

Stevens v Archstone E. 33rd St., LP

2021 NY Slip Op 30482(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 162398/14

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

JENNIFER STEVENS

INDEX NO. 162398/14

- v -

MOT. DATE

ARCHSTONE EAST 33RD STREET, LP

MOT. SEQ. NO. 007

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This is a personal injury action. Defendant Archstone (Archstone) now moves for summary judgment dismissing plaintiff's complaint. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

In or about March 2009, plaintiff moved into apartment 12A located at 377 East 33rd Street, New York, New York. The building is owned and managed by defendant Archstone East 33rd Street, LP (Archstone). At her deposition, plaintiff testified that at some time in December 2011, she made an oral complaint to the front desk regarding the water temperature in her apartment. Specifically, she claimed that when she showered, she would feel "dirty" and that her "water does not taste right". She further testified that the doorman later told her that someone from the building went to her apartment and that "...all is fine now. Something along the lines of that". Plaintiff claims that she experienced joint pain throughout her entire body in early to mid-January 2012 and then in mid-February 2012 she began breaking out with lesions on her back which she believed were caused by the water at the premises. Later that month, she claims that she made another complaint concerning her inability to regulate the temperature of the water and that she felt that the water was dirty. In early March, plaintiff testified that she had further problems with water in her apartment, regarding the temperature and pressure, claiming that the water felt and looked dirty. Plaintiff alleges that the conditions in the apartment were dangerous and unfit for her to continue to reside there.

Jennifer Libby testified on behalf of Archstone. Ms. Libby testified that plaintiff's tenant file contained no references to the December complaint and that the first complaint made by plaintiff regarding hot water and water pressure was noted in the tenant file in January 2012. In response to that complaint, a "new shower body, faucet, etc." was installed by a handyman at the premises. The notations in plaintiff's tenant file reveal that at the end of February plaintiff made another complaint regarding water pressure as well as a leaky faucet, which were repaired by the defendant.

Dated: 2/18/21



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFERENCE

Ms. Libby testified that either plaintiff or her father made complaints thereafter about particulates in the water at the subject apartment and that she advised them that plaintiff needed to run her water and flush out her pipes because a repair had been made. She further testified that based on the notations she made in plaintiff's tenant file on March 12, 2012, plaintiff's father, Alan Stevens, made complaints to her for the first time and in response, both the maintenance staff and the regional maintenance staff for Archstone performed an inspection and found nothing wrong. Ms. Libby also testified that defendant gave plaintiff the opportunity to relocate to other available apartments including a one bedroom, but that plaintiff declined those options. During this time, Archstone allowed plaintiff to shower in empty apartments in the building from March 12, 2012 until she vacated the building on April 16, 2012.

Non-party witness Scott Hochhauser, principle of Isseks Bros., Inc, testified at his examination before trial that he is licensed to maintain and perform work on water tanks in the City of New York and that his company performed a water test on the subject premises during its annual cleaning in June 2011 and that there were no issues. He further testified that while particulates do sometimes get into the water due to water shutdowns or work on the pipes, to remedy those conditions one would run the water for several minutes.

Archstone now moves for summary judgment, arguing that: [1] plaintiff's allegation that a dangerous or defective condition in the water caused plaintiff's injuries is based on speculation and conjecture; [2] that defendant had no notice of any dangerous or defective condition; and [3] defendant did not violate statutes of the New York City Administrative Code. Plaintiff opposes the motion and contends that triable issues of fact preclude summary judgment.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

A landowner has a duty to maintain its premises in a reasonably safe condition. (*Basso v. Miller*, 40 NY2d 233, 386 N.Y.S.2d 564 (1964)). It is well settled that absent evidence that an owner or possessor of a premises created a dangerous condition, or that said owner had prior notice of a defective condition, actual or constructive, said owner cannot be held liable for an accident resulting from said dangerous condition. (*Acevedo v. York Intern. Corp.*), 31 AD3d 255. 81 8 NYS.2d 83 [1st Dept. 2006]); *Thomas v. Our Lady of Mercy Med. Ctr.*, 289 AD2d 37, 734 NYS2d 33 (1st Dept. 2001). Constructive notice will be imputed only if the defect is visible and apparent and has existed for a sufficient period of time to allow for discovery and correction. (*Gordon v. American Museum of Natural History*, 67 NY2d 8356, 501 NYS2d 646 [1986]).

On this record, Archstone has demonstrated its entitlement to summary judgment. In turn, plaintiff has failed to raise a triable issue of fact. Indeed, plaintiff cannot even establish through sufficient credible evidence that a defective condition existed. Further, no reasonable factfinder could conclude on this record that Archstone had notice of the alleged water issues at the premises or that it caused or created same. Specifically, defendant has established that in response to plaintiff's complaints regarding the hot water, water pressure and that the "water doesn't look clean", it installed a "new shower body, faucet, etc." and then in mid-February when plaintiff made complaints, that she was unable, defendant again took remedial measures and repaired the water pressure and leaky faucet issue. Here, defendant took remedial measures to address plaintiff's complaints. Moreover, defendant did not receive any other complaints from any other tenant in the approximately 200 unit building regarding the water at the premises other than those made by plaintiff. Plaintiff's self-serving statements that a dangerous condition existed in her apartment absent credible evidence to support that conclusion is insufficient to create a triable issue of fact.

Plaintiff's argument that the document titled "New York City Department of Health and Mental Hygiene Inspection Report – Notice of Violation" is sufficient notice to defendant is rejected. Uncertified records from a New York City agency constitutes inadmissible hearsay which cannot be considered on a motion for summary judgment. (*See, Atlantic Finance, LLC v. Xinlei Lin*, 158 AD2d 598, 87 NYS2d 848 [AD 2d 2018].) First, the information contained in the uncertified, two-page document was from apartment 11A and not plaintiff's apartment 12A. And second, plaintiff mischaracterizes the document, which is not in admissible form, as a "Notice of Violation" when a review of the document is plaintiff's version of the complaint to the NYC representative. Further, the affidavit of Michael Corr, of Golden Eye Claims, Inc., states that in 2016 he personally submitted a FOIL request (#2016FR01414) to the New York City Department of Health and Mental Hygiene and in response Christopher D'Andrea of the NYC Department of Health and Mental Hygiene advised The Office of Environmental Investigations has NO record of an investigation at the above address" referring to 377 East 33rd Street.

Next, plaintiff argues that that "the affirmation of plaintiff's expert is sufficient to raise a triable issue of fact as to whether Defendant should have noticed a potential defect within the plumbing pipes supplying water to Plaintiff's unit when Plaintiff placed the Defendant on notice by stating the water appeared dirty and had a funny "taste" to it, when the building personnel saw the particulates, when the management moved her from one apartment to another and other issues addressed by the Expert", "that the affirmation of Vincent Garone...raise triable issues of fact as to Defendant's negligence in failure to inspect the Plumbing system used to supply water to Plaintiff's unit, failures of maintenance allowing the conditions to become and remain within the property as a whole and certain property management issues that were handled in a negligent manner". Plaintiff argues that it "provided Defendant with Notice as to potential problems in the Water" and "that there was an off coloring to the water and that it had a strange taste to it". Plaintiff's expert opines that "it may have been an underlying problem, in the piping that would have only been noticed in an inspection done by Defendant – which inspection of the plumbing system was never performed". Finally, plaintiff argues that the Notice of Violation issued to defendant by the NYC Department of Health states that "there was some particulate left over by the running water and that it was indeed brown in color" and that plaintiff obtained an independent water test that found metal contaminates and debris. The court disagrees.

An expert is qualified to proffer an opinion if he or she is "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable". (*Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]; *see O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 834 NYS2d 231 [2007]; *Miele v American Tobacco Co.*, 2 AD3d 799, 802, 770 NYS2d 386 [2003])

Here, there has been no showing that Mr. Garone possesses the requisite experience, training or education to offer his opinion regarding plumbing, water quality and potable issues or the management of apartment building. Garone claims to be a New York City licensed Construction Specialist, is a carpenter, and possesses experience in construction as well as various OSHA and fire safety certifications,

but lacks the qualifications, training or expertise to offer his opinion on the issues in this matter. Moreover, Mr. Garone's affidavit is based on speculation and unsubstantiated conclusions that are not supported by the record. It is of no moment that he reviewed "over 1000 pages of documents". The evidence that Mr. Garone relied on to reach his opinions such as the "Notice of Violation", not only is in inadmissible form, but doesn't exist in the City of New York records and the photographs he relies on were never made part of this record. Throughout his affidavit, he cites to no credible evidence in this record to support his conclusions and did not perform any water quality inspections, plumbing inspections or examinations of the premises or subject apartment. Garone's conclusion that "the copper particulates and other particulate descended from the upper portions of the plumbing in the premises and entered the potable water system and came into contact with the Plaintiff" is incredible and as the reliability of the alleged sample tests is lacking. Finally, Mr. Garone's bald conclusions that Archstone failed to follow standards for management of the building and industry protocols and/or procedures lacks any factual basis or specific violation of industry standard. In light of the foregoing, the expert's affidavit is insufficient to create a triable issue of fact.

The court rejects the uncertified 8 pages of records from Eco Test Laboratories, Inc. annexed to plaintiff's papers. There must be certainty that the evidence/water sample is truly what it is purported to be and where that's not the case, the integrity of the legal result reached is in question. (*Amaro v. City of New York*, 40 NY2d 30, 386 NYS2d 19 [1976]). Moreover, regular and proper procedures must be followed, and the proponent of the evidence must be prepared to show what happened to each specimen from the moment it was collected until the time it was proffered. (*Lugo v. Gaines*, 83 A.D.2d 542, 441 N.Y.S.2d 466 [First Dept, 1981]). Here, plaintiff has woefully failed provide certainty to ensure the reliability surrounding the water samples allegedly taken by plaintiff's father, Alan Stevens. It is unknown what procedure, if any was followed, the test conditions or chain of custody of the samples to ensure the integrity of the samples.

Plaintiff's claims for breach of the warranty of habitability and breached the covenant of quiet enjoyment are dismissed. Neither cause of action creates an alternative remedy to recover damages for personal injuries in a negligence action. (See, *Stone v. Gordon*, 211 AD2d 881, 621 NYS2d 220 [AD 3rd 1995]). Moreover, as this court found, no dangerous or defective condition existed at the premises, which deprived plaintiff of the quiet use and enjoyment of her apartment. Even if a breach occurred, plaintiff's measure of damages is rent overpayment upon plaintiff vacating the premises, which claim is rejected because plaintiff's rent was paid by a third party and not plaintiff.

Finally, defendant argues that it did not violate City of New York Administrative Code Sections 141.03 Drinking Water Supply Sources, 141.07 Building Drinking Water Storage Tanks, 141.09 Building Water Tank Cleaning, Painting and Coating, and that Section 141.11 does not apply to the instant case. The court agrees. The record is devoid of any evidence to establish that water was not available at the premises. Here, Jennifer Libby and Scott Hochhauser both testified at their respective depositions that the subject premises were connected to the New York City water supply and that there was compliance with annual inspections.

Based on the foregoing, Archstone's motion for summary judgment is granted and plaintiff's complaint is dismissed.

Accordingly, it is hereby **ORDERED** Archstone's motion for summary judgment is granted and plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 2/18/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.