different lawsuit. *Id.*; *see also Gadani v. DeBrino Caulking Assoc.*, 86 A.D.3d 689, 691 (3d Dep't 2011); *Dittmer v. State*, 140 A.D.2d 663, 663-64 (2d Dep't 1998). While the related doctrines of res judicata and collateral estoppel may be applicable here, defendants have not raised this argument in their motion nor have they asserted these defenses in their answers, therefore, they will not be considered.

Defendants Lugo and Larson next argue that even if the claims against them are not barred by the law of the case doctrine, the complaint should nevertheless be dismissed because they had not actual or constructive notice of the alleged defect in the piping of the kitchen sink. The court in the *Oneworld* action found this argument persuasive, finding that because this was the first instance of a leak occurring in the kitchen sink, the owner had no obligation to inspect or repair the sink which appeared to be working properly, and thus had no actual or constructive notice of the alleged defect. Affirmation of Jennifer Prusiccki dated November 27, 2019, Exh. A. Likewise, here, plaintiff does not dispute the testimony from *Oneworld* and the defendants that this was the first leak that occurred at the premises since 2012, when defendants Lugo and

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Larosn moved into the unit. However, this testimony only shows that defendants-owners lacked actual notice of the alleged defect. This testimony is insufficient to meet defendants-owners' prima facie burden of demonstrating a lack of constructive notice as it fails to establish when defendants-owners last inspected the area relative to the time of the accident and that the dangerous condition did not exist at the time of the inspection. *Niu v. Sasha Realty LLC*, 151 A.D.3d 488, 489 (1st Dep't 2017) (holding defendants failed to establish their prima facie burden on constructive notice because they did not present evidence of when the location of the accident was last inspected) ; *Joachim v. AMC Multi-Cinema Inc.*, 129 A.D.3d 433, 434 (1st Dep't 2015) (same).

Further, defendants-owners have not shown that the defect was latent and would not have been discovered upon a reasonable inspection. *See Arevalo v. Abitabile*, 148 A.D.3d 658 (2d Dep't 2017). Finally, to the extent that defendants-owners argue that they are out-of-possession landlords and do not bear responsibility for maintaining the unit, this argument is contradicted by the terms of the sublease which not only give defendants-owners a right of reentry but also states that they are responsible for maintaining the pipes in the unit. *Prusiecki Aff.*, Exh. G (Sublease Paras. 15 [A]). Accordingly, the motion for summary judgment must be denied.

With respect to the cross-motion, it appears to be moot as defendants-owners state that they have fully responded to plaintiff's document demands and plaintiff does not dispute this statement in its sur-reply. Accordingly, it is

ORDERED that the motion for summary judgment and the cross-motion to compel are denied.

4/21/20
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

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