Canales v Sharbowicz
2017 NY Slip Op 31826(U)
August 23, 2017
Supreme Court, Suffolk County
Docket Number: 12-14088
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-14088
CAL. No. 16-01111OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-30-16 (004, 005)
ADJ. DATE 3-2-17
Mot. Seq. # 004 - MG
005 - MG

PAULA CANALES,

Plaintiff,

- against -

LINDA LEE SHARBOWICZ, BEST QUALITY PLUMBING AND HEATING CORP., WILLIAM GREMLER dba BEST QUALITY PLUMBING AND HEATING, SEAN GORDON dba NORTH FORK RENOVATIONS and SEAN GORDON dba SEAN GORDON ENTERPRISES,

Defendants.

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Upon the following papers numbered 1 to 19 read on these motions for summary judgment; Notices of Motion/Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10 - 15; Replying Affidavits and supporting papers 16 - 19; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the pending motions (004 and 005) are combined herein for disposition; and it is

ORDERED that the motion (004) by defendant Sean Gordon d/b/a North Fork Renovations and d/b/a Sean Gordon Enterprises seeking summary judgment is granted and the complaint and any cross claims asserted against this defendant are hereby severed and dismissed; and it is further

ORDERED that the motion (005) by defendant Linda Lee Sharbowicz seeking summary judgment is granted and the complaint and any cross claims asserted against this defendant are hereby severed and dismissed.

In this negligence action, plaintiff seeks to recover damages for personal injuries she sustained on July 17, 2011, when the ground collapsed underneath her while in the backyard of the premises she rented at 1000 Mastic Beach Road in Mastic, New York (the "Premises"). At the time of the accident, defendant Linda Lee Sharbowicz ("Sharbowicz") owned the Premises, having purchased it as an investment property in June or July 2010. Defendant Sean Gordon d/b/a Sean Gordon Enterprises and d/b/a Sean Gordon Enterprises ("Gordon") was hired by Sharbowicz to do various jobs in the interior of the house. Defendant William Gremler d/b/a Best Quality Plumbing ("Gremler") was hired by Sharbowicz in August 2010 to perform certain plumbing jobs at the Premises which included the abandonment of an old underground oil tank. It is not disputed that the ground collapsed in the area where the oil tank was buried.

Plaintiff commenced a separate action against each defendant and thereafter stipulated to consolidating the actions for all purposes under the instant index number. The allegations against each defendant are the same, the gravamen of which are that the defendants were negligent in the ownership, operation, management and control of the Premises and created a dangerous and trap-like condition as a result of excavation in the backyard which was not properly backfilled. Plaintiff further alleges that upon taking possession of the Premises, she was not warned of the dangerous condition, and that the defendants had actual or constructive knowledge of the condition or upon reasonable inspection should have discovered it.

"Liability for a dangerous condition on real property is generally predicated upon ownership, occupancy, control or special use of the subject premises" (***Casson v McConnell***, 148 AD3d 863, 864, 49 NYS3d 711 [2d Dept 2017]; ***Hickman v Medina***, 114 AD3d 907, 907, 980 NYS2d 834 [2d Dept 2014]). "'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property'" (***Hickman v Medina***, *supra at* 907, quoting ***Aversano v City of New York***, 265 AD2d 437, 437, 696 NYS2d 233 [2d Dept 1999]). Here, Sharbowicz testified that she hired Gordon, a carpenter, to perform various jobs at the Premises and that when she needed a plumber to install a water heater, an above ground oil tank and to abandon the old in-ground oil tank, Gremler was hired upon the recommendation of Gordon.

Plaintiff lived at the Premises with her fiancé and three children from October 2010 to December 2011. Plaintiff testified that other than meeting Sharbowicz while viewing the Premises with a real estate agent and then signing the rental agreement shortly thereafter, she did not see Sharbowicz at the Premises again. Plaintiff also testified that during the fourteen months she lived at the Premises, other than the subject accident, the only problem she experienced was a leak in the bathroom for which she called Sharbowicz, and Gordon fixed.

Plaintiff further testified that she maintained the lawn in the backyard since moving in, and that in the Spring of 2011 her fiancé planted a small vegetable garden. Plaintiff testified that she and her family watered the garden using the spigot and hose attached to the back of the house. Plaintiff also testified that prior to her accident, she and her fiancé used the spigot several times a week without incident; she never noticed anything unusual with the ground or reported any problems to Sharbowicz. On the morning of her accident, she walked to the spigot to wash out a cooler to take to the beach. As she reached to turn on the water, the ground beneath her feet suddenly collapsed creating a hole up to her knees, causing her to fall backwards.

Gordon testified that he did not perform any work in the backyard or help with the installation or abandonment of either oil tank. He further testified that other than recommending Gremler to Sharbowicz, he was not involved with the work. It was after plaintiff's accident occurred, and ten months after Gremler completed the work, that Gordon, at the request of Sharbowicz, returned to the Premises to fill in the hole that had been created when the ground collapsed.

Gremler testified he is a licensed plumber in Suffolk and had abandoned underground oil tanks dozens of times during his more than twenty years as a plumber. Gremler testified that he and his son were in business together and performed the work at the Premises, denying that Gordon or Sharbowicz supervised, assisted or were any way involved with the work. Gremler testified as to how he performed the abandonment of the in-ground tank by excavating the soil around it, cutting the pipes and sealing them, pumping out the waste oil, cleaning the tank and filling it with 55 gallons of sand. He then backfilled the excavated area, compacting the soil and sand and placed a dome of sand on top in the event of settling, raked the area and left it clean. Gremler also testified that the spigot in the backyard was two feet away from where he was working and that he obtained water from it to do his work. He did not see any settling of the ground in the area and noted that the soil around the in-ground tank was of very good quality. According to Gremler, after Sharbowicz paid him for the job, he never returned to the Premises, received any complaints regarding the work, or was made aware that the ground had collapsed.

