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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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LLOYDS OF LONDON a/s/o MIKE RUTHERFORD, Index No. 151786/2012

Plaintiff

- against - DECISION AND ORDER

JAMES W. EVANSTON,

Defendant

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LUCY BILLINGS, J.:

Plaintiff sues to recover for property damage caused by water that leaked from defendant's apartment to the apartment below owned by plaintiff's subrogor. Plaintiff moves for summary judgment on liability, C.P.L.R. § 3212(b) and (e), or to dismiss defendant's affirmative defenses. C.P.L.R. § 3211(b). Defendant cross-moves for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). Although defendant denies his liability, he stipulated to discontinue his affirmative defenses to his liability, rendering moot the alternative relief sought by plaintiff.

I. UNDISPUTED BACKGROUND FACTS

The parties do not dispute that defendant, as the owner of his apartment in the condominium building housing his apartment and the apartment owned by plaintiff's subrogor, individually owned and controlled the heating, ventilation, and air conditioning (HVAC) units in his apartment. Consequently, on December 16, 2010, defendant arranged for a service technician to

inspect an inoperative HVAC unit in defendant's apartment. The technician advised defendant that the unit needed replacement.

Two days after the technician's service, defendant turned the HVAC unit on for a short period and then turned it off, as it was blowing cool instead of warm air. On December 30, 2010, 14 days after the unit was inspected and while defendant and his wife were away from their apartment on vacation, water emanating from defendant's apartment leaked down into the apartment of plaintiff's subrogor below defendant's apartment, causing damage in that apartment below.

II. PLAINTIFF'S ENTITLEMENT TO SUMMARY JUDGMENT

Plaintiff claims the water that caused damage in the apartment of plaintiff's subrogor leaked from defendant's HVAC unit.

A. Direct Evidence of Defendant's Liability

Premises owners owe a duty to maintain their premises in a condition that will not foreseeably cause injury to persons or other property. 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d 280, 290 (2001); 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667 (1st Dep't 2011). See Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Kalish v. HEI Hospitality, LLC, 114 A.D.3d 444, 445 (1st Dep't 2014); Hasley v. Abels, 84 A.D.3d 480, 482 (1st Dep't 2011); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006). To hold defendant liable for a condition on his premises due to his negligence, plaintiff must demonstrate that he created the condition or

received actual or constructive notice of the condition in time to remedy the condition before it caused the injury claimed. Kalish v. HEI Hospitality, LLC, 114 A.D.3d at 445; Hasley v. Abels, 84 A.D.3d at 482; Alexander v. New York City Tr., 34 A.D.3d at 313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006). Thus defendant, as the owner of the apartment above the apartment of plaintiff's subrogor, would be liable for damage caused by defendant negligently allowing water to infiltrate the apartment below. Liberman v. Cayre Synergy 73rd LLC, 108 A.D.3d 426, 427 (1st Dep't 2013).

Plaintiff claims that defendant, as the owner of his apartment who has exclusive control over the HVAC unit that caused the water leak, not only failed to follow the technician's advice to replace the HVAC unit, but turned it on, causing the unit to leak water. Plaintiff presents no evidence, however, showing defendant's actual or constructive notice of a foreseeable leak. In fact, defendant's deposition testimony that plaintiff presents demonstrates defendant was unaware of any prior water leaks from any of his HVAC units, Aff. of Marc B. Schuley Ex. D, at 53, and received no warning of this danger from the technician who inspected the inoperative unit. Id. at 42. Nor does any evidence in the record, whether deposition testimony or an affidavit, from either an expert or a lay witness, establish that, by not replacing the HVAC unit and turning it on for 10 minutes, id. at 89-90, defendant caused it to leak water 12 days later.

B. Res Ipsa Loquitur

Plaintiff nonetheless insists that this water leak was a condition that does not occur absent negligence, entitling plaintiff to an inference of negligence and, in the absence of admissible evidence rebutting this inference, summary judgment in plaintiff's favor. Res ipsa loquitur, a doctrine based on circumstantial evidence of defendant's unspecified negligence, entitles plaintiff to summary judgment only where plaintiff's circumstantial evidence is so convincing and defendant's opposition so weak as to render an inference of defendant's negligence inescapable. Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006); Stubbs v. 350 East Fordham Road, LLC, ___ A.D.3d ___, 2014 WL 2209142, at *1 (1st Dep't May 29, 2014).

For res ipsa loquitur to apply, plaintiff must establish that the leak (1) was not caused by plaintiff's contributory action, (2) was caused by an instrumentality in defendant's exclusive control, and (3) was a condition that ordinarily does not occur absent negligence. Morejon v. Rais Constr. Co., 7 N.Y.3d at 209; Smith v. Consolidated Edison Co. of N. Y., Inc., 104 A.D.3d 428, 429 (1st Dep't 2013). Even if plaintiff is entitled to an inference of negligence under res ipsa loquitur, the doctrine does not relieve plaintiff of its burden to establish the absence of any factual issue whether defendant's negligence caused the damage claimed. James v. Wormuth, 21 N.Y.3d 540, 548 (2007); Morejon v. Rais Constr. Co., 7 N.Y.3d at 212. See Smith v. Consolidated Edison Co. of N. Y., Inc., 104

A.D.3d at 430.

The record of evidence before the court nowhere suggests that plaintiff's subrogor contributed to the water leak. To establish defendant's exclusive control of the instrumentality that plaintiff claims caused the leak, plaintiff relies on the building superintendent's testimony that the individual condominium unit residents operate their HVAC units. Schuley Aff. Ex. F, at 37. Plaintiff need not establish defendant's sole physical access to his premises or that it was impossible for anyone other than defendant to exercise control over his premises. Hutchings v. Yuter, 108 A.D.3d 416, 417 (1st Dep't 2013); Singh v. United Cerebral Palsy of N.Y. City, Inc., 72 A.D.3d 272, 277 (1st Dep't 2010). Exclusivity of control bears on the likelihood that defendant was responsible for causing the harm and whether that likelihood is so high that it reasonably eliminates all other explanations for the leak. James v. Wormuth, 21 N.Y.3d at 548.

Defendant disclaims his exclusive control of the HVAC unit based on the service technician's access to the unit. Defendant himself, however, granted the technician access to perform the maintenance needed. Schuley Aff. Ex. D, at 39-40; Singh v. United Cerebral Palsy of N.Y. City, Inc., 72 A.D.3d at 277. Defendant was responsible for the maintenance, repair, and replacement of his HVAC units and their component parts. Schuley Aff. Ex. D, at 78-79. Although defendant was away from his apartment when the water leak occurred, plaintiff claims that he

was negligent before he departed, by turning the HVAC unit on after the technician advised defendant the unit needed replacement, and that that act of turning the unit on caused the subsequent leak. As the record shows no other entity or individual responsible for the operation or maintenance of the HVAC unit, Schuley Aff. Ex. D, at 46, defendant establishes the element of exclusive control necessary for any inference of defendant's liability for the harm the unit caused. Levine v. City of New York, 67 A.D.3d 510, 511 (1st Dep't 2009); Hodges v. Royal Realty Corp., 42 A.D.3d 350, 352 (1st Dep't 2007).

Even if water leaking from the HVAC unit were a condition that ordinarily does not occur absent negligence, the record still does not reveal any admissible evidence that the water leak from defendant's apartment originated from his HVAC unit. The only evidence that the HVAC unit leaked water is defendant's deposition testimony in a related action of multilayered hearsay from his daughter who was staying in his apartment the day of the leak:

Q: What did your daughter say to you?

A: She spoke to my wife.

Q: Did she ever speak to you?

A: No.

Q: Did your wife ever talk to you about what your daughter said?

A: Yes.

Q: What did she say?

A: There was water. Apparently one of the units was

> leaking water. The fire department broke down the door and that's basically it.

Schuley Aff. Ex. D, at 11-12. Consistent with the description of a forced entry to the apartment, defendant further testified that his daughter stated even she was not in the apartment when the leak occurred December 30, 2010, and never observed the HVAC unit leaking before the fire department broke into the apartment. Id. at 97-98. Although a party's admission even when based on hearsay is admissible, People v. Caban, 5 N.Y.3d 143, 151 n.* (2005); People v. Chico, 90 N.Y.2d 585, 589 (1997), defendant testified only that he heard how the leak occurred: that he heard his daughter's statement, which is not an admission of the facts in that statement. E.g., Giandana v. Providence Rest Nursing Home, 32 A.D.3d 126, 134 (1st Dep't 2006); rev'd on other grounds, 9 N.Y.3d 859 (2007); People v. Molson, 89 A.D.3d 1539, 1541 (4th Dep't 2011). Any assumption that the water leak came from the HVAC unit expressed by an attorney at defendant's deposition was never adopted by defendant. See People v. Campney, 94 N.Y.2d 307, 312-13 (1999); People v. Woodward, 50 N.Y.2d 922, 923 (1980).

Absent a showing that the HVAC unit caused the water leak, defendant's operation of the unit despite having been advised to replace it and whether water leaking from an HVAC unit ordinarily does not occur in the absence of negligence are of no consequence. At most, the record establishes that the leak emanated from defendant's apartment during his absence and that within the prior two weeks an HVAC unit in his apartment had been

malfunctioning. This evidence falls short of eliminating any reasonable explanation for the water leak originating from defendant's apartment other than his negligence, James v. Wormuth, 21 N.Y.3d at 548; Cortes v. Central El., Inc, 45 A.D.3d 323, 324 (1st Dep't 2007), so as to establish an inescapable inference of his negligence. Morejon v. Rais Constr. Co., 7 N.Y.3d at 209; Stubbs v. 350 East Fordham Road, LLC, ___ A.D.3d ___, 2014 WL 2209142, at *1; Bunting v. Haynes, 104 A.D.3d 715, 716 (2d Dep't 2013). Therefore the court denies plaintiff's motion for partial summary judgment. C.P.L.R. § 3212(b) and (e).

III. DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant is entitled to summary judgment dismissing plaintiff's complaint against him if he establishes that he received no actual or constructive notice of a condition likely to cause a water leak from his apartment. Issing v. Madison Sq. Garden Ctr., Inc., 116 A.D.3d 595, 595 (1st Dep't 2014); Rodriguez v. New York City Hous. Auth., 102 A.D.3d 407, 407 (1st Dep't 2013); Walters v. Collins Bldg. Servs., Inc., 57 A.D.3d 446, 446 (1st Dep't 2008); Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 500 (1st Dep't 2008). He may not obtain summary judgment merely by pointing to the gaps in plaintiff's evidence. Coastal Sheet Metal Corp. v. Martin Assoc., Inc., 63 A.D.3d 617, 618 (1st Dep't 2009); Bryan v. 250 Church Assoc., LLC, 60 A.D.3d 578, 578 (1st Dep't 2009); Torres v. Industrial Container, 305 A.D.2d 136, 136 (1st Dep't 2003); Deutsche Bank Natl Trust Co. v. Spanos, 102 A.D.3d 909, 911 (2d Dep't 2013).

Defendant relies on the dismissal of an action that also involved defendant's HVAC unit, by the condominium building's insurer against Crowne Aire Inc., which provided the maintenance services for the HVAC unit. Although defendant here was another defendant in that action, the court there dismissed only the claims against Crowne Aire. That court concluded that Crowne Aire's failure to shut off the water valve from which water flowed to the HVAC unit, to prevent any water leakage, was not negligent, because Crowne Aire addressed the HVAC unit's malfunctioning for which service was requested and found no indication or danger of water leakage.

That conclusion is without collateral estoppel effect here, as the decision did not determine defendant's liability. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199-200 (2008); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007). See Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); Gomez v. Brill Sec., Inc., 95 A.D.3d 32, 35 (1st Dep't 2012). Although the decision may establish Crowne Aire's lack of actual and constructive notice, it does not in any way show that defendant, who owned and resided in his apartment where he used the HVAC unit, did not receive actual or constructive notice of the leaking condition, whether in the HVAC unit or originating elsewhere in his apartment, or actually cause that condition himself.

Nor does defendant make that showing with admissible evidence. He presents no evidence that he did not cause the leak

by turning the HVAC unit on two days after being advised that it needed to be replaced. Stubbs v. 350 East Fordham Road, LLC, ___ A.D.3d ___, 2014 WL 2209142, at *1; Guerrero v. Duane Reade, Inc., 112 A.D.3d 496, 496 (1st Dep't 2013); O'Halloran v. City of New York, 78 A.D.3d 536, 537 (1st Dep't 2010); Torres v. New York City Tr. Auth., 305 A.D.2d 165, 165 (1st Dep't 2003). Defendant did testify that the Crowne Aire technician suggested to defendant that he turn the unit on after it cooled down to test its functioning, Schuley Aff. Ex. D, at 42, which might negate his negligence in turning the unit on. Nevertheless, that testimony does not negate his causation of a leaking condition originating in his apartment or at least his notice of such a condition before he left for his vacation, giving him time to remedy the condition before it caused the damage claimed. E.g., Alexander v. New York City Tr., 34 A.D.3d at 313. In any event, even if defendant presented evidence negating his negligence, the testimony of the technician, that he advised defendant not to operate the HVAC unit after the technician shut it off, Schuley Aff. Ex. E, at 24, contradicts defendant's testimony and raises a factual issue that defendant was negligent, an issue that may not be resolved via summary judgment. Justino v. Santiago, 116 A.D.3d 411, 411 (1st Dep't 2014); Hernandez v. 21 Realty Co., 113 A.D.3d 503, 503 (1st Dep't 2014); Guerrero v. Duane Reade, Inc., 112 A.D.3d at 496; O'Halloran v. City of New York, 78 A.D.3d at 537.

IV. DISPOSITION

Consequently, for the reasons explained above, the court denies both plaintiff's motion for summary judgment on liability, C.P.L.R. § 3212(b) and (e), and defendant's cross-motion for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). The court also denies as moot plaintiff's motion to dismiss defendant's affirmative defenses, C.P.L.R. § 3211(b), based on his stipulation discontinuing his affirmative defenses to his liability.

DATED: June 5, 2014

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.