Coreano v 983 Tenants Corp.
2020 NY Slip Op 35365(U)
August 11, 2020
Supreme Court, Kings County
Docket Number: Index No. 514351/2015
Judge: Lorna J. McAllister
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(3) JW 8/12

At an IAS Term, Part 10, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of August, 2020.

PRESENT:

HON. LORNA J. MCALLISTER,
Justice.S.C.

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Edwin Coreano and Elizabeth Coreano,

Plaintiffs,

- against - Index No. 514351/2015

983 Tenants Corp.,

Defendant.

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The following e-filed papers read herein:	Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3

Upon the foregoing papers in this bifurcated slip-and-fall personal injury action, defendant 983 Tenants Corp. (983 Tenants) moves (in motion sequence [mot. seq.] ten), by order to show cause, for an order (1) staying the jury selection and damages trial pending the determination of the instant post-trial motion, as well as its interlocutory appeal of the liability judgment, pursuant to CPLR 2201, and (2) setting aside the liability verdict,

pursuant to CPLR 4404 (a), due to the court's February 13, 2020 rulings pertaining to the applicable Building Code and resultant jury charges.

Background

On February 3, 2020, a jury trial was commenced in Part 10 of this Court, in which the plaintiff Edwin Coreano (Coreano) was allegedly injured when he slipped and fell on a service entrance staircase at 983 Tenants' commercial property.

Prior to the conclusion of the trial, on February 13, 2020 a jury charge conference was conducted during which the parties argued their positions as to whether the 1925 Building Code or the 1968 Building Code should apply to this personal injury action. At the conclusion of the conference, this court ruled that: (1) the 1925 Building Code applied to the subject staircase; (2) the staircase was a "required exit" from the building; and (3) the staircase was an "exterior staircase" pursuant to the 1925 Building Code.

Thereafter, the jury rendered a verdict as to the issue of liability in which it was determined that 983 Tenants was 100% liable for Coreano's personal injuries. Due to the unavailability of two jurors, the jury panel was disbanded and jury selection for the damages trial was scheduled for February 20, 2020. On February 20, 2020, at the request of 983 Tenants', this court entered a judgment on the jury's liability verdict. On February 21, 2020, 983 Tenants noticed its interlocutory appeal from the liability judgment.

983 Tenants' Instant Motion
To Set Aside the Liability Verdict

On February 20, 2020, 983 Tenants moved, by order to show cause, to stay jury selection and the damages trial pending the determination of the instant post-trial motion to set aside the liability verdict, pursuant to CPLR 4404 (a), and pending its interlocutory appeal of the liability judgment. This court granted 983 Tenants a temporary restraining order (TRO) staying all proceedings, including the February 20, 2020 jury selection date and damages trial, pending the hearing and determination of 983 Tenants' instant motion to set aside the liability verdict.

983 Tenants, in support of its motion to set aside the liability verdict, argues that the court misapplied the law to the facts of this case and improperly charged the jury regarding the missing handrail and the obstructed handrail. Importantly, 983 Tenants concedes that "[i]t is impossible to determine whether the jury's finding of negligence against [it] was a result of these improper jury charges . . . or whether the negligence finding was based on the alleged slippery and sandy condition of the service entrance stairway at issue." Nevertheless, without addressing the evidence at trial of common law negligence, 983 Tenants contends that if the court's decisions regarding the applicability of the 1925 Building Code and the classification of the service entrance staircase as an "exterior stairway" were improper, the jury verdict is invalid.

983 Tenants contends that the court improperly applied and interpreted the 1925 Building Code to the facts of this case because Coreano did not satisfy his burden of proving which Building Code applies. At the jury charge conference, counsel for Coreano argued that the 1925 Building Code was applicable since the building was constructed in 1927. 983 Tenants argues that Coreano "did not meet [his] burden of proof because [he]

did not establish *when the stairway* at issue was built" (emphasis added). 983 Tenants notes that its engineering expert, Jeffrey Schwalje, P.E. (Schwalje), gave expert testimony in which he opined that the service entrance stairway was not built in 1927, but that "the service entrance stairway was approximately 50 years old and was built around 1970, such that the 1968 Building Code was the applicable Building Code." However, Schwalje, on cross-examination, testified that the materials that comprise the service entrance stairway existed in 1927, and Coreano contended that this was sufficient to rebut Schwalje's expert opinion regarding when the stairway was built. Coreano argued that it would be unduly burdensome if he were required to establish the construction of every component of the building. 983 Tenants now argues that the court "misapplied the law in holding that plaintiff submitted sufficient proof as to when the stairs were constructed by virtue of the cross-examination of [its] expert witness, Mr. Schwalje."

