Frassinelli v 120 E. 73rd St. Corp.
2015 NY Slip Op 31515(U)
August 12, 2015
Supreme Court, New York County
Docket Number: 118093/09
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
--X

DECISION AND ORDER

MARZIA FRASSINELLI and ALBERTO CONTI,

Plaintiffs,

Index №.: 118093/09
Motion Seq. Nos.
010, 011, 012

-against-

120 EAST 73rd STREET CORP., OCRAM HOLDING INC., RAGNO BOILER MAINTENANCE, and TIFFANY HEATING SERVICES, INC.,

Defendants.
--X
120 EAST 73rd STREET CORP.,

Third-party Plaintiff,

-against-

RAGNO BOILER MAINTENANCE and TIFFANY HEATING SERVICES, INC.,

Third-party Defendants.
--X
120 EAST 73rd STREET CORP., OCRAM INC. and OCRAM HOLDING, INC.,

Second Third-party Plaintiffs,

-against-

E. ROGER HOTTE and HARLINGEN COPRORATION a/k/a HARLINGEN MANAGEMENT CO.,

Second Third-party Defendants.
--X
CAROL R. EDMEAD, J.S.C.:

In a case involving a woman who was scalded by water while showering, second third-party defendant E. Roger Hotte (Hotte) seeks summary judgment, pursuant to CPLR 3212, dismissing the second third-party complaint as against it, as well sanctions against

defendants/second third-party plaintiffs 120 East 73rd Street Corp. (120 East 73rd), Ocram Inc. (Ocram), and Ocram Holding, Inc. (Ocram Holding) (together, the Ocram defendants) (motion seq. No. 010). The Ocram defendants also move for summary judgment dismissing the complaint, as well as all cross-claims and counterclaims against them; in the alternative, they move for summary judgment against Hotte (motion seq. No. 011). Plaintiff cross-moves against 120 East 73rd, Ocram and Ocram Holding, Inc., seeking summary judgment against them, as well as summary judgment against defendant Tiffany Heating Services, Inc. (Tiffany). Finally, Tiffany seeks summary judgment dismissing the complaint (motion seq. No. 012). The motions are consolidated for disposition.

BACKGROUND

Plaintiff Marzia Frassinelli (Frassinelli), an Italian national, was on vacation in New York City with her family when she was scalded while showering. The shower, which was in a bathtub, had three dials, with hot and cold separated by a dial that switches the water from the shower nozzle to the bath nozzle. When Frassinelli finished showering, she turned the middle dial to switch the water stream from the shower to the bath nozzle. While the water coming from the shower nozzle was comfortable, the water coming from the bath nozzle was scalding. Frasinelli slipped several times trying to get out of the bathtub until her daughter finally pulled her out (Frassinelli tr at 76; 83-108). Frassinelli suffered severe burns on the lower half of her body and required a skin graft surgery on her right leg (*id.* at 115-119).

The amended complaint alleges that defendants are liable for negligence. Moreover, plaintiff Alberto Conti brings derivative claims for loss of his wife's services.

ANALYSIS

"Summary judgment must be granted if the proponent makes '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 opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Hotte

Hotte owned the building 16 years before Frassinelli's accident. The Ocram defendants claim that Hotte is liable to them for common-law indemnification and contribution. Both causes of action require a showing of active wrongdoing (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011]; CPLR 1401). Here, the Ocram defendants must show that Hotte is liable in negligence in order for him to be liable for common-law indemnification or contribution.

"In order to establish negligence, [a] plaintiff is required to prove the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). In these circumstances, the element of duty is unlikely to exist between a previous owner and an injured party such as Frassinelli, as "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership,

control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]).

However, there is a narrow exception where prior owners may be liable "where a dangerous condition may have existed at the time of the conveyance and the new owner or manager has not had reasonable time to discover and remedy the defect" (*Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]). In *Armstrong*, the plaintiff was injured "shortly after management of the [property] changed hands" (*id.* at 318). In contrast, the First Department has held that four years is long enough to discover a defect (*Humareda v 500A E. 87th St.*, LLC, 117 AD3d 533, 534 [1st Dept 2014]). Here, where ownership changed hands 16 years ago, the Ocram defendants have had sufficient time to discover and remedy any defect that existed during the time that Hotte owned the building. In these circumstances, Hotte cannot be liable in negligence for Frassinelli's injuries. As such, the Ocram defendants claims against Hotte must be dismissed.

Hotte also seeks sanctions against the Ocram defendants for bringing frivolous claims against him. Under 22 NYCRR 130-1.1 [c] [1] attorney conduct is frivolous, such that a court may, in its discretion, order sanctions if "it is completely without merit in law and cannot be supported by reasonable argument for an extension, modification or reversal of existing law." Here, while the Ocram defendants have a weak basis to argue for liability against Hotte, it is not so weak as to be frivolous. As such, the branch of Hotte's motion seeking sanctions is denied.

II. The Ocram Defendants

Plaintiffs allege that Frassinelli's accident was caused by a defective tempering valve, as well as a defectively designed shower that prevented Frassinelli from escaping the scalding water.

The Ocram defendants argue that they had no notice of any dangerous condition prior to plaintiff's accident. In support, the Ocram defendants note that Frassinelli and her family did not complain about the water temperature prior to the accident. The Ocram defendants also submit an affidavit from Marco Walker (Walker), who testified that he did not receive "any complaints or notifications of any dangerous conditions involving the bathroom" (Walker aff, ¶ 12).

