

Lavalais v Casa Elegante Inc.

2003 NY Slip Op 30158(U)

October 23, 2003

Supreme Court, New York County

Docket Number: 0117498/2001

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

ABE LAVALAIS and JOCELYN WOODSON,

INDEX NO. 117489/01

Plaintiff(s),

MOTION DATE _____

-against-

MOTION SEQ. NO. 002

CASA ELEGANTE INC. and OMAR HOLDING
CORP.,

MOTION CAL. NO. _____

Defendant(s).

----- X

CASA ELEGANTE INC.,

Third-party Plaintiff,

-against-

ANTHONY LO SCHIAVO,

Third-party Defendant.

SCANNED
OCT 24 2003

The following papers, numbered 1 to _____ were read on this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

The third-party defendant Anthony Lo Schiavo (Lo Schiavo) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the third-party complaint and all cross claims.

The defendant Casa Elegante, Inc. (Casa Elegante) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

The plaintiffs Abe Lavalais and Jocelyn Woodson (plaintiffs), reside in a third-floor loft at **171 East 118th Street** in Manhattan. The third-party defendant Lo Schiavo owns the building at **171 East 118th Street**. The defendant and third-party plaintiff Casa Elegante operates a furniture store in the adjoining building located at **2162 Third Avenue**. The defendant Omar Holding Corp. (Omar) is the owner of **2162 Third Avenue**.

Casa Elegante used the alleyway between the two buildings to store furniture under a metal overhang. The alleyway is also shared with a Chinese restaurant. A fire originated in Casa Elegante's furniture stored in the alleyway. The fire extended via a window to the plaintiffs' third-floor loft. Subsequent to the fire, Casa Elegante received a citation for improper storage of combustible material.

The plaintiffs commenced this action to recover for the property damage to their loft. Casa Elegante commenced a third-party action against Lo Schiavo, alleging common-law negligence and Building Code violations.

The report generated by the Fire Officers who fought the fire indicates that the building at **171 East 118th Street** had sprinklers in service that did not operate. Additionally, Lo Schiavo testified, at his examination before trial, that the fire alarm system at **171 East 118th Street** was inoperable.

Following the fire, Fire Marshall Matteo (Matteo) of the New York City Fire Department conducted an investigation. He interviewed the owner of Casa Elegante, who stated that at night, the workers from the Chinese restaurant relax on the furniture stored in the alley. Matteo also interviewed the owner of the Chinese restaurant, who stated that, on the night of the fire, three of his workers were sleeping in the back of the restaurant. The restaurant owner also stated that his workers relax on the stored furniture. Through an interpreter, Matteo also interviewed the three restaurant workers, who stated that on the night of the fire, they did "go in the back of the store." Matteo observed numerous discarded cigarettes which the workers attempted to hide. Matteo concluded that:

It was a hot summer night and what appears to have happened is one of the Chinese workers went out to the alley during the night and was sitting in one of the chairs in the yard smoking a cigarette, which he carelessly discarded.

In support of his motion for summary judgment, Lo Schiavo argues that there is no evidence of his negligence. Lo Schiavo also argues that because his building pre-dates the 1968 Building Code changes, the Building Code's fire alarm and sprinkler requirements do not apply to his building.

In opposition to Lo Schiavo's motion for summary judgment, the defendant Omar argues that Lo Schiavo was negligent in failing to maintain the existing sprinkler and fire alarm systems in his building.

Also in opposition Lo Schiavo's motion, Casa Elegante argues that the post-1968 Building Code provisions, cited in its bill of particulars, apply to Lo Schiavo's building because the plaintiffs' loft was converted from commercial to residential use. It is argued that the conversion makes the Building Code applicable.

In reply, and in further support of his motion, Lo Schiavo argues that there is no proof that the conversion from commercial to residential use had an effect on the treatment of the property under the Building Code.

In support of its cross motion for summary judgment, Casa Elegante argues that Fire Marshal Matteo's conclusion that the fire could have been caused by an errant lit cigarette is insufficient to create a triable issue of negligence, notwithstanding that the restaurant workers normally smoked in the area (citing Tower Ins. Co. of New York v M.B.G. Inc., 288 AD2d 69 [1st Dept 2001]).

In opposition to Casa Elegante's cross motion, the plaintiffs argue that it was negligence for Casa Elegante to place combustible material in the alley, and knowingly permit the restaurant workers to sleep, lounge, and smoke on the furniture.

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 issue of fact from the case (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The court will first dispose of Lo Schiavo's motion for summary judgment, before turning to Casa Elegante's cross motion.

Lo Schiavo relies on Administrative Code § 27-111, which grandfathered any lawful use and occupancy existing on the effective date (1968) of the Building Code provisions in question, and provides:

The lawful occupancy and use of any building, including the use of any service equipment therein, existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements, as provided in section 27-105 of article one of this subchapter, may be continued unless a retroactive change is specifically required by the provisions of this code.

Casa Elegante relies on Administrative Code § 27-118 (a), which states:

Except as otherwise provided for in this section, if the alteration of a building or space therein results in a change in the occupancy group classification of the building under the provisions of subchapter three, then the entire building shall be made to comply with the requirements of this code.

This subsection, incorporates, by reference, Administrative Code §§ 27-115 through 27-117 (see, Administrative Code § 27-118 [c]), which provide that § 27-118 does not apply unless the cost of renovations exceeds a certain percentage of the value of the building.

Triable issues of fact exist as to whether the alterations and repairs made to **171 East 118th Street** brought it within the purview of the Building Code. In Lesocovich v 180 Madison Ave. Corp. (**81 NY2d 982 [1993]**), the Court of Appeals held that the burden is on the owner, as the proponent of a motion for summary judgment, to make out a prima facie case, by submitting proof in admissible form, eliminating any issue as to the applicability of the Building Code to the building in question.

Here, the defendant/third-party plaintiff Casa Elegante has proffered evidence in opposition, indicating that costly alterations were made to Lo Schiavo's premises which resulted in a change in the occupancy group classification, as well as documentary evidence indicating that Lo Schiavo and the plaintiffs themselves, by installing sprinklers and a fire alarm system, believed that the **1968** Building Code applied, while Lo Schiavo and the plaintiffs, who are certainly in a better position to obtain documentation concerning the alterations, their costs, and the value of the building, have remained silent. As a result, this court concludes that issues of fact exist as to whether the premises fall within the purview of the cited sections of the Administrative Code, and, if so, whether the failure of the fire alarm and sprinklers to operate violated any of those provisions cited by Casa Elegante.

Turning to the cross motion, negligence actions are particularly unsuited for summary judgment (Ugarriza v Schmieder, **46 NY2d 471,475 [1979]**; Andre v Pomeroy, **35 NY2d 361, 366-367 [1974]**). Questions concerning foreseeability and causation are generally for the fact-finder (Derdiarian v Felix Constr. Corp., **51 NY2d 308 [1980]**). The presence of the illegally stored furniture in the alley created the occasion for the fire. Whether or not the intervening act of discarding a cigarette was foreseeable is a triable issue of fact.

Contrary to Casa Elegante's assertion, it has not met its burden of eliminating any material issue of fact from this case. The burden is on Casa Elegante, as the movant for summary judgment, to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,

and the failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Avotte v Gervasio*, 81 NY2d 1062[1993]). Plaintiffs have identified a dangerous condition caused by Casa Elegante's negligence in storing furniture in an alley. It is not the plaintiffs' burden to show, in the first instance, that the storage of the furniture led to the fire. Rather, it is Casa Elegante's burden to show, in the first instance, that such storage was not the cause of the fire. In light of Casa Elegante's failure to come forward with any evidence on the issue of its alleged negligence, the burden to offer evidence on the issue never shifted to the plaintiffs.

Furthermore, the evidence is sufficient to establish a prima facie case of negligence against Casa Elegante. In a circumstantial evidence case, such as this, the plaintiffs are not required to exclude every other possible cause of the fire other than the defendants' negligence. Rather, the other possible causes must be rendered sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation. It is enough that the plaintiffs show facts and conditions from which the negligence of the defendants, and the causation of the fire by that negligence, may reasonably be inferred (*Ingersoll v Liberty Bank of Buffalo*, 278 NY 1 [1938]).

Triable issues of fact are presented, including: (1) whether it was negligence for Casa Elegante to illegally store the furniture in the alley; (2) whether Casa Elegante exercised reasonable care to prevent the restaurant workers' use of or access to the illegally stored furniture; (3) whether it was foreseeable that the restaurant workers' use of the illegally stored furniture for smoking and lounging would lead to a discarded cigarette causing a fire; and (4) whether a discarded cigarette caused the fire.

Reasonable persons could differ as to whether Casa Elegante could have done more to prevent access to its stored furniture by smoking restaurant workers, and whether Casa Elegante should have foreseen that it was likely that a carelessly discarded cigarette would cause a fire.

In Tower Ins. Co. of New York v M.B.G. Inc., (288 AD2d 69, supra), the individual defendant, the store's owner and manager, admittedly smoked a pack of cigarettes a day in the back room. The Suffolk County Police Department, which investigated the accident, reported that, while the cause of the fire could not be determined, "it could have been caused by an errant lit cigarette left on the shelf in the back room." The court held that such evidence is insufficient to raise the issue of fact claimed, because to infer that defendant caused the fire because he normally smoked in the area where the fire started is to indulge in unwarranted speculation.

The legal authority heavily relied upon by Casa Elegante, (Tower Ins. Co. of New York v M.B.G. Inc., supra) is distinguishable on its facts from the instant case, in that Tower Insurance involves an allegation that the defendant therein carelessly discarded the lit cigarette. Here, on the contrary, all that is alleged is that Casa Elegante negligently stored furniture. Casa Elegante had a duty to maintain its premises in a reasonably safe condition (Tagle v Jakob, 97 NY2d 165 [2001]). There is a triable issue of material fact concerning whether Casa Elegante was negligent in creating or permitting the condition that led to the plaintiffs' property damage. The source of ignition is secondary. The source of ignition could have been lightning, arson, a restaurant grease fire, etc. The plaintiffs have shown facts and conditions from which the negligence of Casa Elegante, and the cause of the fire by that negligence, may reasonably be inferred.

Accordingly, it is

ORDERED that the motion, and the cross motion for summary judgment, are both denied.

Dated: _____

10/23/07

MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION