SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CARLOS RONDA et al.

INDEX NO. 155293/2018

MOT. DATE

- v -

MOT. SEQ. NO. 005

THE CITY OF NEW YORK et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is a personal injury action, wherein decedent Carlos Ronda allegedly was burned when he came into contact with a heating pipe in his apartment owned and operated by defendant New York City Housing Authority ("NYCHA"). NYCHA now moves for summary judgment. Plaintiff opposes the motion. Issue has been joined and note of issue was filed on December 18, 2020. This motion was brought more than 120 days after the note of issue was filed, specifically it was filed on June 21, 2021.

Previously, NYCHA made a motion to extend its time to move for summary judgment (motion sequence 4). Although plaintiff opposed that motion, the court preliminarily granted NYCHA leave to file a late motion for summary judgment, with the determination of whether good cause has been shown for the exact delay in so moving held in abeyance pending a proper showing.

NYCHA now explains that it was adversely affected by closures due to the Covid-19 pandemic which led to decreased staffing levels and an inability to review NYCHA's paper records. The court deems NYCHA's excuses reasonable and thus, the court finds that NYCHA has demonstrated good cause for bringing this motion approximately 60 days late. Therefore, summary judgment relief is available. For the reasons that follow, the motion is denied.

Many of the relevant facts are not in dispute. Plaintiff's decedents Carlos and Carmen Ronda lived in the subject apartment, Apartment 12B at 70 Amsterdam Avenue, New York, New York, since 1968. Since this action was commenced, the Rondas passed away. Plaintiff Yolanda Ronda has been issued Letters of Administration and now prosecutes this action as the Administratix of the Rondas' Estates.

Plaintiff claims that on November 17, 2017, Carlos Ronda allegedly fell inside his bedroom and was burned when he came into contact with a heating pipe connected to the radiator which provided

Dated: 1/19/22

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

heat to the apartment. The heating pipe was very hot; at least 218 degrees Farrenheit and up to 235 degrees Farrenheit. According to the bill of particulars, Carlos Ronda suffered second, third and fourth degree burns on his scalp, neck, chest, forearm, elbow, wrist and leg. Plaintiff has provided photos of both the piping and the burns Carlos Ronda sustained. Plaintiff asserts that the heating pipe that Carlos Ronda fell into inside his bedroom should have been covered or insulated.

Daisy Suarez, Carlos Ronda's caretaker, was present in the apartment when the accident occurred and came to Carlos Ronda's aid when he fell. Suarez testified at a deposition that, prior to the incident, both she and Carlos Ronda made complaints to NYCHA staff about the temperature of the piping. Specifically, Suarez testified:

> Q. The pipe that you pointed to in the photograph with Carlos' skin, were you aware if that pipe was ever hot the day before this accident?
> ...
>
> A. Yes, very hot.
>
> Q. Why do you say that?
>
> A. Because before I left either Thursday or Friday, I would go into the bedroom and clean up and I felt those tubes and the tubes in the bathroom were very, very hot.

Suarez claimed that she complained to the building porter about the temperature in the Apartment:

> Q. You said that you personally made a complaint about those pipes in their bedroom being hot?
>
> A. Yes.
>
> Q. That was approximately a week before the November 17 accident or November 5?
>
> A. It was in between those two dates.
>
> Q. Who did you make the complaint to?
>
> A. The porter.
>
> Q. Was this the same female porter that you mentioned earlier?
>
> A. Yes.
>
> Q. How did you make this complaint?
>
> A. She was in the hallway where you get the elevator and I told her the temperature is warm and the tubes are very, very hot...
>
> Q. Just to go back, the complaint you made to this porter, it was downstairs in the building?
>
> A. In one occasion it was downstairs and in another occasion I told her upstairs.

Suarez further testified: "I was cleaning the bathroom and I even burned myself on my forehead. So, when I saw her, I told her the pipes are very hot and I burned myself." Suarez claimed that she made the second complaint on November 14th, three days before the accident:

> Q. When you spoke to her at that time, did you tell her about the pipes in the Rondas' bedroom being hot again?
>
> A. Yes.
>
> Q. Was Carlos present when you were telling the porter this?
>
> A. Yes.

NYCHA contends that the 1968 Building Code does not apply since the building was constructed in 1948 and the grandfathering provisions of the 1968 Building Code at §27-115 and §27-116 do not apply. NYCHA has submitted an expert affidavit by Chester T. Vogel, P.E., who asserts therein that when the building was constructed, it was industry standard and in compliance with the then-existing Building Code to not insulate heating piping. Otherwise, Vogel states "it is my opinion held with a reasonable degree of engineering certainty, that NYCHA appropriately maintained the heating system in the subject apartment." Thus, NYCHA argues that it had no duty to plaintiff and cites a series of appellate cases in support of this proposition.

Plaintiff argues that NYCHA has not met its burden on this motion. Specifically, plaintiff contends since the piping was above 200°F, triable issues of fact exist as to whether NYCHA breached its common law duty with regard to the operation of its heating system. Plaintiff has submitted her own expert affidavit by R. Craig Williams, PE, CFEI, CFII, stating that "regardless of Mr. Vogel's conclusion that the heating system conformed to 1938 standards, it remains my opinion to a reasonable degree of engineering certainly that the boiler system at the premises was not operated as designed and intended for the weather and as a result the surface temperature of the exposed piping in Apartment 12B was an unreasonable hazard that caused severe burns."

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]). 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]).

The sole question of law here is whether NYCHA can be held liable for exposed heating pipes when the applicable building code at the time the building was constructed did not require those pipes to be covered. The answer is yes, when NYCHA has notice of a dangerous condition and a reasonable opportunity to remedy same. Here, although there is no dispute that the 1968 Building Code does not apply and the building was properly constructed according to then-existing standards, plaintiff has at least raised a triable issue of fact as to notice of the hot heating pipes in the apartment so as to survive summary judgment. That is, assuming *arguendo* that NYCHA even met its burden on this point, NYCHA has a common law duty to maintain the apartment in a reasonably safe condition (*see i.e. Rivera v Nelson Realty, LLC*, 7 NY3d 530, 535 [2006] ["Even in the absence of statute, a common-law duty to repair defective conditions within the home may and often does arise from the contractual relationship be-

tween landlord and tenant."]; *compare Trader v New York City Hous. Auth.*, 117 AD3d 1032 [2d Dept 2014] ["Moreover, the plaintiffs failed to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the alleged dangerous condition, violating its common-law duty to maintain a safe premises"]). Since plaintiff's caretaker clearly testified that she reported to the porter that the heat pipes in the apartment were very hot days and weeks prior to Carlos Ronda's accident, plaintiff has raised a triable issue of fact as to whether NYCHA had sufficient notice of a dangerous condition in the apartment.

NYCHA's arguments in support of the motion and on reply miss the point. NYCHA has a duty to maintain the apartment in a reasonably safe condition. While it does not have a duty to provide insulation or covers for heating pipes based upon clearly established precedent, if the heating pipes in the subject apartment were in an unreasonably safe condition, then NYCHA breached its duty to maintain the premises in a reasonably safe condition so long as it had notice of the dangerous condition. Thus, it remains for a jury to determine whether the heating pipes in the subject apartment which were between 218 and 235 degrees Fahrenheit constitute a dangerous condition and whether NYCHA had notice of same.

Accordingly, NYCHA's motion for summary judgment is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that NYCHA's motion for summary judgment is denied.

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: 1/19/22
New York, New York

So Ordered:

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