

Viamontie v Rutledge Hotel, LLC
2022 NY Slip Op 35080(U)
May 19, 2022
Supreme Court, Bronx County
Docket Number: Index No. 25509/2015E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK : Part IA-12

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RACHEL VIAMONTIE and PETER VIAMONTIE,
Plaintiffs,

-against-

RUTLEDGE HOTEL, LLC a/k/a RUTLEDGE
PROPERTIES CORP. C/O APPLE CORE HOTELS
INC., RAMADA NEW YORK/EAST SIDE and G2
MANAGEMENT, LLC,

Defendants.

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Kim Adair Wilson, J.:

DECISION AND ORDER

Index No. 25509/2015E

Motion Seq. #004

HON. KIM ADAIR WILSON

J.S.C.

“NOTICE OF MOTION FOR SUMMARY JUDGMENT,” dated June 17, 2020 and filed June 18, 2020, by Anthony Orcel, Esq. (Cartafalsa, Turpin & Lenoff), counsel for defendants Rutledge Hotel, LLC a/k/a Rutledge Properties Corp. c/o Apple Core Hotels Inc., Ramada Inn East Side i/s/a Ramada New York/East Side and G2 Management, LLC (“Rutledge, Ramada and G2 Management”), seeks an “order: (i) granting summary judgment in favor of defendants pursuant to CPLR R. 3212 dismissing plaintiffs’ complaint together with (ii) such other and further relief as this court may deem just and proper.” By way of opposition, Beth S. Gereg, Esq. (of counsel, Lesch & Lesch, P.C.), on behalf of plaintiffs Rachel Viamontie and Peter Viamontie (“Viamontie plaintiffs”), submits an **“AFFIRMATION IN OPPOSITION,”** dated and filed September 3, 2020, respectively. In reply, defendants’ counsel submits a **“REPLY AFFIRMATION IN FURTHER SUPPORT,”** dated and filed October 9, 2020, respectively. The defendants’ motion is decided as set forth below.

By Summons and Verified Complaint (October 5, 2015), the plaintiffs commenced the underlying action against the defendants seeking to recover monetary damages alleging that the defendants’ negligence caused them to sustain serious injuries. The Viamontie plaintiffs claim that, on or about December 11, 2014, they were lawful occupants of Room 411 at the Ramada New York/East Side, located at 161 Lexington Avenue in New York County (“subject premises”), when they were “caused to sustain serious and permanent injuries as a result of the bed bug infestation and of being bitten by said vermin” (Verified Complaint ¶ 28). The subject premises is owned, operated and managed by the defendants.

Defendants Rutledge, Ramada and G2 Management move for CPLR 3212 summary judgment on the basis that plaintiffs observed no bed bug infestation, made no complaints; their room was cleaned and inspected regularly; the bed sheets were routinely changed and washed; and there was no evidence of any bed bug activity anywhere in the hotel at the time of plaintiffs' visit. Summary judgment is a drastic remedy which a court should employ only when there is no doubt as to the absence of triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Gibson v American Export Isbrandtsen Lines, Inc.*, 125 AD2d 65 [1st Dept 1987]).

In support of their motion, defendants Rutledge, Ramada and G2 Management proffer the pleadings, the January 16, 2020 deposition transcripts of plaintiffs Rachel and Peter Viamontie, and the January 23, 2020 deposition transcript of Mohinder Singh, the general manager of the subject premises. In opposition to the defendants' motion, the Viamontie plaintiffs, by way of their counsel's affirmation (September 3, 2020), contend, in general, that the defendants were negligent in the "ownership, maintenance and management of the premises; failing to exterminate bed bugs; allowing a nuisance to exist; failing to observe the condition; failing to have an action plan in place for bed bugs; failing to take the necessary steps to eradicate bed bugs; and concerns with the bed bug extermination procedures employed." In support of their position, the plaintiffs, like the defendants, also rely on the deposition testimony of plaintiff Rachel Viamontie and Mohinder Singh. The plaintiffs also proffer the expert affidavit and curriculum vitae of their licensed exterminator, Jeffrey Eisenberg; and black and white copies of photographs of the alleged bug(s), but they are indecipherable.

Plaintiff Rachel Viamontie testified that she and her brother, plaintiff Peter Viamontie, checked into the Ramada Hotel on December 11, 2014 and checked out on December 12, 2014. They booked a room with one bed. When they entered the room, they took of their stuff, looked around and observed nothing to cause them concern. They slept in the same bed and stayed the night. When she awakened the next morning, Ms. Viamontie stated that she was itching. She swatted a little black insect onto the white bed sheet. Her brother was still sleeping. She did not wake him to inform him of the bug. Later, two men, who were sent by the hotel staff to check the room, came to the room. When they lifted the mattress, Ms. Viamontie observed a family of bed bugs under the mattress on her brother's side of the bed. She stated that the men confirmed that they were bed bugs. The plaintiffs point out that Ms. Viamontie also stated that her brother had a cluster of bites on his forehead. Peter Viamontie testified that his sister showed him a bug that she picked up on the bed that was biting her.

Mohinder Singh, the hotel's general manager, testified during his deposition that he was the overseer of the building's operations. He recalled a guest complaining that they were bitten by an insect. The exterminator was called right away, and they locked the room door. On the following day, the exterminator investigated the claim and reported no bed bug activity. The exterminator's report is referenced as Exhibit G but Exhibit G does not exist and no report is provided. Mr. Singh further stated that, to his knowledge, the hotel had no history of bed bug infestations and there were no complaints about bed bugs. He stated that the hotel was inspected twice a month; the hotel staff was trained to check all sheets while cleaning the beds; and all linen was washed daily. In contrast, the plaintiffs assert that the defendants proffer no evidence to establish when the room they occupied, room 411, was last inspected. The plaintiffs further assert that the exterminator may have serviced the property twice a month, but Mr. Singh testified that he only checked five of the hotel's one hundred fifteen rooms; and the staff may have checked the sheets but there is no indication that the mattresses were checked.

Jeffrey Eisenberg, the plaintiffs' licensed exterminator, attests by affidavit (September 3, 2020) that he has over 30 years of experience in the industry with an expertise in, *inter alia*, bed bugs. He reviewed the deposition transcripts, the pleadings and the defendants' motion. Mr. Eisenberg opined that the defendants, in detecting bed bugs, did not follow good and accepted practices under the industry standards. Specifically, inspecting five out of one hundred fifteen rooms twice a month is an insufficient means to detect bed bugs in a hotel. Instead, the proper way is to use a trained dog who can smell their presence. Bed bugs, according to Mr. Eisenberg, spend 99.9% of their time in deep crevices and cracks, in mattresses, drawers, closets, behind switch plate covers and base moldings; and they appear every seven to fourteen days to feed. Accordingly, since a multi-unit building has thousands of cracks and crevices, the proper practice is to have a plan for the entire building, not just a cluster of rooms because their travel pattern is unrecognizable, and they are able to skip floors. Mr. Eisenberg references the submitted photographs of the alleged bed bugs, but they are indecipherable. Based on his review of the documents and expertise, Mr. Eisenberg concluded, "with a reasonable degree of certainty in the extermination industry, that not only were Defendants violative of generally accepted practices and procedures in the industry, but the omissions and failure directly resulted in the presence of the bed bugs which Plaintiffs testified resulted in their injuries." By way of reply, defendants' counsel contends that Mr. Eisenberg's findings fail to raise a triable issue of fact. Counsel asserts that Mr. Eisenberg did not inspect or examine the hotel room and relies upon "poor quality photographs." Counsel further contends that the defendants could not have departed from industry standards and practices because in 2009, in another case relating to bed bugs (*Assoc*

v CW, 24 Misc.3d 1225(A), 897 NYS2d 668), Mr. Eisenberg, who served as an expert in that case, testified that there were “no hard and fast guidelines” as to remedial measures for bed bugs.

A landowner has a non-delegable duty to maintain his or her property in a reasonably safe condition under the existing circumstances (*O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996]; *Mejia v New York City Transit Authority*, 291 AD2d 225 [1st Dept 2002]). In order to recover damages for an alleged breach of this duty, the plaintiff must demonstrate that the landlord created, or had actual or constructive notice, of the condition which precipitated the injury. In order to constitute constructive notice, a defect must be visible and exist for a sufficient length of time prior to the accident to permit the owner, or its employees, to discover and remedy it (*Zuk v Great Atlantic & Pacific Tea Co., Inc.*, 21 AD 3d 275 [1st Dept 2005]). The defendants, as movants for summary judgment, bear the initial burden to establish lack of notice as a matter of law (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

Defendants Rutledge, Ramada and G2 Management, as the owners and managers of the subject hotel, owed the plaintiffs a duty to provide them with reasonably safe hotel accommodations. They bear the burden to establish lack of notice, but they fail to do so. Mr. Singh testified that the exterminator investigated the plaintiffs' claim and reported no bed bug activity. Significantly, the referenced exterminator's report is missing. Mr. Singh testified that the exterminator inspected the hotel twice a month for bed bugs by checking five of the one hundred fifteen hotel rooms. Notably, there is no indication that room 411, which was occupied by plaintiffs, was one of the five rooms. Mr. Eisenberg, plaintiff's bedbug expert, stated in his affidavit that this practice deviates from the industry's standards and practices. Defendants' counsel challenges Mr. Eisenberg's opinion, to the extent that, in 2009, he had a different opinion, stating that there were “no hard and fast guidelines” to remedy bed bugs. The defendants do not, however, proffer an expert affidavit to refute Mr. Eisenberg's opinion and establish that the industry standards and practices that were in place in 2009, were in place in 2014, when the plaintiffs' incident occurred. Accordingly, the defendants fail to establish that the hotel's practices were sufficient and did not deviate from industry standards and practices. Mr. Singh also testified that the hotel staff was trained to check sheets while cleaning the beds, and that the linen was washed daily, but there is no indication that mattresses were inspected.

When deciding a motion for summary judgment, the Court's function is issue finding rather than issue determination (*Sanchez v National Railroad Passenger Corp.*, 92 AD3d 600 [1st Dept 2012]). In other words, where there is no real dispute as to the facts or the proper inferences to be drawn from such facts, the issue of probable cause is a question of law to be decided by the court (*Brown v Sears Roebuck and Co.*, 297 AD2d 205 [1st Dept 2002] citing *Parkins v Cornell Univ., Inc.*, 78 NYS2d 277 [1991]). If conflicting inferences can be drawn, it is a question of fact for the jury. Here, the parties present questions of fact for the jury relative to, *inter alia*, whether the defendants had constructive notice of the bed bugs, whether they were negligent, and whether their practice to inspect for and remedy bed bugs, namely, inspecting five out of one hundred fifteen rooms bi-monthly is a deviation from industry standards and practices.

In light of the above, upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that the parties' proffered evidence create triable questions of fact which preclude summary judgment.

Accordingly, the defendants' motion for summary judgment is **DENIED** as stated herein.

The movants are directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the court.

This constitutes the Decision and Order of this Court.

Dated: May 19, 2022
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.