One World Wireless, Inc. v Lugo
2019 NY Slip Op 33370(U)
November 13, 2019
Supreme Court, New York County
Docket Number: 157460/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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ONE WORLD WIRELESS, INC.,

Plaintiff,

- v -

JOSEPH LUGO,

Defendant.

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INDEX NO. 157460/2016

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendant for summary judgment dismissing this case is granted.[1]

Background

This property damage case arises out of a water leak from defendant's kitchen sink that occurred at 263 West 23rd Street in Manhattan. Defendant owns an apartment on the second floor and plaintiff operated a Verizon store in the commercial unit located directly below defendant's unit.

On November 7, 2015, plaintiff's principal (Mr. Singh) received a call that there was a leak in the store. Plaintiff contends that when he got to his business, he observed about two

[1] Although the notice of motion purports to move in this case and in a related action (Index No. 160305/2018), that is procedurally improper. Movant needs to make a motion in that other case. Moreover, no RJI has been filed in the 160305/2018 action and, therefore, the undersigned has not been assigned that case.

inches of water on the floor and that his merchandise had serious water damage. Plaintiff believes he received about $45,000 from his insurance company.

Defendant purchased the apartment with his husband in 2011 and lived there from May 2012 through July 2014. He claims that he never observed any leaks from his kitchen sink and points out that he had a new sink installed before he moved in. Defendant later leased the apartment in July 2014 and was not living in the unit on the day of the leak. The tenants living in the apartment insisted that they never observed any leaks from the kitchen sink while living there before the November 2015 incident.

On the day of the leak, one of the tenants claimed he saw water in the kitchen and cleaned it up. Then, a short time later, he saw more water on the kitchen floor and opened the cabinet under the sink and discovered a serious leak. The tenant claims he told the building and the water was eventually shut off—he estimated the water leaked for about 30-45 minutes.

Defendant moves for summary judgment dismissing the case on the ground that he did not cause the defective condition nor did he have notice of the leak. In opposition, plaintiff contends that there are issues of fact arising out of defendant's right to re-enter the property, that defendant created the condition by hiring an unlicensed contractor to install the sink, defendant should have inspected the sink and res ipsa loquitor applies.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima

facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825, 37 NYS3d 750 [2016]).

"A party who possesses real property, either as an owner or as a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition. . . However, there is no legal duty to protect against an occurrence which is extraordinary in nature and would not suggest itself to a reasonably careful and prudent person as one which should be guarded against" (*Martinez v Santoro*, 273 AD2d 448, 448, 710 NYS2d 374 [2d Dept 2000]).

The Court grants the motion. As an initial matter, there is no dispute that neither defendant nor the tenants living in the apartment experienced any leaks from May 2012 until the accident. The account provided by the tenant suggests he discovered the leak and, once he realized it was serious, he took steps to remedy the issue.

Simply put, the Court is unable to find that defendant had a duty to inspect his sink. A reasonably prudent person owning an apartment does not conduct regular inspections of their sink without having a reason to check the sink (i.e., experiencing leaks). The Court declines to find that an issue of fact exists because defendant did not hire a plumber to look at a sink that appeared to be functioning normally.

The defendant's right to reenter the property is not relevant to the instant motion. The right to reenter does not raise an issue of fact about whether defendant breached a duty to plaintiff. The fact is that there was a leak and neither defendant nor his tenants noticed any prior leaks from the kitchen sink.

The Court also rejects plaintiff's arguments concerning the purported unlicensed contractor. Even if the contractor was unlicensed, that does not mean that defendant can be held liable on this record. Plaintiff failed to attach any evidence, such an expert's report, suggesting that the leak arose because of the faulty installation of the sink in 2012. If defendant had hired an unlicensed contractor whose shoddy installation caused the leak, then plaintiff would have a much stronger argument concerning defendant's purported negligence. But a speculative claim that defendant is negligent because he may have hired someone without a license does not create an issue of fact especially where the record shows the sink worked for more than three years before the leak without any problems.

Res ipsa does not apply here either. "In order to submit a case to a trier of fact based on [res ipsa], a plaintiff must establish that the event (1) was of a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant and (3) was not due to any voluntary action or contribution on the part of the plaintiff" (*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 276-77, 896 NYS2d 22 [1st Dept 2010] [internal quotations and citation omitted]).

The water leak here purportedly happened when a ball valve broke. Plaintiff provided no sufficient reason to conclude that this type of incident only happens due to someone's negligence and the Court is unable to find that defendant had complete control over the instrumentality that caused the leak. Obviously, water leaks can occur due to a myriad of reasons outside the control of an apartment owner. Pipes may freeze, there may be a sudden change in water pressure or there could have been an issue stemming from another unit owner's pipes. Defendant does not have exclusive control over the water throughout the entire apartment building. And, as stated above, plaintiff offered no evidence to suggest exactly how the accident occurred.

Summary

The Court recognizes that plaintiff did nothing wrong here. He was running his business when a leak damaged his merchandise. But plaintiff's claim appears to be that defendant should be liable for the leak simply because the leak came from his apartment. Unfortunately for plaintiff, that supports a claim based on strict liability, not a cause of action for negligence. Just because a leak occurred does not mean that defendant is negligent. Sometimes, accidents happen where no party is at fault and, here, plaintiff did not sufficiently establish an issue of fact that defendant created the leak or had actual or constructive notice about any problems with his sink.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted, this case is dismissed, with costs, and the clerk is directed to enter judgment accordingly.

11.13.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE