Galeo v Roohan
2018 NY Slip Op 33440(U)
November 9, 2018
Supreme Court, Saratoga County
Docket Number: 2013-1533
Judge: Richard E. Sise

PRESENT: HON. RICHARD E. SISE
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

NOREEN GALEO and MARK GALEO,

Plaintiffs,

DECISION AND ORDER
Index No.: 2013-1533
RJI No.: 45-1-2015-1263

-against-

JOHN T. ROOHAN, INC. and THE MILL LLC,
Defendants.

(Supreme Court, Saratoga County, Motion Term)

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Sise, J.

Plaintiff Noreen Galeo brought this action to recover for injuries she suffered when the

top portion of a window came out of the frame and struck her in the head as she was attempting to close the window. The double- hung window was designed with sliding latches at the top of each window so that the window could be tilted inward for cleaning. The incident took place at premises leased to plaintiff's employer, St. Peter's Addiction Recovery Center. The building, known as The Mill, is owned by The Mill, LLC. Defendant John T. Roohan, Inc. provided cleaning and maintenance services for the building. After the court denied summary judgment to all parties, a bifurcated jury trial was held. At the close of all the proof, the court, upon motion, directed a verdict in favor of John T. Roohan, Inc. Thereafter, the jury returned a verdict on the issue of liability in favor of plaintiffs finding that the owner had failed to maintain the property in a reasonably safe condition. The Mill (defendant) has now moved pursuant to CPLR 4404 to set aside the verdict on the grounds that the evidence is legally insufficient to support it or alternately, that it is against the weight of the evidence. Plaintiffs brought a cross motion seeking to reargue the determination of the court directing a verdict in favor of John T. Roohan, Inc. Plaintiffs also seek to reargue the decision by the court to refuse to charge the jury with the doctrine of res ipsa loquitor and the court's refusal to include on the jury verdict sheet a question as to whether The Mill created an unsafe condition.

Defendant argues that the proof offered at trial provides no valid line of reasoning and permissible inferences by which the jury could have concluded that The Mill created the alleged unsafe condition, had actual notice of the alleged condition, or from which a jury could make a determination that the defendant had constructive notice of the alleged condition. "[E]vidence is legally insufficient to support a verdict where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the

jury on the basis of the evidence presented at trial. If legally sufficient evidence is found to support a verdict, it may nevertheless be set aside as against the weight of the evidence if the evidence so preponderated in favor of the defendant that the verdict could not have been reached on any fair interpretation of the evidence" (*Towne v Kingsley*, 163 AD3d 1309, 1310-1311 [3d Dept 2018] [internal quotation marks, brackets and citations omitted]).

Defendant argues that there was no direct proof offered at trial to show that a dangerous condition existed, that there was notice to defendant of a dangerous condition or that the condition complained of caused the accident. On this point defendant is correct: there was no direct proof regarding any of these elements of plaintiffs' claims. Instead, plaintiffs relied on circumstantial evidence provided by the testimony of Fredrick Bremer, a licensed architect who inspected the window two and a half years after the accident. Bremer testified about the construction of the window, the operation of the window, including the latches that allowed the window to be tilted inward, and the conditions he found when he performed his inspection. According to Bremer, he found an abundance of dust as well as other particles, or debris, on top of the tilt latch mechanisms. He also found that both latches were binding, getting stuck when he tried to operate them, and that the bolt mechanism would not fully extend into the frame. There was other proof offered that the windows had not been inspected, and no maintenance was performed, in the time between when they were installed around 2003 and the accident in 2012. Bremer, however, testified that windows in a commercial building should be inspected twice a year. In addition, Bremer testified that there was a reasonable liklihood that there was an accumulation of dust on the latches in 2012 and that the debris came from construction activity. Bremer then offered his opinion that based on a lack of inspection and maintenance over nine

years the latches came to be in a condition where they did not operate properly and thus, presented a dangerous condition for any person using the window. Bremer's conclusion that the condition had developed over a long period of time, coupled with his testimony that semi-annual inspections of the windows were called for, provide a reasonable basis for drawing the inference that, in the exercise of reasonable care, defendant should have known that the latch mechanisms were not operating properly and presented a dangerous condition. Thus, there was legally sufficient evidence to support the verdict. Moreover, defendant did not offer expert testimony to counter the testimony by Bremer and consequently, it cannot be said that the evidence so preponderated in favor of the defendant that the verdict could not have been reached on any fair interpretation of the evidence. Accordingly, the motion to set aside the verdict must be denied.

Plaintiffs cross motion to reargue the determination of the court directing a verdict in favor of John T. Roohan, Inc., must also be denied. The decision to dismiss the case against this defendant was based on a determination that plaintiffs had failed to present proof that any of the exceptions to imposing a duty of care upon a contracting party, such as John T. Roohan, Inc., in favor of a third-party, were present (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Plaintiffs argue that because of the circumstances presented, wherein John Roohan, individually, had an ownership interest in, and operated, both entities, the rule against imposing a duty of care, against a party in the shoes of John T. Roohan, Inc, should not apply. The argument is not persuasive and no relevant case law is cited in support. The argument is more akin to one offered when attempting to pierce the corporate veil and impose liability on an owner (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015]). Here, however, John Roohan, in his individual capacity, was stipulated out of the case well before trial.

The argument that the jury verdict sheet should have contained a question as to whether The Mill created an unsafe condition stems from proof that by placing screws in the jamb of the window, the window could have been permanently shut or that the hazard of the tilting windows could have been eliminated by simply turning a safety screw on the latch mechanism that would prevent the latch from operating. Though Bremer testified that the default position for the safety screw was the closed position, no proof was offered to establish that the exercise of reasonable care dictated that the default position be employed. Furthermore, there was insufficient proof to support a conclusion that reasonable care dictated that the windows be screwed shut.

The argument that the doctrine of res ipsa loquitor should have been included in the jury charge is without merit. The doctrine applies in instance where the actual or specific cause of an accident is unknown (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *Frank v Smith*, 127 AD3d 1301, 1302 [3d Dept 2015]). Here, the proof showed that the window fell and struck plaintiff because the latch mechanisms were not engaged in the closed position. Consequently, the doctrine does not apply.

Accordingly, it is

ORDERED, that the motion and cross-motion are denied.

This constitutes the decision and order of the Court. The original decision and order is returned to the attorney for plaintiffs. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
November 9, 2018

Richard E. Sise
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated June 4, 2018;
2. Affidavit of Murry Brower dated June 4, 2018 with Exhibits A-I annexed;
3. Memorandum of Law dated June 4, 2018;
4. Notice of Cross-Motion dated July 9, 2018;
5. Affidavit of Linda B. Johnson dated July 9, 2018 with Exhibits 1-17 annexed;
6. Memorandum of Law dated July 9, 2018;
7. Affirmation of Thomas E. Kelly dated August 27, 2018;
8. Letter memorandum dated September 12, 2018.