SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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P.R., an infant by his Mother and Natural Guardian, SHAMEKA WILLIAMS, and SHAMEKA WILLIAMS, Individually,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY

Defendant.

DECISION/ORDER
Index No. 150649/2012

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HON. CYNTHIA KERN, J.:

Plaintiffs commenced the instant action to recover damages for personal injuries the infant-plaintiff allegedly sustained when he came into contact with an uninsulated steam heating pipe in an apartment building located at 55 East 99th Street, New York, New York (the "building") on January 23, 2011. Plaintiffs' complaint asserts that NYCHA was negligent and that NYCHA violated § 78 of the Multiple Dwelling Law and various provisions of the Building Code of the City of New York, only § 27-809 of which plaintiffs still contend is applicable to the instant action. Defendant New York City Housing Authority ("NYCHA") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint. For the reasons set forth below, NYCHA's motion for summary judgment is granted.

The relevant facts are as follows. On January 23, 2011, plaintiff Shameka Williams ("Williams") placed the infant-plaintiff, who was approximately one year old, next to her on her bed. Williams had placed her bed next to uninsulated steam heating pipes used to heat the apartment. When Williams turned her back to the infant-plaintiff, he fell from the bed. He made contact with a vertical steam heating pipe next to the bed and suffered burns for which Williams sought medical attention. It is undisputed that

Williams had never complained about the uninsulated steam heating pipes to anyone responsible for managing the building until after the accident occurred.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

NYCHA has established its *prima facie* right to summary judgment on the ground that it did not have a common law duty to insulate the steam heating pipes and was not required to insulate the pipes by either Multiple Dwelling Law § 78 or any provision of the New York City Building Code. A landlord generally is not liable to a tenant for dangerous conditions on leased premises unless a duty to repair dangerous conditions is imposed by statute, regulation or contract. *Rivera v. Nelson Realty, LLC*, 7 N.Y.3d 530, 535 (2006). However, a common law duty to repair often results from the landlord-tenant contractual relationship. *See id.*; *Litwock v. Plaza Realty Investors, Inc.*, 11 N.Y.3d 820, 821 (2008) ("A landlord may be liable for failing 'to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs'") (internal citations omitted). Moreover, a duty to repair is imposed by Multiple Dwelling Law § 78, which provides that "[e]very multiple dwelling...shall be kept in good repair." The Court of Appeals has interpreted Multiple Dwelling Law § 78 to impose upon a landlord "a duty to persons on its premises to maintain them in a reasonably safe condition." *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 627, 643 (1996).

As an initial matter, NYCHA has established that it did not have a common law duty by virtue of the lease to insulate the steam heating pipes. The First Department has held in two cases that a landlord has no common law duty to insulate steam heating pipes. In *Isaacs v. West 34th Apts. Corp.*, 36 A.D.3d 414 (1st

Dept 2007), a case wherein the plaintiff passed out and fell against a steam heating pipe and was burned within seconds, the First Department reversed the Supreme Court's decision, which had denied the defendant's motion for summary judgment dismissing the complaint on the ground that there were issues of fact with respect to the landlord's negligence in failing to maintain the premises in a reasonably safe condition and granted summary judgment dismissing the plaintiff's complaint, including his cause of action for common law negligence. *Id.* at 415-16. Similarly, in *White v. New York City Housing Authority*, 139 A.D.3d 579, 580 (1st Dept 2016), a case wherein the plaintiff's son was burned by a steam heating pipe, the First Department modified the Supreme Court's decision and granted summary judgment dismissing the plaintiff's common law negligence claim. The First Department held that "[t]he mere fact that the heating pipe, a heat source for the bedroom, was hot and lacked insulation, which would have interfered with its function, is not actionable." *Id.* at 580. In both of these cases, the First Department relied on *Rivera*, wherein the Court of Appeals held that a landlord's failure to supply radiator covers did not breach any duty to keep the premises in good repair "under common law by virtue of the lease" as the plaintiffs did not claim that the radiator needed repair or was defective in any way. *Rivera*, 7 N.Y.3d at 535.

NYCHA has also established that Multiple Dwelling Law § 78 did not require it to insulate the steam heating pipes. The First Department has specifically held that a landlord's failure to insulate steam heating pipes does not violate a landlord's obligation to keep leased premises in good repair pursuant to Multiple Dwelling Law § 78. *See Isaacs v. West 34th Apts. Corp.*, 36 A.D.3d at 415-16 (dismissing plaintiff's complaint and citing *Rivera*, 7 N.Y.3d at 535).

