

Bookin-Ismagilova v 1685-1693 E. 21st St. LLC

2023 NY Slip Op 34790(U)

February 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 514828/2019

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 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 9th day of February 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
DILYAFRUZ BOOKIN-ISMAGILOVA,

Index No. 514828/2019

Plaintiffs,

-against-

DECISION AND ORDER

1685-1693 EAST 21ST STREET LLC AND YU LAN WU,

Motion Sequence #4

Defendants.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

| | |
|---|--------|
| Notice of Motion/Cross Motion and | |
| Affidavits (Affirmations) Annexed | 40-57, |
| Opposing Affidavits (Affirmations)..... | 59-61, |
| Reply Affirmation or Affidavit | 62 |

After a review of the papers and oral argument, the Court finds as follows:

This is an action for alleged personal injuries in relation to an occurrence on October 20, 2018. The Plaintiff, Dilyafruz Bookin-Ismagilova (hereinafter the "Plaintiff"), alleges that she was injured after the bathroom ceiling of the apartment she was residing in collapsed. The apartment is located at 1689 East 21st Street, (Unit 5C), Brooklyn, New York (hereinafter referred to as the "Building"). The Plaintiff was a tenant who had purportedly leased the condominium unit (the "Unit") from Defendant Yu Lan Wu (hereinafter the "Defendant Wu"), who, with her sister, non-party Yuyu Wu, owned the Unit.¹

¹ As part of a Decision and Order dated October 1, 2020, the complaint was dismissed as against Defendant 1685-1693 East 21st Street, LLC.

Defendant Wu now moves (motion sequence #4) for an order, pursuant to CPLR 3212, granting her summary judgment, and dismissing all claims and cross-claims against her. Defendant Wu contends that she had no duty to the Plaintiff in relation to the incident, and as a result summary judgment should be granted in her favor. Defendant Wu contends that the alleged defective condition was located in a common area of the Building, not within the Unit. Defendant Wu argues that she had no ownership or control of the area where the condition existed.

The Plaintiff opposes the motion. The Plaintiff contends that Defendant Wu has failed to show that the alleged defective condition was not in the Unit and as such, Defendant Wu has failed to meet her *prima facie* burden. The Plaintiff argues that the condition was within the Unit, Defendant Wu was aware of the condition, a leak in the ceiling, for a significant period of time, and she failed to responsibly address the issue.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”

Garnham & Han Real Estate Brokers v Oppenheimer, 148 AD2d 493 [2d Dept 1989]. Failure on the part of the movant to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

When asked during what period of time she lived at the Premises, the Plaintiff stated, “2016 and 17.” (See Defendant Wu’s Motion, Exhibit “E”, Page 18). When asked whether the ceiling had fallen on her, the Plaintiff stated, “[y]es, the ceiling fell.” (See Defendant Wu’s Motion, Exhibit “E”, Page 42). When asked where in the apartment the ceiling fell, the Plaintiff stated, “[i]n the nursery.” (See Defendant Wu’s Motion, Exhibit “E”, Page 42). When asked to clarify, the Plaintiff stated, “[f]irst, there is the bedroom, then there is the junior room, and across from it there is a bathroom and a toilet, and there is a small living room with a balcony.” (See Defendant Wu’s Motion, Exhibit “E”, Page 43). When asked what she was doing when the ceiling collapsed, the Plaintiff stated, “I was sleeping.” (See Defendant Wu’s Motion, Exhibit “E”, Page 44). When asked what she believed caused the ceiling to collapse, the Plaintiff stated, “[i]t was raining heavily on that day, and that was the day when the ceiling collapsed in our living room and in the room where I was in bed.” (See Defendant Wu’s Motion, Exhibit “E”, Page 46). When asked if the ceiling had collapsed previously, the Plaintiff stated, “[i]t collapsed once before and they superficially fixed it, and it collapsed again on my son, and we did not claim anything and we did not report it to anyone, and the owner said that she would fix it.” (See Defendant Wu’s Motion, Exhibit “E”, Page 46). When asked when she first noticed a leak in the ceiling, the Plaintiff stated, “when I came back to sign the lease, then I saw the circle [in the ceiling] for the first time.” (See Defendant Wu’s Motion, Exhibit “E”, Page 48). When asked to describe the ceiling condition prior

to the collapse, the Plaintiff stated, “[f]irst of all, it got bigger and during the rain time, some white liquid started dripping from it and eventually it fell through, and also in the living room, the crack appeared.” (See Defendant Wu’s Motion, Exhibit “E”, Page 48). When asked if she had notified the owners of the ceiling condition when she first signed the lease, the Plaintiff stated, “I told both girls at the same time.” (See Defendant Wu’s Motion, Exhibit “E”, Page 51). When asked if she continued to complain about the condition thereafter, the Plaintiff stated that “[w]hen I paid the first rent, I asked her; why haven't you still done anything.” (See Defendant Wu’s Motion, Exhibit “E”, Page 63). When asked what kind of repairs were done after she complained, the Plaintiff stated, “[h]e scraped, applied some kind of a net, and then cement, and then he painted, and it stunk for another three days.” (See Defendant Wu’s Motion, Exhibit “E”, Page 67). When asked whether she complained again after the attempted repair, the Plaintiff stated, “I told her, here is the money for August and look, the ceiling is yellow again.” (See Defendant Wu’s Motion, Exhibit “E”, Page 70).