Plaintiffs argue that the Ocram defendants created the defect through improper maintenance. In support, plaintiffs submit an affidavit from Donald Wise (Wise), a mechanical engineer and retired master plumber. Wise opines that a "failure of a Holby Tempering Valve" allowed the water in Frassinelli's shower to reach scalding levels (Wise aff, ¶ 28). Wise attributes this failure of the tempering valve to improper maintenance:

> "a Holby Tempering Valve is not an item that can be maintained properly by utilizing the breakdown method of maintenance. A thermostat is often the component that causes Tempering Valves to fail in a hazardous manner. A preventative maintenance program would replace the thermostat periodically, and before the time at which early failures start to occur. Combining a periodic monitoring program with preventative maintenance program is an acceptable method for maintaining a Tempering Valve. Proper maintenance must incorporate a periodic monitoring program, [with] inspections increasing in frequency as a Valve approaches the end of its service life. A heightened equipment monitoring schedule would have been required for equipment approaching its end-of-life if predictive maintenance was employed. Testimony provided indicates that the valve was rarely, if ever, inspected before it was allowed to fail and expose tenants to the hazards of excessively hot water with fluctuating temperatures. Failure to implement a maintenance program for the Holby Valve, and to maintain it in a safe condition on an ongoing basis . . . was a substantial cause of [Frassinelli's] injury"

(*id.*, ¶¶ 46-49).

Wise also faults the Ocram defendants for failing to have the valve inspected by a licensed master plumber (*id.* ¶¶ 50-56) and for failing to use a mixing valve, a safer alternative to

a tempering valve (*id.* at 71-87).[1] It is clear that Wise's testimony raises a question of fact as to whether the Ocram defendant's created the dangerous water condition that caused Frassinelli's accident through negligent maintenance.

A showing of notice is not required where the property owner, or party in possession or control of the property, creates the allegedly dangerous condition (*see San Marco v Village/Town of Mount Kisko*, 16 NY3d 111 [2010]). As plaintiff raises an issue of fact as to whether the Ocram defendants caused the dangerous condition, the Ocram defendant's motion must be denied. While this disposes of the Ocram defendant's motion, there is also a question of fact as to whether the shower's placement was a dangerous condition that trapped Frassinelli with the scalding water and exacerbated her injuries.

III. Tiffany

Tiffany handled inspections of the buildings boiler for the Ocram defendants. It argues that it owed no duty to Frassinelli, and that, in any event, it was not negligent in its work relating to the boiler. Duty is the threshold question. *Espinal v. Melville Snow Contrs.,* 98 NY2d 136 [2002], the seminal case involving question of duty owed by contractors to noncontracting parties, held that there is no duty in between such parties, except in three situations:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*id.* at 140 [internal quotation marks and citation omitted]).

[1] Wise opines that a mixing valve is safer than a tempering valve because a malfunction in the former results in cold water whereas a malfunction in the latter results in hot water.

Here, Frassinelli fails to make a prima facie showing that any of these three exceptions are applicable (*see generally Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431 [1st Dept 2008]). As Tiffany had no duty to Frassinelli, it cannot be liable in negligence. Thus, Tiffany's motion dismissing all claims against it is granted. Accordingly, the branch of plaintiffs' cross motion seeking summary judgment against Tiffany must be denied.

IV. Plaintiffs' Cross Motion

As against the Ocram defendants, plaintiffs reiterate the same arguments discussed above relating to the creation of a defect through negligent maintenance as well as the allegedly defective design of the shower/bathtub. Plaintiffs also argue, again relying on the affidavit of their expert, Wise, that the Ocram's defendants violated various New York City agency regulations. The Ocram defendants submit their expert affidavit from Daryl James Smith (Smith), a professional engineer who opines that the Ocram defendants did not violate any applicable regulations and were not negligent. As is typically the case where both sides submit expert testimony in a negligence case, there is a question of fact as to negligence here that must be decided by a jury. Accordingly, plaintiffs' motion for summary judgment must be denied.

Plaintiffs argue that the Ocram defendants' expert disclosure was insufficient and should be ignored by the court. However, the disclosure provided reasonable detail as to the subject matter of Smith's testimony. In this circumstance, preclusion of Wise's testimony would be inappropriate (*see Dwight v New York City Tr. Auth.*, 30 AD3d 270, 271 [1st Dept 2006]).

CONCLUSION

Accordingly, it

ORDERED that the branch of second third-party defendant E. Roger Hotte's motion (motion seq. No. 010) seeking summary judgment dismissing all claims as against him is granted, **said claims are severed and dismissed and the Clerk of the Court shall enter judgment accordingly,** while the branch of the motion seeking sanctions is denied; and it is further

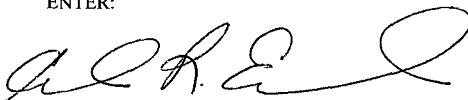
ORDERED that the joint motion by defendants/second third-party plaintiffs 120 East 73rd Street Corp., Ocram Inc., and Ocram Holding, Inc.'s for summary judgment dismissing all claims against them (motion seq. No. 011) is denied; and it is further

ORDERED that defendant Tiffany Heating Services, Inc.'s motion for summary judgment seeking dismissal of all claims as against it (motion seq. No. 012) is granted **said claims are severed and dismissed and the Clerk of the Court shall enter judgment accordingly** ; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied.

Dated: August 12, 2015

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD