Stanton v DBD Servs. Inc.
2011 NY Slip Op 33425(U)
December 16, 2011
Sup Ct, NY County
Docket Number: 101914/10
Judge: Eileen A. Rakower
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[* 1]

SCANNED ON 12/27/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART ____

Index Number : 101914/2010

STANTON, JUNE R.

VS.

DBD SERVICES

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

otion to/for ____

No(s). ____

No(s). ____

No(s). ____

Upon the foregoing papers, it is ordered that this motion is

FILED

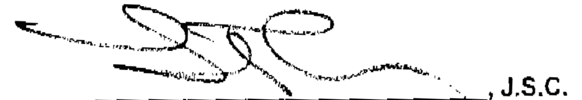
DEC 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

Dated: 12/19/11



____, J.S.C.
HON. EILEEN A. RAKOWER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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---X

JUNE R. STANTON,

Plaintiffs,

Index No.
101914/10

- against -

Decision and Order

DBD SERVICES, INC., MH RESIDENTIAL 1 LLC, MH RESIDENTIAL 2, LLC, MH COMMERCIAL, LLC and DOUGLAS ELLIMAN PROPERTY MANAGEMENT,

Mot. Seq. No's.
002, 004, & 005

Defendants.

---X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she fell after getting her foot caught in a "pocket" that formed in plastic sheeting covering her apartment floor on October 27, 2008. Plaintiff alleges that the floor covering was improperly placed, and that defendants were negligent in failing to secure the covering to the floor or the wall to prevent it from bunching up.

Plaintiff lived in a studio apartment which consisted of a living area, a small separate kitchen, a foyer, a small dressing room, and a bathroom. Plaintiff sustained a leak in her kitchen, and the leak was determined to be coming from the "risers." There was asbestos insulation surrounding the risers, which had to be removed prior to repairing the leak. The removal process required three steps. First, the asbestos was removed, which was followed by air testing. After it was confirmed that all the asbestos was gone, the plumber was called in to fix the pipes. The final step involved repairing the holes and painting the wall.

Azz Environmental ("Azz") performed the asbestos removal. Non party Lawrence Environmental was hired to take air quality samples. Non-party, Pace Plumbers ("Pace"), was responsible for repairing the leaking riser. Defendant DBD

Services, Inc. ("DBD") was a painting company that provided painting services for the subject building, with an office in the basement. Defendants MH Residential 1, LLC, MH Residential 2, LLC, and MH Commericial, LLC ("MH") are the owners of the building, and defendant Douglas Elliman Property Management ("Douglas") managed the building. DBD cross-claims against MH for contractual[1] and common law indemnification. MH cross-claims against DBD for common law indemnification.

In addition to the post-removal painting, plaintiff asked the building manager if her living room and foyer could be painted as well. Plaintiff had to be relocated to another apartment prior to the asbestos removal. Before leaving, plaintiff had moved her furniture in order to prepare the apartment for painting, except for a large bookcase that was placed against a wall, and a hanging mirror.

The asbestos removal was completed on, or about October 26, 2008. On October 27, 2008 plaintiff returned to the apartment with "Mike" from DBD, to consult with him about the painting job. Mike told plaintiff that the bookcase would have to be moved in order to paint behind it. They started to remove books from the bookcase but ran out of boxes. Plaintiff left to get more boxes, and when she returned to the apartment, Mike was gone. Plaintiff observed Frank in the foyer "chipping" paint from the ceiling.

Plaintiff began removing the remainder of the books herself. The box was located about "five or six" steps from the bookcase. Plaintiff had been packing books for about fifteen or twenty minutes, and as she was turning from the box back to the bookcase, her foot got stuck in the plastic sheeting, and she fell. Plaintiff claims that Frank helped her up and told her he was "sorry." Plaintiff further testifies that the plastic covering was not on the floor when she went downstairs to get the boxes, but when she returned it was over "most of the area of the living room."

DBD now moves for summary judgment dismissing the complaint and the cross-claims against it. By separate motion MH moves to dismiss the complaint, and seeks summary judgment against DBD on its cross claim for common law indemnification. MH moves to consolidate the instant action with the action titled JUNE R. STANTON v. MHC 1 INC., MANHATTAN HOUSE CONDOMINIUM and AZZ ENVIRONMENTAL, INC., bearing Index No. 105237/11, for the purposes

[1]No party has produced a contract as between DBD and MH.

of trial only. Plaintiff opposes the motions for summāry judgment.

DBD submits the depostion transcript of plaintiff; Victor Zajdel, Painting Supervisor for DBD; Franciszek Siarkowski ("Frank"), of DBD; Nichal Smolak ("Mike") of DBD; Filip Kruaze, of AZZ; Eugene Peron, of Pace; Raul Colon, "Handyman" for MH; and Patrick Geoghgan, "Resident Manager" for MH. MH submits duplicate deposition transcripts, and also includes the following: the deposition transcripts of Carl Reinlib, General Manager of Douglas; the deposition transcript of Raul Colon, Handyman for MH; the affidavit of Mr. Reinlib; a job work order; and an accident report prepared by Douglas.

Defendants both claim that plaintiff cannot establish what caused her fall. Moreover, even if she could establish that there was a dangerous condition, she will not be able to prove that there was notice of such condition. Both DBD and MH assert that they did not create the alleged defect. DBD claims that it AZZ was responsible for the plastic floor cover that allegedly caused plaintiff's accident. DBD asserts that the floor covering, which it describes as "thick" and "cloudy," is the type of plastic used for asbestos removal. MH argues that it did not perform any work in the apartment and that it did not supervise or control DBD's work.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Initially, the actions, which arise from the same incident, are properly consolidated for joint trial, as they involve common issues of questions of law and fact(*see*; CPLR §602[a]).

Defendants' contention that plaintiff cannot establish the cause of her fall is not supported by the evidence. Plaintiff testifies:

> Q: How did your accident happen?
> A: I was turning to come back to get more books and my foot, I felt it go into kind of a pocket, so that I couldn't, you know, step forward and that's when I fell.
>
> . . .
>
> Q: Did you see the pocket after you fell?
> A: No.
> Q: How do you know it was a pocket?
> A: Because it felt tight over my foot. You know when you turned around on plastic and I know I couldn't move it so obviously the plastic was holding it.

In addition, Mr. Reinlib corroborates plaintiff's testimony by describing the area where plaintiff fell as "somewhat bunched and not flat on the floor." The instant action can be distinguished from the facts in *Martinez v.Trustees of Columbia University in City of New York*, 271 AD2d 223[1st Dept. 2000], where the court found that there was no direct evidence connecting the placement of a drop cloth to plaintiff's fall, since her own testimony established that it was more likely her inattentiveness that caused her to trip. (also compare; *Jacobsohn v. New York Hospital*, 250 AD2d 553[1st Dept. 1998], where the court found that there was no evidence that a runner that plaintiff alleged caused her fall had bunched up or was raised).

It is well settled that in order for a defendant to be found negligent for a defective condition, the defendant must have caused or created the defect, or had actual or constructive notice of the existence of such defect. (see *Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238 [1st Dept. 2004]). "Where a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition ."(*Mitchell v. City of New York*, 29 AD3d 372[1st Dept. 2006]).

Here, defendants have established that there was neither actual or constructive notice. Plaintiff testifies that she traversed the same path safely for twenty minutes

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before her fall, and there is no evidence of complaints regarding the plastic sheeting. However, defendants have failed to establish, as a matter of law, that they did not cause of create the alleged defect. Plaintiff has presented facts from which a jury may reasonably infer that defendants were negligent in failing to properly secure the plastic covering to the floor or the wall, thereby allowing it to bunch up and create a tripping hazard.(see; *Dillon v. Rockaway Beach Hospital and Dispensary*, 284 NY 176[1940]).

As to the issue of who was responsible for creating the alleged defect, the testimony contains differing accounts of the circumstances surrounding plaintiff's accident. For example, plaintiff testifies that there was no plastic on the floor when she left the apartment to get more boxes, but that it was there when she returned. The DBD witnesses, however, claim that AZZ covered the floor with a thick cloudy plastic and Masonite prior to its arrival. Mr. Kruaze, for AZZ, testifies that the living room floors were prepped before it arrived by the "building people." Mr. Kruaze further testifies that AZZ used a 6 ml fire retardant plastic on the floor in the kitchen, around where it was working, but it did not place anything on the living room floor.

Mr. Colon, the building handyman, testifies that the building is not in charge of covering the floors in preparation for work in the apartments. Mr. Goeghan, the building manager, testifies that when he entered the apartment at some unspecificed time "after the work was completed," he observed that the floors were covered with "white plastic" which he surmised belonged to AZZ. Mr. Reinlib testifies that when he went to the apartment after plaintiff's accident to investigate, he observed the floors covered in what "appeared to be a typical 1-1/2, two mil type of polystyrene plastic sheeting."

In light of the conflicting testimony, summary judgment must be denied, as it is well settled that issues of credibility are to be resolved by the jury.(*see; Lu v. Spinelli*, 44 Ad3D 546[1st Dept. 2007]). Nor can summary judgement be granted on MH's cross-claim for indemnification. Such relief is premature before an apportionment of fault has been determined. (*Cuevas v. City of New York*, 32 AD3d 372[1st Dept. 2006]).

Wherefore it is hereby

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ORDERED that the motion to consolidate for purposes of joint trial is granted and the above captioned action will be jointly tried with the action titled JUNE R. STANTON v. MHC 1 INC., MANHATTAN HOUSE CONDOMINIUM and AZZ ENVIRONMENTAL, INC., bearing Index No. 105237/11; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a copy of it with notice of entry upon the Clerk of the Trial Support Office (Room 158), and the Clerk shall assign the action bearing Index No. 105237/11 to the undersigned Justice; and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that defendant DBD Services, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendants MH Residential 1, LLC, MH Residential 2, LLC, and MH Commercial, LLC, Douglas Elliman Property Management's motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that MH Residential 1, LLC, MH Residential 2, LLC, and MH Commercial, LLC, Douglas Elliman Property Management's motion for summary judgment on its cross claim for indemnification is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 16, 2011

EILEEN A. RAKOWER, J.S.C.

FILED

DEC 23 2011

NEW YORK
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