When asked when she and her sister purchased the Unit, Defendant Wu stated, “I believe it's in April 2018, but I'm not certain.” (See Defendant Wu’s Motion, Exhibit “F”, Page 13). When asked when she first became aware of problems with the ceiling, Defendant Wu stated, “August second.” (See Defendant Wu’s Motion, Exhibit “F”, Page 28). When asked who informed her of the problem, Defendant Wu stated, “[t]he tenant told me that.” (See Defendant Wu’s Motion, Exhibit “F”, Page 28). When asked if she had seen a leak, Defendant Wu stated, “I did not witness the leak personally, myself.” (See Defendant Wu’s Motion, Exhibit “F”, Page 30). When asked if she had ever repaired a ceiling condition, Defendant Wu stated, “[t]he management company, they did.” (See Defendant Wu’s Motion, Exhibit “F”, Page 30). When asked how she communicated the Plaintiff’s complaints about the ceiling leak to the management company, Defendant Wu

stated, “[t]ext message, telephone, and e-mail.” (See Defendant Wu’s Motion, Exhibit “F”, Page 32). When asked how many times the management company sent someone to repair the ceiling, Defendant Wu stated, “[a]t least three times.” (See Defendant Wu’s Motion, Exhibit “F”, Page 38).

Turning to the merits of the motion (motion sequence #4), Defendant Wu has failed to meet her *prima facie* burden that she had no duty to the Plaintiff regarding the purported ceiling condition in the Unit and its collapse. “As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property.” *Suero-Sosa v. Cardona*, 112 AD3d 706, 707, 977 NYS2d 61, 63 [2d Dept 2013]. What is more, “[i]t is clear that condominium common elements are solely under the control of the board of managers.” *Pekelnaya v. Allyn*, 25 AD3d 111, 120, 808 N.Y.S.2d 590, 597 [2d Dept 2005]. However, in the instant proceeding, Defendant Wu has failed to provide sufficient evidence to support the position that the ceiling leak and collapse was solely a product of a condition within the common elements and was solely outside of the Unit. Neither the testimony of the Plaintiff nor the testimony of Defendant Wu constituted evidence of what caused the leak and subsequent collapse, and whether the leak and subsequent collapse may have otherwise been a product of a defective condition within the Unit. The Court does not agree that, as argued by the Defendant, that “one can only conclude” that the condition was caused by “faulty draining or leaks within the outer walls of the building.” There was no evidence proffered in relation to the cause of the purported condition, or whether the Defendant was able to address the condition in order to prevent further hazard.

The cases cited by Defendant Wu in support of her motion do not relate to injuries that occurred within a condominium unit, but instead to situations where the defect was clearly

removed from the unit. See *Risucci v. Zeal Mgmt. Corp.*, 258 A.D.2d 512, 512, 685 N.Y.S.2d 280, 281 [2d Dept 1999] [tripped on protruding screw that was part of the pool cover system]; *White v. Great Atl. & Pac. Tea Co.*, 262 AD2d 636, 636, 692 N.Y.S.2d 678, 679 [2d Dept 1999] [plastic debris outside of store]; *Pekelnaya v. Allyn*, 25 AD3d 111, 113, 808 N.Y.S.2d 590, 592 [1st Dept 2005] [section of fencing fell off roof of building and struck pedestrian below]; *Rothstein v. 400 E. 54th St. Co.*, 51 A.D.3d 431, 432, 857 N.Y.S.2d 100, 101 [1st Dept 2008] [icy condition on outdoor stairs]; *Turrisi v. Ponderosa Inc.*, 179 AD2d 956, 957, 578 N.Y.S.2d 724, 726 [3rd Dept 1992] [parking lot outside of restaurant].

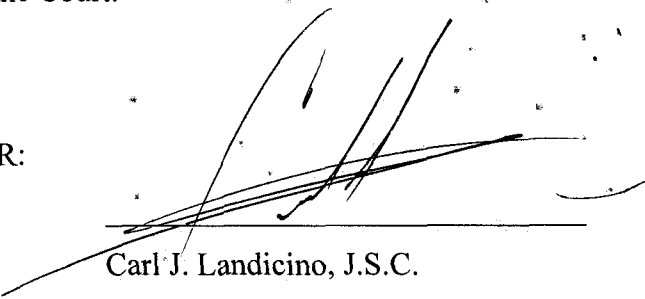
Since the Defendants failed to meet their *prima facie* burden, we need not consider the sufficiency of the Plaintiff's opposition papers. See *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 AD3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Wu's motion (motion sequence #4) for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

2023 FEB 24 AM 9:21
KINGS COUNTY CLERK
FILED