Siben v Croman
2008 NY Slip Op 33712(U)
August 12, 2008
Supreme Court, New York County
Docket Number: 101379/05
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

-- X

ANDREA SIBEN,

Plaintiff,

INDEX NO. 101379/05

-against-

STEVEN CROMAN, HARRIET CROMAN, and EDWARD M. CROMAN,

Defendants.

-- X

FILED AUG 15 2008 COUNTY CLERK'S OFFICE NEW YORK

LOUIS YORK, J.:

Defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint.

Plaintiff cross-moves for an order: (i) striking defendants' answer due to spoliation of evidence consisting of the building maintenance records for two years prior to the June 4, 2004 fire which allegedly caused plaintiff's injuries, and the electric shoe-buffing machine owned by plaintiff's neighbor; (ii) granting leave to "renew" and upon renewal granting plaintiff's prior motion to dismiss defendants' answer on the grounds of non-compliance with plaintiff's discovery demands and spoliation of evidence; and, (iii) sanctioning defendants in the amount of $10,000 for bad faith non production of building maintenance records.

This is an action for damages for personal injuries allegedly sustained by plaintiff on June 10, 2004 as the result of inhaling smoke from a fire in a neighboring apartment in a building owned by defendants. The complaint asserts a single cause of action based on negligence (see defendants' exhibit A).

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Defendants contend that they are entitled to summary judgment dismissing the complaint because the evidence fails to demonstrate that any negligence on their part proximately caused plaintiff's injuries or that they had actual or constructive notice of any dangerous condition in the building.

In support of her cross-motion, plaintiff argues that defendants' answer should be stricken and defendants should be sanctioned for bad faith conduct because they failed to turn over building maintenance records, which plaintiff needs to prove notice, despite being ordered by the court to do so and because they failed to preserve an electrical shoe-buffing machine belonging to plaintiff's neighbor which may have caused the fire. Plaintiff argues further that she should be granted leave to "renew" her prior motion to strike defendants' answer for failure to comply with her discovery demands and for spoliation of evidence.

The proponent of a motion for summary judgment must establish his defense or cause of action sufficiently to warrant a court's directing judgment in his favor as a matter of law and he must do so by tender of evidentiary proof in admissible form (see Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). The opponent must then produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact; mere conclusions or unsubstantiated assertions are insufficient (*id.*).

As noted above, plaintiff previously moved (seq. no. 001) to strike defendants' answer for failure to comply with her discovery demands. By decision and order dated June 1, 2007, this court granted plaintiff's motion to the extent of directing defendants to furnish the materials sought by plaintiff, while stating that if defendants are still unable to produce such records they shall provide a detailed affidavit from a person with personal knowledge stating why the records

are not available (see plaintiff's cross-motion, exhibit Q, p 4). On or about June 22, 2007 defendants produced voluminous materials in purported compliance with the court's order (see defendants' reply affirmation, exhibit 1). First among the materials (which are not tabbed, although extensive) is an affidavit dated June 22, 2007 from Christine Bermudez, the property manager of defendants' building, in which she states in pertinent part that she conducted an extensive search for records pertaining to the building and was unable to locate any maintenance records for two years prior to June 10, 2004 (see defendants' reply affirmation, exhibit A to exhibit 1, ¶¶ 2 and 6). In her affidavit dated October 16, 2006, defendant Harriet Croman averred that upon conducting a further search she was unable to locate building maintenance records for two years prior to June 10, 2004 (see plaintiff's cross-motion, exhibit F, ¶ 3) and at her examination before trial held on October 23, 2006, Ms. Croman testified that she did not maintain building maintenance records for the two years prior to June 10, 2004 (see defendants' motion, exhibit G, p 22). "On a motion for summary judgment the court is not to determine credibility" (S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation, 34 NY2d 338, 341 [1974]). In view of the sworn statements set forth above and the ruling in S.J. Capelin, the court is constrained to conclude that the maintenance records sought by plaintiff either do not exist or cannot be found.

Plaintiff's attorney contends that "[i]t was foreseeable that the [shoe-buffing machine] would be a critical piece of evidence as it was clear that the fire took place in the closet and this device was found burnt within the closet" (see affirmation of Randolph Janis in support of plaintiff's cross-motion, p 8, ¶ 23). Counsel's contention that the fire clearly took place in the closet exculpates defendants and insulates them from a charge of negligence because the papers

before the court clearly reflect that the closet was in plaintiff's neighbor's apartment. "Foreseeability is an essential element of negligence [citation omitted]" (Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 518 [1980]). There is no way that defendants could foresee (even if they knew about the buffing machine, which has not been claimed) that the piece of machinery owned by plaintiff's neighbor and kept in the closet of his apartment would cause physical injury to plaintiff.

Although academic, the court finds that the branch of plaintiff's cross-motion requesting leave to renew is improperly cast. A motion for leave to renew must be based on additional material facts which existed at the time of the prior motion but were not known by the moving party and therefore not made known to the court (see Foley v. Roche, 68 AD2d 558, 568 [1st Dept 1979], app den 56 NY2d 507 [1982]). Were plaintiff seeking leave to reargue, her motion would be both improper and untimely (id., at 567-568).

Accordingly, it is hereby

ORDERED that defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is granted, together with costs and disbursements; and it is further

ORDERED that plaintiff's cross-motion for an order granting multiple relief is denied in its entirety.

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The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: Aug. 12, 2008

J.S.C.

LOUIS B. YORK
J.S.C.