STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-11-545
TDW-CUM-5/23/2013

NORMAND J. COTE,

Plaintiff

v.

ORDER

M. BLAIS PROPERTIES LLC, et al,

Defendants

Before the court is a motion for summary judgment by defendants M. Blais Properties LLC, M. Blais Builders Corporation, Maurice Blais, and Jocelyne Blais.

Plaintiff Normand Cote was a tenant in an apartment building that is owned by defendants Maurice and Jocelyne Blais and managed by M. Blais Properties LLC (Blais Properties). The building was constructed by another Blais company, M. Blais Builders Corporation (Blais Builders). Cote alleges that he was seriously injured in October 2009 when he fell after a handrail in the stairway of the building pulled out of the wall.

Defendants have raised three arguments in moving for summary judgment. The first is that any negligence in the installation of the handrail that occurred during the construction of the building was the responsibility of an independent contractor. The second is that there is no evidence prior to the accident that would have put Maurice Blais, Jocelyne Blais, or Blais Properties on notice of any dangerous condition with respect to the handrail. The third is that there is insufficient evidence to avoid summary judgment on the issue of causation.

Summary Judgment

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In considering a motion for summary judgment, the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. E.g., Johnson v. McNeil, 2002 ME 99 ¶ 8, 800 A.2d 702. The facts must be considered in the light most favorable to the non-moving party. Id. Thus, for purposes of summary judgment, any factual disputes must be resolved against the movant. Nevertheless, when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for judgment as a matter of law, summary judgment should be granted. Rodrigue v. Rodrigue, 1997 ME 99 ¶ 8, 694 A.2d 924.

In this case, there is one procedural issue at the outset. In response to the statement of additional facts submitted by Cote as part of his response to defendants' motion, see M.R.Civ.P. 56(h)(2), defendants submitted a reply statement of material facts pursuant to Rule 56(h)(3). Defendants' reply statement contained a number of objections to the admissibility of evidence cited by Cote in his statement of additional material facts and to the factual support for assertions made by Cote in his statement of additional material facts.

As permitted by Rule 56(i)(2) counsel for Cote filed a response to defendants' objections. However, counsel for Cote simultaneously filed a seven page sur-reply memorandum responding to the arguments in defendants' reply memo.[1] Defendants

[1] The memorandum is entitled "Plaintiff Normand A. Cote's Response to Defendants' Summary Judgment Reply Pursuant to M.R.Civ.P. 56(i)(2)" and is dated March 31, 2012.

have objected to this latter submission, which is not permitted by Rule 56 and for which counsel did not seek leave of court.

The sur-reply memorandum shall be stricken from the record. Summary judgment practice is cumbersome enough without unauthorized submissions by counsel seeking to have the last word.

Liability of Blais Builders

The summary judgment record establishes that installation of the handrail was performed by an independent contractor when the building was constructed in 1993 or 1994. Defendant's Statement of Material Facts (SMF) dated February 5, 2013 ¶¶ 8, 10. Although Cote states that he "reserves the right" to prove that the installer was an employee,[2] Cote has not offered evidence generating a disputed issue for trial as to whether the installer was an employee or as to whether Blais Builders exercised control over the details of the installer's work. Moreover, Cote and his expert have elsewhere essentially conceded that the installer was an independent contractor. See Plaintiff's SMF dated February 26, 2013 (response to ¶ 59); Dodge Dep. 93.

The remaining question raised on the instant motion is whether Blais Builders can be held liable for alleged negligence on the part of an independent contractor. On this issue Blais Builders relies on the Law Court's adherence to the principle that employers are not generally liable for the negligence of independent contractors. E.g., Rainey v. Langen, 2010 ME 56 ¶ 14, 998 A.2d 342; Legassie v. Bangor Publishing Co., 1999 ME 180 ¶ 5, 741 A.2d 442. Cote relies on the list of exceptions to that principle that are set forth in the Restatement (Second) of Torts.

[2] See Plaintiff's Response to Defendants' Motion for Summary Judgment dated February 26, 2013 at 3.

Cote primarily relies on Restatement section 410 (negligent orders or directions given by employer), section 412 (failure to inspect repair or maintenance work), section 421 (liability for maintenance and repair work), section 422 (liability of possessors of land once they have resumed possession from contractor), and section 424 (statutes or regulations requiring specified safeguards or precautions). He also cites, at least in passing, Restatement sections 413, 414, and 416.

As far as the court can tell, the Law Court has never adopted the Restatement sections on which Cote primarily relies and has expressed reservations with respect to two of the other sections cited by Cote. See Dexter v. Town of Norway, 1998 ME 195 ¶¶ 9–10, 715 A.2d 169 ("we are far less certain as to whether and under what circumstances we would recognize" the principles set forth in Restatement sections 413 and 416). Moreover, even if they were to be adopted in Maine, most of the exceptions relied upon by Cote do not appear to be applicable in the instant case.

Restatement sections 412 and 421 thus expressly apply to persons who are under a duty to "maintain" premises in a reasonably safe condition and who contract out repair work. Cote offers no authority for the proposition that a construction company which built a building in 1993 or 1994 has a continuing duty to maintain that building in a safe condition. The remaining defendants do have such a duty, as discussed below, but that duty does not extend to Blais Builders just because Blais Builders is owned by Maurice and Jocelyne Blais.[3]

Similarly, Restatement section 422 applies to a "possessor" of land, but Blais Builders was not the possessor of the building at the time Cote was injured. Restatement section 410 states that an employer of an independent contractor who

[3] Cote has not contended – and has offered no evidence – that the corporate form of Blais Builders should be disregarded.

negligently gives orders and directions to the independent contractor is liable as if the contractor's acts or omissions were the employer's own. On this record, however, the undisputed evidence is that the independent contractor was instructed to install the handrail safely and in compliance with all municipal and industry requirements.[4]

That leaves, however, Restatement section 424 which provides as follows:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

On this issue Cote has demonstrated the existence of a disputed issue for trial on whether the handrail as installed violated building code specifications designed for the safety of persons using the stairwell.[5]

While the court has some doubt as to whether a company who constructs a building but does not own or manage the building has a general duty to subsequent tenants, building code requirements designed to safeguard building occupants represent legal duties that have already been imposed and the court cannot see any reason why those should not be enforceable by damage suits on behalf of persons the code requirements are designed to protect.

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[4] The evidence is scant on this issue because the installation occurred in 1993 or 1994 and the installer has since died. However, the court does not find that Cote's attempts to dispute defendant's evidence as to the instructions given, based on supposition and conjecture from Cote's safety expert, David Dodge, is sufficient to create a disputed issue for trial on this issue, even assuming that Maine would adopt section 410 of the Restatement. Moreover, the court is also not convinced that if Blais Builders had installed the handrail itself, the Law Court would adopt the principle that a company which constructs a building (as opposed to the owner of that building) owes a duty to all of the tenants who subsequently occupy the building and may be injured on the premises.

[5] There may be an issue as to whether the building code specifications relied upon by Cote were in effect in Hallowell in 1993 or 1994. For purposes of summary judgment inferences on that issue must be drawn in Cote's favor. At trial, however, it will be Cote's burden to show that any Building Code provisions upon which he relies were in effect at the relevant time.

Moreover, since a building contractor is already ultimately responsible for compliance with building code requirements, the court predicts that the Law Court would adopt section 424 of the Restatement and would not shield the building contractor from liability for a building code violation resulting from work performed by an independent subcontractor. The court concludes that Blais Builders is not entitled to summary judgment on this issue.

Blais Builders may have other legal defenses, including the statute of limitations. In his summary judgment papers Cote argues that his claim is not time-barred against Blais Builders based on the "continuing tort" doctrine. The court expresses no opinion on that issue because Blais Builders has not raised or relied on the statute of limitations in its pending motion for summary judgment.

Liability of Blais Properties, Maurice Blais, and Jocelyne Blais for Dangerous Condition in Stairwell

With respect to Cote's claim against Blais Properties, Maurice Blais, and Jocelyne Blais (collectively the "landlord defendants"), the court concludes at the outset that there is no evidence that any of those defendants were on notice of the existence of the allegedly dangerous condition of the handrail prior to Cote's injury. Plaintiff's safety expert, David Dodge, has surmised that certain of the handrails may have moved with a wiggle, but this was based on an inspection he conducted in April 2012. See Dodge Dep. 95-96. He acknowledged he had no factual information that the handrails wiggled prior to Cote's fall. Id. 96. Accepting that Dodge observed some wiggle in April 2012, that observation more than two years after the accident is not admissible evidence as to the condition of the handrails prior to Cote's injury or as evidence that the landlord defendants should have been on notice that any handrails were unstable.

Cote himself testified that he regularly used the handrails in the building, never noticed any problems or looseness, and never made any complaints about the handrails. Defendants' SMF ¶¶ 32-33 (admitted). It is also undisputed that from the completion of construction until the date of Cote's injury, there were never any complaints made about any handrails anywhere in the apartment complex. Defendants' SMF ¶ 25 (admitted).

However, while the liability of possessors of land to invitees depends on whether the possessor knew or had reason to know of the existence of a dangerous condition on the premises, see Restatement (Second) of Torts § 342, a different rule appears to apply to a landlord's obligation to tenants with respect to dangerous conditions in common areas under the landlord's control. In that case liability depends, not on whether the landlord had reason to know of the condition, but on whether the Landlord by the exercise of reasonable care could have discovered the condition. Restatement (Second) of Torts § 360. See also Restatement (Second) of Property, Landlord and Tenant § 17.3.

On several occasions the Law Court has stated that

> [i]f landlords retain control over common areas in the rental property, they can consequently be held liable for dangerous conditions in those areas.

Stewart v. Aldrich, 2002 ME 16 ¶ 13, 78 A.2d 603. Accord, Nichols v. Marsden, 483 A.2d 341, 343 (Me. 1984) ("A landlord also may be found liable in negligence for injuries caused by defective conditions in common areas of a rented building over which he is deemed to have control"). On those occasions the Law Court did not add a qualifier that liability would only exist if the landlord knew or had reason to know of the dangerous condition.

While the above statements in the Stewart and Nichols decisions are arguably dicta, the Law Court has in fact applied the above principle in upholding verdicts

against landlords in Anderson v. Marston, 161 Me. 378, 213 A.2d 48 (1965), and Horr v. Jones, 157 Me. 1, 170 A.2d 144 (1961). In Anderson the evidence demonstrated that the landlord had reason to know of the dangerous condition, but the court did not state that reason to know was required. See 161 Me. at 381-82, 213 A.2d at 49-50. In Horr liability was premised on the landlord's negligence in failing to inspect the porch even though "[t]here had been no visible warning" of the dangerous condition. See 157 Me. at 3, 8, 213 A.2d at 145, 147.

The issue of whether the landlord defendants in this case could by the exercise of reasonable care have discovered any dangerous condition that may have existed in the handrails presents a disputed issue for trial in this case.

Causation

The defendants' final argument, premised on Addy v. Jenkins Inc, 2009 ME 46, 969 A.2d 935, is that because no one observed Cote's fall or the separation of the handrail from the stairwell wall, there is insufficient evidence of causation. Cote's testimony is that he has no recollection of his fall or the circumstances that led to the fall. Defendants' SMF ¶ 57.[6] Defendants argue that – with Cote's history of unprovoked falls, see Defendants' SMF ¶ 38 (admitted) – there is no basis on which to find that his fall was caused by the separation of the handrail from the wall.[7]

[6] Counsel for Cote counters with testimony from Leo Lessard that Cote told Lessard at the hospital the following day that he grabbed the handrail and it came out of the wall. Plaintiff's SMF ¶ 57; see L. Lessard Dep. 25-26. However, Lessard's testimony as to what Cote later stated is hearsay that is not admissible on summary judgment or at trial and is not saved by the present sense impression or excited utterance exceptions.

[7] There are several other conceivable alternative mechanisms of injury, some more tenuous than others. One is that Cote fell at a different location, and it is only a coincidence that the handrail separated from the wall around the same time. Defendants have not advanced that argument. A second is that Cote fell on his own and hit the handrail, which then separated from the wall, partially breaking his fall. Defendants appear to have picked this as their primary alternative

In the court's view, the summary judgment record, construed in the light most favorable to plaintiff, contains sufficient circumstantial evidence – including the handrail separated from the wall, the presence on the landing of possessions that Cote had kept in the basement, the nature of the injuries that Cote suffered – from which a fact-finder at trial could arrive at an inference that it is more likely than not that Cote fell because he was holding the handrail when it pulled out of the wall. The circumstantial evidence in this case, particularly the handrail separated from the wall in close proximity to Cote's belongings, distinguishes this case from Addy.

Defendants' motion for summary judgment on the issue of causation is denied.

The entry shall be:

Defendants' motion for summary judgment is denied. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: May 23, 2013

Thomas D. Warren
Justice, Superior Court

hypothesis. A third possible alternative is that Cote fell on his own near the handrail and pulled the handrail out of the wall trying to stand up. As discussed in the accompanying text, regardless of the relative merits of any alternative theories, there is sufficient evidence to proceed to trial on plaintiff's theory of causation. Whether that theory will prevail once all the facts and circumstances are developed at trial remains to be decided.

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