983 Tenants further argues that the court improperly interpreted case law in reaching its determination that the service entrance stairway is an "exterior stairway" when it concluded that the First Department's holding in *Gaston v The New York City Housing Authority*, (258 AD2d 220 [1999]), was not applicable here. 983 Tenants asserts that the court wrongly determined that the facts in *Gaston* were distinguishable, when "the *Gaston* case was merely the first in a long line of cases distinguishing 'exterior stairways' subject to the applicable building code provisions from stairways that simply happen to be located outside a building." 983 Tenants asserts that *Gaston* and its progeny "stand for the proposition that simply because a stairway is located outside a building, it is not automatically an exterior stairway." 983 Tenants argues that "the service staircase is not

an exterior staircase because it does not provide a means of egress into the building" and, therefore, "is not governed by any applicable Building Code[,]" which requires two unobstructed handrails.

983 Tenants also argues that "the service entrance stairway cannot be a 'required exit' pursuant to the 1968 Building Code" because "the metal gate doors to the service entrance stairway are locked each day between the hours of 5:00 p.m. and 8:30 a.m., thereby preventing access to and from the building." 983 Tenants argues that "[i]t is evident from the 1968 Building Code that a 'required exit' is one that is accessible at all times as a means of egress from the building and not obstructed 15.5 hours per day Monday-Friday and closed during the weekends." 983 Tenants also noted that "the primary purpose of the service entrance stairway at issue is for deliveries during business hours." 983 Tenants contends that the stairway "must therefore be classified as an access stairway, which does not require any handrails under the 1968 Building Code."

Coreano's Opposition

Coreano, in opposition, asserts that the trial court correctly determined that "because the building was built in 1927, it was subject to the 1925 Building Code and that under the 1925 Building Code, exterior stairways are required to have two handrails." Coreano also argues that the court correctly determined that "the subject stairway was an exterior stairway as opposed to an access stairway . . ." "because it was not a stair[way] between two floors." Coreano contends that Schwalje's expert testimony regarding the date that the staircase was constructed was speculative.

Coreano further contends that "[i]ndependent of the Building Code violation, the verdict should not be set aside because the evidence supports the jury verdict under principles of common law negligence." Coreano argues that the trial evidence proved that "[t]he stairs were not in a reasonably safe condition because the lone existing handrail was inaccessible [because it was blocked by 983 Tenants' gate] and the steps were slippery with sand." Coreano notes that 983 Tenants' own expert, Schwalje, testified that a person descending the stairway would not have access to the handrail until reaching the third step. Coreano testified at trial that he descended down the stairs at the service entrance on the left side (because the right side was covered with snow) and slipped on the third step because it was slippery, wet and covered with sand. Coreano further testified that he tried to prevent his fall by reaching for the handrail, but that there was no handrail on the left side of the staircase. Coreano argues that "[i]n permitting these conditions to exist, defendant was negligent and created a dangerous condition on the stairs that proximately caused [his] accident." Coreano notes that 983 Tenants "ignores the fact that the jury considered [its] violation of the common law in reaching its verdict."

Discussion

CPLR 4404 (a) provides, in relevant part, that:

> "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . ."

"A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" (*Allen v Uh*, 82 AD3d 1025, 1025 [2011]). "In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and 'must look to his [or her] own common sense, experience and sense of fairness . . .'" (*Heubish v Baez*, 178 AD3d 779, 780 [2019] [quoting *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 (1976)]).

In a recent decision, the Appellate Division, Second Department held that "[a] jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence" (*Sarnelli v City of New York*, 181 AD3d 623, 625 [2020]).

Here, regardless of the applicable Building Code, the jury found 983 Tenants 100% liable for common law negligence based on testimonial evidence that Coreano slipped and fell as a result of a dangerous and slippery condition on the subject staircase. The evidence revealed that 983 Tenants applied calcium and sand to the steps on the staircase three times in the morning before Coreano's accident, which created a slippery condition on the staircase. In addition, 983 Tenants' own expert confirmed that there was no accessible handrail on both sides of the staircase where Coreano slipped and fell. A fair interpretation of the trial evidence supported the jury's conclusion that 983 Tenants, the building owner, was negligent in its maintenance of the subject staircase. Accordingly, it is

ORDERED that the branch of 983 Tenants' motion (in mot. seq. ten) seeking to set aside the jury verdict regarding liability is denied; and it is further

ORDERED that the branch of 983 Tenants' motion (in mot. seq. ten) which seeks a stay of the jury selection and damages trial pending the determination of the interlocutory appeal of the liability judgment is granted. The Court has exercised its discretion within which to grant a stay [see CPLR 5519 (c)] as well as the fact that the defendant has perfected its appeal.[1]

This constitutes the decision and order of the court.

Dated: August 11, 2020

ENTER

HON. Lorna J. McAllister
A.J.S.C.

Hon. Lorna McAllister

[1] Counsel for the plaintiff in a subsequent affirmation dated August 7, 2020 acknowledges that the defendant perfected its appeal.