

Ortega-Gonzalez v W.T.P. Realty LLC
2020 NY Slip Op 34083(U)
December 3, 2020
Supreme Court, Kings County
Docket Number: 501947/2016
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 3rd day of December 2020.

P R E S E N T:

Honorable Reginald A. Boddie, JSC

-----X
CRESCENCIANO ORTEGA-GONZALEZ,

Plaintiff,

Index No. 501947/2016
Cal. No. 34 MS 6

-against-

W.T.P. REALTY LLC, SUDS "R" US
LAUDROMATEAST, INC., FLORAL PARK
MUSIC AND DANCE CENTER,

Defendants.
-----X

<u>Papers</u>	<u>Numbered</u>
MS 6	Docs. # 73-99, 101

Upon the foregoing cited papers, the decision and order on defendant WTP Realty LLC's motion for summary judgment, pursuant to CPLR 3212, is as follows:

Plaintiff commenced this action to recover for personal injuries he allegedly sustained on September 30, 2014, on the premises at 323 Jericho Turnpike, Floral Park, New York. The premises is owned by defendant WTP Realty LLC (WTP) and leased by defendant Suds R Us Laundromat East, Inc. (Suds R Us). Pursuant to a September 1, 2014 lease, Suds R Us was in possession of the building and basement at the subject premises. The lease provided the tenant was responsible for maintaining the demised premises and the owner was responsible for making structural repairs.

Plaintiff was making a delivery of laundry detergent to the cellar of Suds R Us. He testified that he was working alone and therefore he positioned himself backwards down the stairwell and

used both hands to brace the barrel as he rolled it down the stairs. He testified that his boss determined whether to send a helper with him on his delivery route depending on the size of the delivery. Plaintiff testified that if his boss had sent him with a helper, he may have used a hand truck to move the detergent barrel down the stairs.

Plaintiff accessed the stairway through hatch doors from the sidewalk and obtained the key to the cellar doors from Suds R Us. He described the stair treads as narrow, dirty, cracked at the edges, broken and ugly, and alleged the stairwell lacked a handrail. He testified rain had fallen into the stairway between the time he opened the cellar doors and unloaded his truck, the stairs were a little wet from the rain and greasy with old soap, garbage, tree leaves and dirt. He testified he was descending the cellar stairway backwards while rolling a 30 gallon barrel down the stairs when he slipped and fell on wet dirt that was on the stairs.

WTP moved for summary judgment on the grounds that Suds R Us was responsible for the maintenance of the stairwell pursuant to the lease, it did not create or have notice of the slippery condition, and did not owe a duty to plaintiff. William Psaros, on behalf of WTP, testified that the tenant was in sole possession of the key to the cellar and WTP did not have access to the cellar. Plaintiff and Suds R Us opposed the motion.

Liability of the landowner arises when the landowner has possession and control of the premises (*see Gronska v County of Monroe*, 18 NY3d 347, 379 [2011], citing *see Chapman v Silber*, 97 NY2d 9, 19 [2001]). The issue of possession and control is both a question of law and fact (*id.*). Here, pursuant to the lease, Suds R Us was in possession and control of the building and basement and was responsible for maintaining the premises including cleaning the cellar stairs. According to the lease, WTP was responsible for structural repairs to the premises, which Mr. Psaros admitted included the cellar stairway. Whether the obligations of the lease, here, give rise

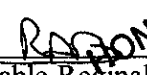
to liability depends on the cause of plaintiff's accident. It is axiomatic that there may be more than one proximate cause of an accident (*see e.g. Martinez 1261 Realty Co., LLC*, 121 AD3d 955, 956 [2d Dept 2014], and, except where only one conclusion may be drawn from the facts, proximate cause is generally a question for the jury to resolve (*Raldiris v Enlarged City Sch. Dist. of Middletown*, 179 AD3d 1111, 1114 [2d Dept 2020] [citations omitted])).

Here, plaintiff and Suds R Us opposed the motion arguing that plaintiff's accident was caused by structural defects in the stairwell, including deteriorating concrete, insufficient treads and the lack of a handrail, and the lease obligates WTP to make structural repairs. Plaintiff also pleaded this theory of liability in the Bill of Particulars. The opponents of the motion argued WTP inspected the cellar stairs at the time it purchased the property and was aware of the alleged structural defects and lack of handrail.

Plaintiff proffered an affidavit in support of his opposition wherein he averred that the lack of a handrail was a substantial factor in causing his accident. Plaintiff also proffered the affidavit of Stanley Fein, an accident investigator, who concluded same. In both affidavits, plaintiff's deposition testimony regarding the lack of a handrail was parsed and reconstructed in order to demonstrate that plaintiff testified the lack of a handrail contributed to the happening of his accident. However, upon review of the transcript, it is clear that plaintiff did not testify to such and maintained that his slip was caused by the wet dirt on the stairs. Moreover, Fein relied on the New York City Administrative Code in arguing the lack of handrails violated the building code. However, the premises is located in Nassau County, which is governed by the New York State Fire Prevention and Building Code and the Municipal Code of the Incorporated Village of Floral Park.

A movant's burden on summary judgment is to affirmatively demonstrate the merit of its claim or defense (*see Martinez 1261 Realty Co., LLC*, 121 AD3d 955, 956 [2d Dept 2014]). As here, once movant establishes its prima facie entitlement to summary judgment, the burden shifts to the parties opposing the motion to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). Here, plaintiff and Suds R Us have failed to do so. Moreover, pursuant to the terms of the lease, Suds R Us is obligated to defend and indemnify WTP. Accordingly, WTP's motion for summary judgment is granted in its entirety.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court

REGINALD A. BODDIE
J.S.C.

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FILED
KINGS COUNTY CLERK