

Scott v Towers on the Park Condominium

2017 NY Slip Op 32480(U)

November 20, 2017

Supreme Court, New York County

Docket Number: 156240/13

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

ROSE SCOTT,
Plaintiff,

-against-

TOWERS ON THE PARK CONDOMINIUM,
THE BOARD OF MANAGERS OF TOWERS
ON THE PARK CONDOMINIUM and TUDOR
REALTY SERVICES CORP.,

Defendants.

INDEX NO. 156240/13
MOTION DATE 11-08-2017
MOTION SEQ. NO. 002
MOTION CAL. NO.

TOWERS ON THE PARK CONDOMINIUM,
THE BOARD OF MANAGERS OF TOWERS
ON THE PARK CONDOMINIUM and TUDOR
REALTY SERVICES CORP.,

Third-Party Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC., and FRED SMITH PLUMBING &
HEATING CO., INC.,

Third-Party Defendants.

The following papers, numbered 1 to 17 were read on this motion and two cross motions pursuant to CPLR §3212 for Summary Judgment :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendants/third-party plaintiffs, Towers on the Park Condominium, The Board of Managers of Towers on the Park Condominium and Tudor Realty Services' (hereinafter referred to jointly as the "Towers Defendants") motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all counter-claims asserted against them, is granted. Third-party defendant Consolidated Edison Company of New York's (hereinafter referred to individually as "Con Ed") cross-motion pursuant to CPLR §3212 for summary judgment dismissing the third-party plaintiffs' complaint and dismissing all cross-claims asserted against it, is granted. Third-party defendant Fred Smith Plumbing & Heating Co. Inc.'s (hereinafter referred to individually as "Fred Smith") cross-motion pursuant to CPLR §3212 for summary judgment dismissing the third-party plaintiffs' complaint against it and dismissing all cross-claims asserted against it, is granted. The entire case is dismissed.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff suffers from dysplasia in both hips since birth, in 2009 she had left hip replacement surgery. In August of 2011 plaintiff underwent right hip replacement surgery. In December of 2011 the right hip hardware became infected. Initial treatment of the right hip infection was ineffective, and on March 30, 2012 plaintiff was admitted to the hospital for the insertion of an antibiotic tube into her right leg. Plaintiff was discharged from the hospital on April 3, 2012 with an antibiotic tube in place, given a walker, and a visiting nurse was assigned to come to her apartment on a daily basis to assist with wound care (Mot. Exh. I).

On April 3, 2012 when plaintiff returned to her apartment located at 300 West 110th Street, Apartment 8A, New York, N.Y. (hereinafter referred to as the "apartment"), managed and maintained by the Tower Defendants, the gas had been shut off for the entire building. Con Ed required the Tower Defendants shut off the gas and bring in a contractor for repairs after a gas leak was found in the building's basement due to damage from a water main break. The Tower Defendants retained Fred Smith to perform repairs on the gas lines in the basement, and replace gas valves and flex hoses for the all the stoves in each of the apartments in the building. It is alleged that on April 4, 2012, after the repairs to the gas lines, tests were performed to check for gas leaks by Fred Smith, Con Ed and the Department of Buildings; no leaks were found. The same day, after the tests were performed, the gas for the building was turned on.

Plaintiff alleges that on April 4, 2012 at approximately 5:00 p.m., after the nurse left, the assistant superintendent turned on the gas to the stove in the apartment without changing any equipment. She further alleges that at 5:30p.m. she smelled gas and called the building security office to file a complaint and have someone come to the apartment to investigate. Plaintiff's apartment is equipped with both a smoke detector and a carbon monoxide dectector but neither device was activated. After waiting for thirty (30) minutes plaintiff left the apartment using her walker to go to the lobby to find out the response to her complaint. Plaintiff alleges that she met Anthony Pereya, a maintenance man for the building, on her way to the lobby and asked him to check the stove. Mr. Pereya allegedly checked the stove and after finding the burners did not ignite, left the apartment. Plaintiff alleges that she stayed in the apartment after Mr. Pereya left and about an hour and a half later she went into a smaller bedroom that had an open window. Plaintiff claims that because she was feeling dizzy and disoriented while using the walker, she decided to crawl approximately fifteen to sixteen feet to her smaller bedroom to avoid falling, and laid there on the floor overnight. Plaintiff claims that two plumbers came in the afternoon of April 5, 2012 and replaced something in the back of the stove, stopping the gas leak (Mot. Exh. I).

It is alleged that almost a month later, on May 6, 2012, while getting out of bed, plaintiff's right leg gave way causing her to fall back on her bed. It was subsequently determined she had a right femur fracture requiring surgery. Plaintiff alleges that the fracture in her right leg was the result of being forced to crawl to the bedroom due to the gas leak on April 4, 2012. She claims that crawling to the bedroom, when combined with normal daily activities, weakened the bone in her right leg (Mot. Exh. I).