Further, NYCHA has made a *prima facie* showing that it was not required to insulate the steam heating pipes pursuant to § 27-809 of the 1968 Building Code of the City of New York (the "1968 Building Code"), the only potentially applicable provision. Section 27-809 of the 1968 Building Code requires landlords to insulate certain steam heating pipes. The grandfathering provision of the 1968 Building Code, NYCAC § 27-111, exempts buildings that were constructed before the 1968 Building Code's effective date of December 6, 1968 from compliance with the 1968 Building Code, unless a building has undergone certain alterations pursuant to NYCAC §§ 27-115 and 27-116. NYCAC § 27-115 provides that if the cost

of making alterations in a 12-month period exceeds 60 percent of the building's value, the entire building must comply with the 1968 Building Code. NYCAC § 27-116 provides that if the cost of making alterations in a 12-month period is between 30 and 60 percent of the building's value, the altered portions of the building must comply with the 1968 Building Code.

In the present case, NYCHA has made a *prima facie* showing that the building is not required to comply with § 27-809 of the 1968 Building Code as it is undisputed that the building was constructed in 1958 and NYCHA has made a *prima facie* showing that neither of the exceptions to the grandfathering provision applies here through its submission of the affidavits of Robert Burke ("Burke") and Adam W. Eagle ("Eagle"). Burke, NYCHA's Assistant Director for Risk Finance, testified that he evaluated the property value of the building for every year between 1966 and 2014 by consulting the Marshall Valuation Service and that NYCHA hired an outside consultant, J.P. West Inc., that evaluated the property value of all buildings in NYCHA's portfolio in 2014. Burke included with his affidavit a table listing said property values of the building. Eagle, Deputy Director for NYCHA's Capital Projects Administration, testified that he reviewed and compared these annual building valuations with capital improvement records from 1968 on, and concluded that the cost of alterations was not between 30 and 60 percent, and did not exceed 60 percent, of the building's value in any 12-month period.

In opposition, plaintiffs have failed to raise a triable issue of fact. Plaintiffs' argument that the property valuation table attached to Burke's affidavit is inadmissible hearsay because it is unsupported by an affidavit from J.P. West Inc., NYCHA's outside consultant, is without merit. Although it is unclear from Burke's affidavit whether the values in the table were derived from his own valuation or the valuation by J.P. West Inc., the court finds that Burke's affidavit is admissible. Even if J.P. West Inc. compiled the property valuation table, the table is admissible as a business record as J.P. West Inc. was acting on behalf of NYCHA. *See People v. Cratsley*, 86 N.Y.2d 81, 90-91 (1995).

Further, plaintiffs' argument that NYCHA's motion for summary judgment should be denied because NYCHA was unable to produce one contract listed in the capital improvement summary table provided by NYCHA, numbered HE0025000 ("Contract HE0025000"), is without merit. Discovery is

complete in the present case as NYCHA has complied with the court's decision dated December 8, 2015, which held that NYCHA must locate the contracts specified in plaintiffs' notices to produce or submit an affidavit stating its inability to locate the contracts after a reasonable search had been conducted. NYCHA produced all contracts except Contract HE0025000 and submitted an affidavit that it was unable to find Contract HE0025000, which was executed over twenty years ago, after conducting a reasonable search. Moreover, plaintiffs have failed to identify any discrepancies between the contracts NYCHA produced and the capital improvement summary table that lists the values of all contracts for the building, such as would suggest that Contract HE0025000 was for a different amount than the amount shown on the summary table and would trigger an exception to the 1968 Building Code's grandfathering provision. Thus, as NYCHA has established its *prima facie* entitlement to summary judgment dismissing the complaint and plaintiffs have failed to raise a triable issue of fact as to whether one of the exceptions to the 1968 Building Code's grandfathering provision applies despite the completion of discovery, the court will not deny NYCHA's motion for summary judgment on the basis that NYCHA was unable to find Contract HE0025000. The court cannot consider plaintiffs' request for an adverse inference charge at trial as NYCHA has established its entitlement to summary judgment dismissing the complaint.

Accordingly, NYCHA's motion for summary judgment dismissing plaintiffs' complaint is granted and the complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

DATE : 8/3/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.