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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 104954/2008
EADERESTO, JERRY
VS.
22 LEROY OWNERS
SEQUENCE NUMBER : 002
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the accompanying memorandum decision

FILED
MAR 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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JERRY EADERESTO,

Plaintiff,

- against-

Index No.: 104954/2008
Submission Date: 11/16/2012

22 LEROY OWNERS CORP. and A.J. CLARKE MANAGEMENT CORP.,

Defendants.

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For Plaintiff:
Torgan & Cooper, P.C.
17 State Street, 39th Floor
New York, NY 10004

For Defendants:
Palmeri & Gaven, Esqs.
80 Maiden Lane, Suite 505
New York, NY 10038



Papers considered in review of this motion for summary judgment:

Aff in Support of Motion . . . . . 1
Mem of Law. . . . . 2
Aff by Palmeri. . . . . 3
Aff in Opposition. . . . . 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants 22 Leroy Owners Corp. and A.J. Clarke Management Corp. (collectively "defendants") move for summary judgment dismissing the complaint pursuant to CPLR § 3212. Defendants also move to vacate a July 28, 2010 so-ordered stipulation precluding defendants from testifying at trial.

This action arises out of injuries plaintiff Jerry Eaderesto ("Eaderesto") sustained on August 17, 2007 while showering in his apartment located at 22 Leroy Street in Manhattan (the "premises"). Defendant 22 Leroy Owners Corp ("22 Leroy") owns the premises and defendant A.J. Clarke Management Corp. ("A.J. Clarke") manages it.

At his deposition, Eaderesto testified that on the date of his accident he woke up with flu-like symptoms. Eaderesto stated that before entering the shower that morning, he turned on both the cold and hot water faucets. After testing the water and realizing that it was still hot, he turned on the cold water faucet as far as he could and waited inside the shower basin without going under the water.

Eaderesto testified that as he waited for the water to get colder, he began to apply shaving cream. He then fainted, and the next thing he remembers is waking up on the shower basin floor with his right hand white and blistering. Eaderesto also felt pain in his penis, thighs and right forearm. Thereafter, Eaderesto went to the hospital to be treated for his burns, where he remained for approximately two months.

Both Christopher Noey ("Noey"), 22 Leroy's co-op board president, and Claire Berger ("Berger"), A.J. Clarke's managing agent, testified at their depositions that they did not remember receiving any complaints about water temperature at the premises. Pedro Mieles ("Mieles"), the premises' superintendent, testified that sometime before Eaderesto's injury, he had spoken to Noey about the water temperature after another tenant had complained about the hot water.

After the accident, experts Ryan Reese ("Reese") and Harold Wasserman ("Wasserman") tested the water temperature at the premises. Reese attests that on September 10, 2007 he conducted two tests of the shower water in Eaderesto's apartment, measuring the temperature at 170 and 173 degrees Farenheit. Wasserman attests that on December 20, 2007, he measured the water temperature in Eaderesto's shower at 185 degrees Farenheit.

According to Wasserman, water temperature of 155 degrees Fahrenheit will cause a third degree burn in one second. Wasserman also attests that he inspected the premises' mixing valve, which regulates the temperature of the mixed hot water. Wasserman attests that the thermometer at the mixing valve was set at 199 degrees Farenheit, "virtually guaranteeing that anyone exposed to the hot water would be scalded."

Eaderesto commenced this action in April 2008, alleging that defendants "fail[ed] to maintain the hot water distribution system at the Premises in a reasonable manner." On April 24, 2009, Eaderesto served his combined discovery demands. Pursuant to an August 26, 2009 Preliminary Conference Order, the defendants were to respond to the demands by October 26, 2009. After defendants failed to respond by that date, the parties entered into a stipulation on January 27, 2010 extending the deadline to February 22, 2010.

After defendants again failed to respond to the demands, Eaderesto moved on March 23, 2010 to strike defendants' answer. The parties resolved that motion by

stipulation dated July 28, 2010, in which defendants agreed to provide the requested discovery by August 27, 2010 or "be precluded from testifying at trial without further order of the court." Defendants ultimately provided the requested discovery on October 12, 2010, seventy-seven days after the agreed-upon deadline.

John Palmeri ("Palmeri") was the attorney representing defendants when this action began. Palmeri affirms that he was diagnosed with cancer in December 2009 and was unable to work for much of 2010. After his diagnosis, the matter was reassigned to another partner in his firm, Daniel Gaven ("Gaven"). Gaven affirms that his law firm did not make any discovery requests on their clients until April 2010, in response to defendants' motion to strike. Gaven further affirms that he made a follow up inquiry regarding the items after returning from court on July 28, 2010, but makes no mention of any further inquiries until September 24, 2010, twenty-eight days after the preclusion order deadline.

Defendants now move to vacate the July 28, 2010 preclusion so-ordered stipulation, arguing that Palmeri's illness is a reasonable excuse for their delay in providing the requested items. Defendants also move for summary judgment, arguing that they had no notice of the dangerous water temperature and thus are not liable for Eaderesto's injuries. Defendants contend that Eaderesto's assertion that the water was too hot is insufficient as a matter of law to impose liability on defendants. Defendants

further maintain that Eaderesto's remaining in the shower and fainting were superseding causes that relieved defendants of liability.

In opposition, Eaderesto argues that Palmeri's illness is not a reasonable excuse for defendants' discovery delays because other attorneys at the firm could have covered Palmeri's work. Eaderesto also argues that defendants are not entitled to summary judgment because they created, and had actual notice of, the dangerous condition at the premises. Eaderesto further contends that the water temperature was sufficiently high to impose liability on defendants. Lastly, Eaderesto maintains that the issue of whether his actions were superseding causes is a question of fact for a jury to resolve.

**Discussion**

Motion to Vacate So-Ordered Preclusion Stipulation

Defendants have failed to make the required showing to vacate the July 28, 2010 so-ordered preclusion stipulation. Defendants maintain that Palmeri's illness was a reasonable excuse for their discovery delays. However, reasonable excuse is the standard for vacatur of a conditional preclusion order, *see Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 80 (2010), not for vacatur of a stipulation entered into voluntarily by both parties. To successfully move for vacatur of a stipulation, a party must show either fraud, duress, mistake, collusion, or overreaching. *See Ostolski v. Solounias*, 55 A.D.3d 889, 890 (2d Dept. 2008). As defendants have not argued, let alone made the required showing, to

support any of these grounds, the Court denies defendants' motion to vacate and defendants are precluded from testifying at trial.[1]

Summary Judgment Motion

Though defendants are precluded from testifying at trial, they may still establish defenses to Eaderesto's claims through cross-examination of plaintiffs' witnesses, non-party witness testimony, and the submission of exhibits. Accordingly, the Court will determine defendants' summary judgment motion with this stricture in mind.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

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[1]In any event, defendants have not provided a reasonable excuse for their discovery delays. Palmeri was not diagnosed with cancer until December 2009, eight months after Eaderesto initially served the combined discovery demands. At the time of this diagnosis, defendants were already in violation of the August 26, 2009 Preliminary Conference Order, which directed defendants to respond to the demands by October 6, 2009.

After the diagnosis, other attorneys at Palmeri's firm were available to ensure compliance with court orders. Nevertheless, Gaven admits that his firm did not even request the items from defendants until April, 2009, after Eaderesto moved to strike defendants' answer, and almost a year after the plaintiff served his initial discovery demand. Ultimately, defendants provided the outstanding discovery until October 13, 2010, seventy-seven days after the preclusion order deadline, and almost eighteen months after Eaderesto served the demands. Given the repeated and extended discovery delays, and the availability of other attorneys in Palmeri's firm to cover his work, the Court would not find that defendants have provided a reasonable excuse for their discovery delays.

Here, defendants have failed to make a *prima facie* showing of entitlement to judgment dismissing the complaint. First, defendants have failed to show lack of notice of problems with hot water at the premises. Building owners may be held liable for injuries resulting from dangerous conditions on their property only where they created the condition or had actual or constructive notice of the condition. *Trujillo v. Riverbay Corp.*, 153 A.D.2d 793, 794 (1st Dept. 1989).

Though Noey and Berger testified that they do not recall receiving any complaints about the water temperature, their testimony is inadmissible because of the July 28, 2010 preclusion order. *See Hesse Constr., LLC v. Fisher*, 61 A.D.3d 1143, 1144-45 (3d Dept. 2009). In any event, Mieles testified that another tenant had complained about the water before the date of Eaderesto's injury, and that Mieles had discussed this complaint with Noey. Thus, at the very least, there is an issue of fact as to whether defendants had actual notice of the condition. *See Carlos v. 395 E. 151st St.*, LLC, 41 A.D.3d 193, 196 (1st Dept. 2007).[2]

Defendants maintain that Eaderesto's entering the shower after he knew the water was too hot, and subsequently fainting, were superseding causes that relieve defendants of liability. The issue of what constitutes a superseding cause is generally an issue of fact for the jury to resolve. *Derdiarian v. Felix Contractor Corp.*, 51 N.Y.2d 308, 315 (1980).

[2]The Court also rejects defendant's argument that it may not be held liable for burns resulting from problems in regulating water temperature. Numerous New York courts have imposed liability under circumstances similar to those alleged here. *See, e.g., Lindsey v. H.B. Associates*, 24 A.D.3d 274 (1st Dept. 2005); *Rosencrans v. Kiselak*, 52 A.D.3d 492 (2d Dept. 2008).

Here, Eaderesto has submitted evidence that the water temperature was so high that it would cause third degree burns after one second of exposure. Further, his injuries are within the foreseeable risks that flow from negligence in regulating water temperature. Though his fainting may not have been foreseeable, Eaderesto "need not demonstrate . . . that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable." *Derdiarian*, 51 N.Y.2d at 315 (1980). Based on defendants' submissions, they have failed to show that Eaderesto's fainting relieves defendants of liability as a matter of law. *See Lindsey*, 24 A.D.3d at 274; *Rosencrans*, 52 A.D.3d at 493.

In accordance with the foregoing, it is hereby

ORDERED that the motion to vacate the July 28, 2010 self-executing so-ordered stipulation that precludes defendants from testifying at trial is denied; and it is further

ORDERED that the motion for summary judgment by defendants 22 Leroy Owners Corp. and A.J. Clarke Management Corp. is denied.



This constitutes the decision and order of the Court.

Dated: New York, New York
March 19, 2012

ENTER:

Saliann Scarpulla, J.S.C.