On July 9, 2013 plaintiff commenced this personal injury action asserting causes of action for negligence, gross negligence, recklessness and carelessness against the Tower Defendants (Mot. Exh. A). On June 9, 2014 the Tower Defendants commenced a third-party action against Con Ed and Fred Smith for indemnification and contribution (Mot. Exh. 2). Con Ed's Answer asserts a counterclaim against the Tower Defendants and Fred Smith for indemnification and contribution (Mot. Exh. D). Fred Smith's answer asserts a cross-claim against Con Ed for indemnification and contribution, and a counter-claim against the Tower Defendants for indemnification and contribution (Mot. Exh. E).

Tower Defendants' motion pursuant to CPLR §3212 seeks summary judgment, dismissing all claims in plaintiff's Complaint and all counter-claims asserted against them.

Con Ed's cross-motion seeks an order pursuant to CPLR §3212 granting summary judgment dismissing the claims asserted in the third-party complaint and all cross-claims asserted against it.

Fred Smith's cross-motion seeks an order pursuant to CPLR §3212 granting summary judgment dismissing third-party plaintiff's complaints as well as any and all cross-claims asserted against it.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

All of the defendants rely on plaintiff's deposition testimony, the deposition testimony of Angel Valle (the superintendent for the building), of Christine Ang (on site manager for the Tower Defendants at the time of the alleged incident), together with attorney affirmations.

A motion for summary judgment can be decided on the merits when an attorney's affirmation is used for the submission of evidence in admissible form, together with annexing deposition testimony (256 East 10th Street Associates v. Con Edison Co. of New Yorkk, Inc., 282 A.D. 2d 293, 723 N.Y.S. 2d 358 [1st Dept., 2001]). Movants have provided an evidentiary basis to obtain summary judgment.

A prima facie case of negligence requires that plaintiff show : "(1) a duty owed by the defendant to plaintiff; (2) breach of that duty; and (3) an injury suffered by the plaintiff which was proximately caused by the breach" (Murray v. New York City Housing Authority, 269 A.D. 2d 288, 703 N.Y.S. 2d 140 [1st Dept. 2000]). Defendant's liability hinges on whether there is an "intervening act that is a normal or foreseeable consequence of the situation created by the defendants negligence." An extraordinary intervening act that is unforeseeable, is independent, or far removed from the defendant's conduct can break the causal nexus (Derdiarian v. Felix Contr. Corp., 51 N.Y. 2d 308, 414 N.E. 2d 666, 434 N.Y.S. 2d 166 [1980]).

Plaintiff testified at her deposition that she left the apartment after smelling gas, and then returned with the assistant superintendent, Anthony Pereya (Mot. Exh. I, pgs. 37-38, 40-42). After leaving the apartment plaintiff returned and put herself in harm's way by remaining where she continued to smell gas (See Holliman v. New York City Housing Authority, 68 A.D. 3d 515, 892 N.Y.S. 2d 316 [1st Dept., 2009]).

Plaintiff made the decision not to leave the apartment or go to a room with an open window even though she continued to smell gas. Plaintiff testified at her deposition and states in her affidavit, that she waited for approximately an hour and a half while continuing to smell gas before making her way to the second bedroom (Opp. Exh. 1, Mot. Exh. I, pgs. 43, 46). She remained in the living room, which was next to the kitchen and had an unopened window, continuing to smell the gas while watching television, even after her husband and sisters told her over the telephone "to get some fresh air." (Mot. Exh. I, pgs. 43-44 and 48). By the time plaintiff decided to go make her way to the second bedroom which was fifteen or sixteen feet away and had an open window, it was an hour and a half later, she was feeling dizzy and disoriented, which she alleges resulted in her need to

abandon her walker and crawl (Mot. Exh. I, pgs. 43 and 46, Opp. Exh. 1). Her independent and superseding actions intervened to sever any causal connection between any purported negligence on the part of the defendants or third-party defendants, and the injuries allegedly sustained by plaintiff. Plaintiff's actions were not foreseeable and broke the chain of causation (See *Starks v. R + L Carriers*, 134 A.D. 3d 500, 20 N.Y.S. 3d 527 [1st Dept. 2015], *Torres v. 1420 Realty LLC*, 111 A.D. 3d 434, 974 N.Y.S. 2d 405 [1st Dept., 2013] and *Turner v. City of New York*, 290 A.D. 2d 336, 735 [1st Dept., 2002]).

The issue of proximate cause is generally to be determined by a jury, however "where only one conclusion may be drawn from the established facts...the question of legal cause may be decided as a matter of law" (*Boltax v. Joy Day Camp*, 67 N.Y. 2d 617, 490 N.E. 2d 527, 499 N.Y.S. 2d 660 [1986]). The Tower Defendants, Con Ed and Fred Smith have made a prima facie case establishing entitlement to summary judgment because plaintiff is the sole proximate cause of her alleged injuries and there is no need to address the evidence of their alleged negligence.

Plaintiff fails to raise an issue of fact by her claim that she was forced to crawl to the second bedroom, or to establish causation for the alleged injuries she claims manifested themselves in the right femur fracture approximately a month later.

Con Ed and Fred Smith also make a prima facie case because of the failure to have notice of alleged gas leak on April 4, 2012. Plaintiff did not call Con Ed to file a complaint she only called building security. There is no proof that the Tower Defendants notified either Con Ed or Fred Smith on April 4, 2012 of any gas leak in plaintiff's apartment. Both Con Ed and Fred Smith performed tests that showed there were no gas leaks, and had no notice of any problem on plaintiff's line (Opp. Exh. 5) (*Butler-Francis v. New York City Housing Authority*, 38 A.D. 3d 433, 834 N.Y.S. 2d 15 [1st Dept., 2007]).

Tower Defendants argue that the Affidavit of Dr. Douglas B. Unis was never previously exchanged as required pursuant to CPLR §3101[d], even though it is dated May 23, 2013, more than four years ago. Tower Defendants and Fred Smith both argue that plaintiff failed to disclose the name or provide a copy of the expert affidavit for Steven Abraham, the stove expert, as required to CPLR §3101[d]. The opposition papers were the first time he was disclosed even though he performed an inspection more than four years prior on January 15, 2013.

Plaintiff failed to identify experts as required by CPLR §3101[d] or provide an explanation for the non-compliance. Tower Defendants and Fred Smith have met their prima facie burden of showing that CPLR §3101[d] warrants rejection of plaintiff's expert affidavits (*Abrams v. Related, L.P.*, 137 A.D. 3d 655, 28 N.Y.S. 3d 366 [1st Dept., 2016]).

In any case, the affidavits are conclusory and speculative, rendering them insufficient to defeat summary judgment. A plaintiff's evidence concerning the cause of injury must be established by logical inferences and not speculation (*Reed v. Piran Realty*, 30 A.D. 3d 319, 818 N.Y.S. 2d 58 [1st Dept., 2006]). Plaintiff relies on the conclusory expert affidavit of Dr. Douglas B. Unis which is insufficient to defeat summary judgment (Opp. Exh. 2). Dr. Unis fails to identify the objective quantitative and qualitative basis for his conclusion that the May 6, 2012 right periprosthetic femur fractures were a result of plaintiff's crawling to the second bedroom on April 4, 2012. Dr. Unis has no explanation for the cause of the fracture other than that plaintiff did not have a right femur fracture prior to April 4, 2012. This does not explain the extent that "normal everyday activities such as walking and standing "contributed to the fracture" (*See Brooks v. April*, 154 A.D. 3d 564, 2017 N.Y. Slip Op. 07386 [1st Dept., 2017] and *G.L. v. Harawitz*, 146 A.D. 3d 476, 44 N.Y.S. 3d 442 [1st Dept. 2017]).

Steven Abraham, plaintiff's expert in the operation, maintenance and repair of gas stoves, examined the stove in plaintiff's apartment on January 15, 2013, almost nine months after the alleged gas leak. No curriculum vitae for Mr. Abraham was provided (Opp. Exh. 3). Mr. Abraham's statements that "When gas is turned off in a building for a prolonged period of time, this *can* lead to the grease used in the stove T-valve and stove valves becoming hard and brittle," and that a gas leak is "likely" what happened in plaintiff's apartment, are speculative and insufficient to raise an issue of fact on a motion for summary judgment (See *Castro v. New York University*, 5 A.D. 3d 135, 773 N.Y.S. 2d 29 [1st Dept., 2004] and *Butler-Francis v. New York City Hous. Authority*, 38 A.D. 3d 433, *supra* at pages 434-435 [1st Dept. 2007]).

Accordingly, it is ORDERED that defendants/third-party plaintiffs Towers on the Park Condominium, The Board of Managers of Towers on the Park Condominium and Tudor Realty Services' motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and all counter-claims asserted against them, is granted, and it is further,

ORDERED that the complaint and all counter-claims asserted in the answers of third-party defendants Consolidated Edison Company of New York and Fred Smith Plumbing & Heating Co. Inc. against defendants/third-party plaintiffs, Towers on the Park Condominium, The Board of Managers of Towers on the Park Condominium and Tudor Realty Services, are dismissed, and it is further,

ORDERED that third-party defendant Consolidated Edison Company of New York's cross-motion pursuant to CPLR §3212 for summary judgment dismissing third-party plaintiffs' complaint against it with prejudice and dismissing all cross-claims asserted against it, is granted, and it is further,

ORDERED that the third-party complaint and all cross-claims asserted against third-party defendant Consolidated Edison Company of New York are dismissed, and it is further,

ORDERED that third-party defendant Fred Smith Plumbing & Heating Co. Inc.'s cross-motion pursuant to CPLR §3212 for summary judgment dismissing the third-party plaintiffs' complaint against the third-party defendant Fred Smith Plumbing & Heating Co. Inc. and all cross-claims asserted against it, is granted, and it is further,

ORDERED that the third-party complaint and all cross-claims asserted against third-party defendant Fred Smith Plumbing & Heating Co. Inc. are dismissed, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: November 20, 2017

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE