

Brown v Howson

2013 NY Slip Op 32653(U)

October 16, 2013

Supreme Court, New York County

Docket Number: 104524/2011

Judge: Shlomo S. Hagler

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

CANDICE BROWN,

Plaintiff,

- against -

DAVID HOWSON and JESSICA HOWSON,

Defendants.

INDEX NO.: 104524/2011

MOTION SEQ. NO.: 002

DECISION and ORDER

Motion by defendants for summary judgment dismissing complaint or striking and dismissing plaintiff's claim for negligence under a theory of *res ipsa loquitur*.

	Papers Numbered
Defendants' Notice of Motion for Summary Judgment	<u>1</u>
Affirmation of Defendants' Counsel Valerie Van Leer-Greenberg, Esq., in Support of Defendants' Motion with Exhibits "A" through H	<u>2, 3</u>
Affirmation of Plaintiff's Counsel, Hendrick Vandamme, Esq. in Opposition to Defendants' Motion with Exhibits "1" through "3"	<u>4</u>
Affidavit of Carlisle Bend, dated December 12, 2012	<u>5</u>
Affidavit of Tanya Alfonso, dated December 12, 2012	<u>6</u>
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment	<u>7</u>
Defendants' Reply Affirmation of Defendants' Counsel Valerie Van Leer-Greenberg, Esq., in Further Support of Defendants' Motion with Exhibits "A" and "B"	<u>8</u>
Transcript of Oral Argument of March 18, 2013	<u>9</u>

Cross-Motion: No Yes Number of Cross-Motions: 0

Upon the foregoing papers, it is hereby ordered that Defendants' Motion for Summary Judgment is granted and the Complaint is Dismissed as set forth in the attached separate written Decision and Order.


FILED

OCT 25 2013

Dated: October 16, 2013

New York, New York

COUNTY CLERK'S OFFICE
NEW YORK


Hon. Shlomo S. Hagler, J.S.C.

Check one: Final Disposition Non-Final Disposition

Motion is: Granted Denied Granted in Part Other

Check if Appropriate: SETTLE ORDER SUBMIT ORDER

DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 17

FILED

OCT 25 2013

-----X
 CANDICE BROWN,

Plaintiff,

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 -----X

COUNTY CLERK'S OFFICE
 Index No. 104524/2013
 NEW YORK

DECISION and ORDER

Motion Sequence No.: 002

Hon. Shlomo S. Hagler, J.S.C.:

Defendants David Howson (“Howson”) and Jessica Howson, (collectively, “defendants” or “landlords”) move under motion sequence number 002, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing the complaint or, in the alternative, striking and dismissing that portion of plaintiff’s Supplemental Verified Bill of Particulars, dated November 2, 2012, which asserts negligence under the theory of *res ipsa loquitur*. Plaintiff Candice Brown (“Brown” or “plaintiff”) opposes the motion alleging triable issues of fact.

Factual Background

This is an action for personal injuries allegedly sustained by the plaintiff when the ceiling in her apartment, located at 2117 Fifth Avenue, New York, New York, fell on her. On the morning of August 27, 2010, while plaintiff was eating her breakfast, she heard a loud sound, and then a portion of the ceiling fell upon her. (Examination Before Trial of Candice Brown, dated October 22, 2012, [“Brown EBT”], at p. 37.) Brown claims that the cracks had been there for years prior to the time she moved in to the apartment and that a painter had come in several years earlier to paint the apartment, including the living room ceiling, and he informed Howson of the cracks. (Brown EBT at p. 40.) Howson avers that no one ever reported any dangerous condition in the apartment

to him prior to the incident. (Examination Before Trial of David Howson, dated October 22, 2012, [“Howson EBT”] at p. 41.)

Following the close of discovery, plaintiff produced two affidavits – one from Tanya Alfonso (“Alfonso”) and one from Carlisle Bend (“Bend”), both dated December 12, 2012. Alfonso states in her affidavit that “[i]n or about 2002, I noticed cracks in the ceiling of the living room” of the apartment and “[s]hortly thereafter, I informed David Howson, the owner of the subject premises.” Bend stated in his affidavit that “[i]n or about 2004, I noticed cracks in the living room in Apartment No. 6, when I went to discuss possible painting for TANYA ALFONSO.” Bend further states in his affidavit that “[s]hortly thereafter, I informed David Howson, the owner of the subject premises.”

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v N.Y.U. Medical Ctr.*, 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact.” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983].) “It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proof, in order to show that the matters set up in his [complaint] are real and are capable of being established upon a trial.” (*Spearmon*, 96 AD2d at 553, quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant’s papers, the movant’s facts may be deemed admitted and summary judgment granted since no triable issue of facts exists. (See *Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975]).

Discussion

Disposition of this motion turns upon whether this Court may consider the affidavits of Bend and Alfonso because without them, there is no evidence that Howson had notice of the alleged defective condition.

A plaintiff must provide notice of its witnesses before the close of discovery. If notice witnesses were not disclosed before discovery was completed and the note of issue filed, the affidavits of such undisclosed witnesses cannot be considered by the court on a summary judgment motion. (*See Dunson v. Riverbay Corp.*, 103 AD3d 578, 578-579 [1st Dept. 2013]; *Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]; *Concetto v. Pedalino*, 308 AD2d 470, 470-471 [2nd Dept 2003]; *Robinson v New York City Hous. Auth.*, 183 AD2d 434, 435 [1st Dept 1992].) In this case, the affidavits of Alfonso and Bend were only produced after discovery was closed, the note of issue was filed, and only in opposition to defendants' summary judgment motion and, therefore, may not be considered. Since the affidavits cannot be considered, plaintiff has failed to provide proof in an admissible form that the defendants had been given notice of the allegedly dangerous condition.

Assuming, *arguendo*, that the Alfonso and Bend affidavits were to be considered, these purported notices were legally insufficient. When giving notice of a defective condition, the landlord must be given detailed notice of the exact nature of the dangerous condition. (*See Dunson v. Riverbay Corp.*, 103 AD3d at 579 [a report of "dangerous plaster falling from the ceiling" without specifying where in the apartment the condition was occurring was insufficient to put the landlord on notice]; *cf. Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 969 [NY 1994] and *Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] ["general awareness" of defective or dangerous condition is legally insufficient to constitute notice of the particular condition that caused the injury].) Here, Alfonso and Bend alleged in their affidavits that they observed cracks in

the ceiling of the living room of the apartment and notified Howson. Alfonso claims in her affidavit that she observed the cracks “in or about 2002” and that she informed Howson “shortly thereafter.” Similarly, Bend alleges in his affidavit that he observed the cracks “in or about 2004” and informed Howson “shortly thereafter.” The lack of details as to the specific dates in these affidavits precludes their consideration as legally sufficient notice.

Finally, there is a large unexplained gap in time between the alleged notices and the accident which took place in 2010. Specifically, Alfonso states that she gave notice in 2002, and Bend states that he gave notice in 2004. The six to eight year gap between the purported notices and the accident, with no explanation of what happened in the interim, is too attenuated to support plaintiff’s contention that the defendants had legally sufficient notice of the particular condition that allegedly caused the accident.

Res Ipsa Loquitur

Defendants also moves to strike or dismiss that portion of plaintiff’s Supplemental Verified Bill of Particulars, dated November 2, 2012, which asserts negligence under the theory of *res ipsa loquitur*. “To apply *res ipsa loquitur*, a plaintiff must establish that: “(1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff” (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 [1st Dept 2013]). In the instant case, as the plaintiff and Alfonso were both in possession of the apartment as tenants, defendants were not in exclusive control of the apartment or its ceiling. Therefore, the doctrine of *res ipsa loquitur* is plainly not applicable in this situation.

Inasmuch as the Alfonso and Bend affidavits cannot be considered on this motion, plaintiff has failed to counter Howson’s claim of lack of notice or raise a triable issue of fact in opposition

to this summary judgment motion. As such, defendants' motion for summary judgment and to dismiss plaintiff claim of *res ipsa loquitur* must be granted.

Conclusion

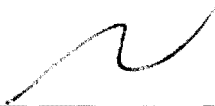
Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint and against David Howson and Jessica Howson is granted. The clerk of the court is hereby directed to enter judgment dismissing the complaint.

The foregoing constitutes the decision and order of this Court.

ENTER :

Dated: October 16, 2013
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

FILED

OCT 25 2013

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NEW YORK**