SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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JAMES DALY,

Plaintiff,

DECISION/ORDER
Index No. 158991/2014

-against-

9 EAST 36TH LLC

Defendant.
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HON. DAVID B. COHEN, J.:

Motion is granted in part and denied in part. Plaintiff James Daly has resided at 9 East 36th Street, Apt. 5A, New York, NY, since approximately 2004. The apartment is a 700 square foot studio consists of a main room, a row of appliances ("gallery kitchen"), 3 closets and a hall connecting the kitchen to the bathroom. The apartment was equipped with a fuse box with 2 fuses. The apartment had seven electrical outlets; two in the gallery kitchen; one in the bathroom; one in the hall between gallery kitchen and the bathroom; and the rest in the living room area. Daly used 6-8 extension cords throughout the apartment. On and before June 19th, 2013, Daly used 2 or 3 extension cords in the living room area of the apartment. On June 19, 2013, Daly went to bed in his apartment at approximately 7:00 pm. At that time, the TV, VCR, lamp, and a fan were plugged into the extension cords located in living room area. Daly's next recollection is waking up in the burn unit of NY Presbyterian Weill Cornell. It is uncontested that Daly was injured in a fire in his apartment on or about June 19, 2013.

Prior to the accident, Daly complained to building super Rafael Crespo that the apartment needed additional, newer outlets, the lack of which necessitated Daly's use of extension cords. Daly further complained to Crespo that the apartment's fuses blew out a couple times a week. Daly made the same complaints to Crespo for over a year prior to the accident. Crespo responded to the complaints by saying that he was working on it, although he had already been informed by building owners they had no intention of updating the electrical in that apartment. Crespo never informed Daly that the request to update the

electric system had been denied. It is undisputed that the apartment below Daly's had an updated electrical system. Crespo approximates that he last spoke to Daly about updating the electrical system about a year prior to the June 19th, 2013 fire.

Crespo also testified that he "possibly" saw 3 extension cords used in Apartment 5A prior to June 19th, 2013. When asked what was plugged into the extension cords, Crespo responded, "television, maybe fan, refrigerator, maybe a toaster or microwave." Daly alleges that prior to the accident he informed Crespon that the extension cords became very hot within an hour's use. Crespo denies ever having a conversation about this. He acknowledges that he and Daly had multiple conversations about the electrical situation in his apartment but denies ever being told that the extensions cords get hot within an hour's use.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Intergrated Logistics Consultants v. Fidata Corp.,* 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz,* 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.,* 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.,* 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

For a property owner to be liable to an injured plaintiff as a result of an incident on their premises, the plaintiff must establish that a dangerous or defective condition existed at the time of the injury and that the property owner either created the condition or had actual or constructive notice of the alleged dangerous or defective condition and had time to remedy it (*Piacquadio v Recine Realty Corp.,* 84 NY2d 967, 969 [1994]; *Gordon v American Museum of Natural History,* 67 NY2d 836, 837-38 [1986]; *Zuk v Great Atlantic & Pacific Tea Co., Inc.,* 21 AD3d 275 [1st Dept 2005]; *Mejia v New York City Transit Auth.,* 291 AD2d

225, 226 [1st Dept 2002]; *Leo v Mt. St. Michael Academy*, 272 AD2d 145, 146 [1st Dept 2000]). A defendant seeking summary judgment has the initial burden of making a prima facie showing that it did not create the dangerous condition, nor had actual or constructive notice of its existence (*Sabalza v Salgado,* 85 AD3d 436 [1st Dept 2011]; *Garcia v Good Home Realty, Inc.,* 67 AD3d 424 [1st Dept 2009]).

Summary Judgment is granted with respect to the defendant not creating the dangerous condition. Nothing in the record indicates that the fire was started within the electrical system of the apartment. Deposition testimony along with the Fire Marshall's report indicates the fire started three feet from the wall most likely from an extension cord being used at the time. Plaintiff acknowledges that it has no recollection of the fire and cannot dispute the Fire Marshall's report. Furthermore, there is no legal requirement for the landlord to update an electrical system and no evidence has been presented that the electric system was dangerous when installed.

However, summary judgment must be denied with respect to defendant's knowledge that a dangerous condition existed in the apartment and that it did not remedy the condition. A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances (*Basso v. Miller,* 40 NY2d 233 241 386 [1976]). "What constitutes a dangerous or defective condition depends on the particular circumstances of each case, and is thus generally a factual question for the jury" (*Freienstein v Mandarin Oriental New York Hotel, LLC,* 44 Misc 3d 1220(A) [Sup Ct, NY County 2014] *citing Trincere v County of Suffolk,* 90 NY2d 976, 977 [1997]). Defendant had knowledge of the blowing fuses and that the system was old. Defendant also acknowledged that it knew about and saw that multiple extension cords were in use. Furthermore, Crespo and plaintiff had multiple conversations about plaintiff's complaints about the electrical system prior to the accident. There also remains an issue of fact whether defendant knew that the cords were heating up with use. Whether any of these constitutes a dangerous or defective condition is a question for the jury. Thus, summary judgement dismissing the complaint must be denied since the record has sufficient evidence to raise a triable issue of fact as to whether the condition alleged was dangerous and whether defendant landlord had actual or constructive notice of, the alleged hazard. (*Piacquadio v. Recine Realty Corp.,* 84 NY2d 967 969; *Gordon v. Am. Museum of Natural History,* 67 NY2d 836 837 838; *Long*

v. Battery Park City Auth., 743 NYS2d 496 497). In addition, defendant has submitted the expert affidavit of Stanley Fein, which unequivocally states that in his opinion "the accident and injuries sustained by James Daly on June 19th, 2013 was caused by the negligence of the building's owner in providing an inferior, inadequate and unsafe electrical supply system to the apartment." The expert also states elsewhere that the lack of updating was the cause of the fire. This affidavit is unrebutted and to the extent that defendant argues is of little probative value because the expert based his opinion on documentary evidence and photographs and not an inspection, defendant has not established that the opinion related to supply is one that requires an inspection of the premises as opposed to an opinion that can be based upon documentary evidence, and defendant will have the opportunity to examine the expert at trial on this issue.

To the extent that defendant argues that it was plaintiff's own extension cords and use thereof that cause the fire, defendant has raised this defense in its Answer. CPLR 1411 provides "[I]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages." Whether or not plaintiff's conduct can be culpably attributable to his claim is a question of fact for the jury to decide and does not bar recovery. It is therefore

ORDERED, that defendant is granted summary judgment to the extent that the Court finds, as a matter of law, that it did not create a dangerous condition; and it is further

ORDERED, that defendant's motion is otherwise denied.

This constitutes the decision and order of the Court.

DATE: 9/12/2016

COHEN, DAVID B., JSC