Based on the defendants' testimony, Gordon has established that he had no ownership interest in the Premises and did not perform any work in the area of the ground collapse or to the underground oil tank on the day of, or any time prior to, plaintiff's accident. Such evidence demonstrates Gordon's entitlement to summary judgment as a matter of law (*see* ***Gueli v City of New York***, 92 AD3d 840, 938 NYS2d 618 [2d Dept 2012]; ***Tillem v Cablevision Systems Corp.***, 38 AD3d 878, 832 NYS2d 296 [2d Dept 2007]; ***Kleeberg v City of New York***, 305 AD2d 549, 759 NYS2d 760 [2d Dept 2003]).

It is well settled that to defeat the motion, the opponents have to establish the existence of "facts and conditions from which the negligence of [Gordon] and the causation of the accident by that negligence may be reasonably inferred" (***Ingersoll v Liberty Bank of Buffalo***, 278 NY 1, 7, 14 NE2d 828 [1938]). Such proof must permit a finding of proximate cause "based not upon speculation, but upon the logical inferences to be drawn from the evidence" (***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 744, 500 NYS2d 95 [1986]). Here, the record contains no evidence that Gordon performed any work in the backyard or related to the oil tank prior to plaintiff's alleged accident. Thus, plaintiff and Gremler have failed to raise an issue of fact, thereby entitling Gordon to summary judgment dismissing the complaint (*see* ***Hickman v Medina***, *supra*; ***Gueli v City of New York***, *supra*; ***Tillem v Cablevision Systems Corp.***, *supra*).

Turning to the motion by Sharbowicz, a landlord has a common-law duty to maintain its premises in a reasonably safe condition (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Davidson v Steel Equities***, 138 AD3d 911, 30 NYS2d 275 [2d Dept 2016]; ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]); however, an out-of-possession landlord retains no general responsibility to do so (***Keum Ok Han v Kemp, Pin & Ski, LLC***, 142 AD3d 686, 36 NYS3d 883 [2d Dept 2016]). An out-of-possession landlord may be held liable for injuries proximately caused by its breach of a duty imposed by statute or regulation, or assumed by contract or a course of conduct (***Keum Ok Han v Kemp, Pin & Ski, LLC***, *supra*; ***Davidson v Steel Equities***, *supra*; ***Alnashmi v Certified Analytical Group, Inc.***, *supra*).

However, whether or not a landlord is considered an out-of-possession landlord, it is well settled that in order to impose liability for injuries resulting from an allegedly dangerous condition on its property, the plaintiff must establish that the landowner either created, or had actual or constructive notice of the condition (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Davidson v Steel Equities***, *supra*; ***Nelson v Cunningham Assocs., L.P.***, 77 AD3d 638, 908 NYS2d 713 [2d Dept 2010]). "To establish that a defendant caused or created a hazardous or defective condition, the plaintiff must point to some affirmative act of negligence on the defendant's part" (***Lococo v Mater Crist Catholic High Sch.***, 142 AD3d 590, 591, 37 NYS3d 134 [2d Dept 2016]). "Actual notice may be delivered to a property owner either orally or in writing" (id.). To

constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it (***Gordon v American Museum of Natural History***, *supra*; ***Lococo v Mater Crist Catholic High Sch.***, *supra*; ***Nelson v Cunningham Assocs., L.P.***, *supra*).

The aforementioned deposition testimony of plaintiff and defendants establishes that Sharbowicz did not create or have actual or constructive notice of the allegedly dangerous condition in the backyard. In opposition, plaintiff has failed to raise an issue of fact. There is nothing in the record to indicate that Sharbowicz knew or should have known of the defective condition. In particular, there is no evidence that Sharbowicz was advised of any defect, that the oil tank as abandoned violated any applicable code or that the defect would have been visible and apparent during a visual inspection of the Premises (***Richardson v Simone***, 275 AD2d 578, 712 NYS2d 672 [3d Dept 2000]). Moreover, plaintiff's testimony that the ground suddenly collapsed negates her theory that Sharbowicz had constructive notice of the condition.

Additionally, contrary to the contentions in opposition, Sharbowicz may not be held liable for Gremler's negligence, if any. "As a general rule, one who hires an independent contractor may not be held liable for the independent contractor's negligent acts" (***Jackson v Conrad***, 127 AD3d 816, 818, 7 NYS3d 355 [2d Dept 2015]; ***Sanchez v 1710 Broadway, Inc.***, 72 AD3d 860, 861, 915 NYS2d 272 [2d Dept 2010]). There are exceptions to this so-called independent contractor rule (*see* ***Rosenberg v Equitable Life Assur. Socy. of U.S.***, 79 NY2d 663, 668, 584 NYS2d 765 [1992]; however, plaintiff has not raised an issue of fact as to whether any of them apply herein. Similarly, the terms of the rental agreement do not raise any issue of fact as to Sharbowicz' liability. Sharbowicz' right to inspect the Premises at any time without advance notice as set forth in paragraph 8 of the rental agreement, and to have a set of keys for the house at all times, as stated in paragraph 9, "does not in itself give rise to a duty to make repairs" (***Keum Ok Han v Kemp, Pin & Ski, LLC***, *supra* at 689). Furthermore, both Gremler and plaintiff failed to cite an applicable statute or demonstrate a course of conduct which would give rise to a duty on the part of Sharbowicz. Therefore, Sharbowicz cannot be held liable for plaintiff's accident and thus is entitled to summary judgment dismissing the complaint.

Accordingly, the motions are granted.

Dated: Riverhead, New York
August 23, 2017

ARTHUR G. PITTS, J.S.C.

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION