

Jenkinson v Bruno

2020 NY Slip Op 30660(U)

February 5, 2020

Supreme Court, Kings County

Docket Number: 516016/2017

Judge: Bruce M. Balter

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KINGS COUNTY CLERK
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2020 FEB 27 AM 10: 00

At IAS Part 13 of the Supreme Court of the State of New York, Kings County, 320 Jay Street, Brooklyn, New York 11201, on the 5th day of February 2020.

PRESENT:

HON. BRUCE M. BALTER,
J.S.C.

X

DECISION /ORDER

516016/2017

Index No.: ~~509819/2016~~ *SMC*

HENRY JENKINSON,

Plaintiff

Motion Date: 01/28/2020
Motion Cal. No: 15
Motion Sequence: 6

-against-

JEAN BAPTISTE BRUNO, ROSA BRUNO, 670 BUSHWICK AVE. RENTAL, JASON OLESON, PAUL HAIRSTON, KMP DESIGN AND ENGINEERING PLLC, PAUL VALERIO Individually and doing business as PAUL P. VALERIO CONSULTING ENGINEER, VALERIO ASSOCIATES CONSTRUCTION ENGINEERS and E-Z RUNNER CONSTRUCTION CORP.,

Defendants.

X

2020 FEB 11 AM 9:13
KINGS COUNTY CLERK
FILED

Defendants JASON OLESON and PAUL HAIRSTON move for an Order pursuant to CPLR § 3212 granting summary judgment in favor of defendants as against plaintiff HENRY JENKINSON and as against defendants JEAN BAPTISTE BRUNO, ROSA BRUNO, 670 BUSHWICK AVE. RENTAL and KMP DESIGN AND ENGINEERING PLLC on the issue of liability.

In support of the motion, defendants JASON OLESON and PAUL HAIRSTON submit the sworn testimony of defendant JASON OLESON and PAUL HAIRSTON, as well as the sworn testimony of co-defendant KMP DESIGN and ENGINEERING by their witness Ken Philogene. Defendants allege that neither defendant JASON OLESON nor defendant PAUL HAIRSTON committed any negligent acts which caused or contributed to the happening of the above captioned accident.

In opposition to the motion, Defendants JEAN BAPTISTE BRUNO, ROSA BRUNO 670 BUSHWICK AVE. RENTAL maintain that questions of fact exist as to the number of

people on the deck the night of the occurrence, and whether there was any prior notice to defendants OLESON and HAIRSTON in the year they lived at the subject premises prior to the date of loss, and as such, summary judgement as to defendants OLESON and HAIRSTON is not warranted in this matter and the liability of HAIRSTON and OLESON should be determined by a trier of fact. Plaintiff HENRY JENKINSON adopts this opposition. KMP DESIGN AND ENGINEERING PLLC also adopts this opposition. Defendant E-Z RUNNER CONSTRUCTION CORP. submits no opposition to this motion.

FACTS AND PROCEDURAL HISTORY

In the matter at Bar, the plaintiff HENRY JENKINSON is alleging that he suffered personal injuries as a result of a deck collapse which occurred on June 5, 2016. The deck was attached to a building located at 670 Bushwick Ave., Brooklyn, NY, in the County of Kings. The building and property were owned by defendants JEAN BAPTISTE BRUNO and ROSA BRUNO. Plaintiff alleges that he was standing on the deck at the time of said collapse, and that he suffered injuries as a result of falling when the deck collapsed. Plaintiff commenced this action via Summons & Complaint dated August 16, 2017, as against defendants JEAN BAPTISTE BRUNO, ROSA BRUNO, 670 BUSHWICK AVE. RENTAL, JASON OLESON, PAUL HAIRSTON, KMP DESIGN AND ENGINEERING PLLC, PAUL VALERIO INDIVIDUALLY and d/b/a PAUL P. VALERIO CONSULTING ENGINEER, VALERIO ASSOCIATES CONSULTING ENGINEERS, P.C. and E-Z RUNNER CONSTRUCTION CORP. Defendants JASON OLESON and PAUL HAIRSTON interposed an Answer on April 26, 2018. Defendants KMP DESIGN AND ENGINEERING PLLC and E-Z RUNNER CONSTRUCTION CORP. Interjected cross-claims as against defendants OLESON and HAIRSTON. Furthermore, PAUL VALERIO Individually and doing business as PAUL P. VALERIO CONSULTING ENGINEER, VALERIO ASSOCIATES CONSTRUCTION ENGINEERS, P.C. as defendants were previously let out of this action on summary judgment.

The subject property is a multifamily house, which was owned by the defendants JEAN BAPTISTE BRUNO and ROSA BRUNO. Defendants JEAN BAPTISTE BRUNO and ROSA BRUNO resided in the first floor of the structure, at the time of the incident. Defendants JASON OLESON and PAUL HAIRSTON had been renting the second floor apartment, in the building, at the time the accident occurred. They began renting the apartment from co-defendants, the BRUNOS, in June of 2015 and were living there at the time of the accident pursuant to a lease extension. Their second floor apartment came with a deck that was approximately 8 feet by 22 feet. The lease agreement specifically barred smoking in the tenant space other than on the deck.

It appears the accident happened while defendants OLESON and HAIRSTON were having a birthday party at their apartment. The party started at around 10:00 p.m. By 11:30 that evening, everyone who was going to the party had already arrived. The deck collapsed sometime around midnight. The door from the apartment to the deck was closed at the time of the incident. At his EBT, Mr. Oleson testified that his first indication that something happened was that he heard something that sounded like a car crashing into the building. He opened the door to look outside At that point the deck was gone and he saw his friends on the ground screaming. At his

EBT, Mr. Hairston testified that he was out smoking a cigarette on the deck, when the deck fell out from underneath his feet. He described that collapse as almost instantaneous. When the accident happened, Mr. Hairston fell straight down. Mr. Hairston testified that the deck was not crowded when it collapsed. At the time of the accident, there was about 12-15 people on the deck. The only furniture on the deck, at the time of the accident, was a table and four chairs purchased from IKEA.

At an EBT, Ken Philogene appeared as a witness on behalf of co-defendant KMP DESIGN & ENGINEERING, PLLC. Ken Philogene testified that the deck should have been able to hold 16,000 pounds. Mr. Philogene testified the co-defendant JEAN BRUNO contacted him two days after the accident, and told him that he needed to redesign the deck. Mr. Philogene testified that he was a professional engineer and had received a bachelor's degree and a master's degree in engineering, which he earned at Cooper Union. He testified that he had taken two exams with the department of education, which he passed, and as a result of same, he has a professional engineering license, which he has had since 1981 or 1983.

Mr. Philogene testified that as a professional engineer he has designed approximately 30 decks. Mr. Philogene testified that by statute, the deck was required to hold a load of 100 pounds per square foot. He testified that decks have to be able to hold 100 pounds per square foot, pursuant to the building code of the Department of Buildings. Mr. Philogene testified that the 100 pounds per square foot, that the deck was required to hold, did not include the weight of the materials which the deck was constructed of. Mr. Philogene testified regarding a violation notice issued to defendant Jean Bruno after the deck collapse. Mr. Philogene testified that based upon the violation notice, the deck that collapsed, was 8 feet by 20 feet, and that based upon same, the total square footage of the deck was 160 square feet. Mr. Philogene testified that the deck should have been able to hold 16,000 pounds. He further testified that if the average person on the deck weighed 200 pounds, the deck should have been able to hold 80 people.

In support of the motion, defendant Paul Hairston submits an affidavit stating that at the time of the accident, there were 12 to 15 people on the deck, that approximately half were men and that half were women; and that all the people on the deck were in their early 20s, and that the men weighed on average 170 pounds, and that the women weighed on average 120 pounds. Defendants argue that the aggregate weight of the people would have had been approximately 2,200 pounds, coupled with one set of IKEA table and chairs on it at the time it collapsed. This amount is well below the 16,000 pounds that the deck should have been able to hold pursuant to the department of buildings regulation in affect at the time of the accident.

At EBT, Defendant Mr. Oleson testified that the deck had never wobbled or swayed prior to the accident and that he was not aware that there were any problems with the deck prior to the accident. He had never made any complaints to anyone regarding the deck prior to the accident and was not aware of anybody making complaints regarding the deck prior to the accident. At EBT Defendant Hairston testified that they had two or three parties, prior to the

night in question, when he and others were on the deck, and he never observed anything wrong with the deck on those occasions and never observed any deterioration of the decking material prior to the incident in question. On the prior occasions Mr. Hairston was on the deck, he did not hear any creaking sounds nor sense any swaying, vibrations or unusual movements.

The night/early morning after the accident a building inspector came to the building. Defendant Oleson spoke with the building inspector, who told him that the deck collapsed because of dry rot. Ken Philogene met with defendant Bruno after the deck collapsed. During that meeting, while defendant Mr. Bruno and Mr. Philogene were discussing the cause of the deck collapse, defendant Bruno admitted that the wood was rotted, and that the joists were rotted.

Ken Philogene testified that based upon Iris review of the violation issued to Jean Bruno after the deck collapse, he did not see any indication on the violation, that the deck collapsed due to overloading. He said that the document indicated that the deck collapsed due to dry rot.

Defendant Mr. Oleson testified that he observed the remnants of the deck after the accident occurred and that the deck was warped and kind of on an angle. He further testified that below the porch, and on the wall where the deck once was, there was a beam of wood that seemed rotted and falling apart. It was also Oleson's observation, that the wood appeared to be old, and that it had been rotting for a while. In support of this motion, defendants maintain that they were never advised by Mr. Bruno, prior to the accident, that there was any limit as to the number of people they could have on the deck, or that there was a limit to the amount of weight they could have on the deck.

In opposition to the motion, Defendants JEAN BAPTISTE BRUNO and ROSA BRUNO maintain that questions of fact exist as to the number of people on the deck the night of the occurrence, as to whether there was any prior notice to defendants OLESON and HAIRSTON in the year they lived at the subject premises prior to the date of loss, and as such, summary judgement as to defendants OLESON and HAIRSTON is not warranted in this matter and the liability of HAIRSTON and OLESON should be determined by a trier of fact. Plaintiff ANNIE CAMINITI adopts this opposition. KMP DESIGN AND ENGINEERING PLLC also adopts this opposition. Defendant E-Z RUNNER CONSTRUCTION CORP. submits no opposition to this motion.

APPLICABLE CASE LAW AND STATUTORY AUTHORITY

Where a party establishes a *prima facie* entitlement to summary judgment, the other parties are then obligated to come forward with evidentiary facts showing the existence of genuine, triable issues of fact". See *Normoyle v. New York City Transit Authority*, 181 AD2d 498. This is axiomatic in summary judgment motions. See *Amplo v. Milden Ave. Realty Associates*, 52 A.D.3d 750 (2nd Dept. 2008); *Benavides v. Peralta*, 52 A.D.3d 755 (2nd Dept. 2008); *Braun v. County of Orange*, 52 A.D.3d 756 (2nd Dept. 2008); *Cangro v. Noah Builders Inc.*, 52 A.D.3d 758 (2nd Dept. 2008); *Capece v. Nash*, 52 A.D.3d 760 (2nd Dept. 2008); *Castle Oil Corp. v. Bokhari*, 52 A.D.3d 762 (2nd Dept. 2008); *Daleo v. James*, 52 A.D.3d 766 (2nd Dept. 2008); *Romano v. St. Vincent's Medical Center*, 178 AD2d 467 (2nd Dept. 1991); *Crown Realty Company v. Crown Heights Jewish Community Council*, 175 AD2d 151 (2nd Dept.

. 1991); *Sannella v. Nassau County Fire Comm.*, 87 AD2d 625 (2nd Dept. 1982); *Gus v. Town of North Hampton*, 174 AD2d 649 (2nd Dept. 1991); *Sikes v. Catvtron Companies*, 173 AD2d 43(2nd Dept. 1991); *Abish v. Cetta*, 155 AD2d 495 (2nd Dept. 1989).

In the matter of *Zuckerman v. City of New York et al*, 49 N.Y.2d 557 (1980), the Court of Appeals held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord v. Swift & Muller Comtr. Co.*, 46 N.Y.2d 276, 281-282; *Fried v. Bower & Gardner*, 46 N.Y.2d 765, 767; *Platzman v. American Totalisator Co.*, 45 N.Y.2d 910, 912; *Mallad Const. Corp, v. County Fed. Sav. & Loan Asm.*, 32 N.Y.2d 285, 290. Where there are several possible causes for an injury the plaintiff cannot have a recovery for an injury since there is no proof that the negligence of the defendant caused the injury. See *Ingersoll v. Liberty Bank*, 278 NY 1 (1938).

In the matter of *Mahon v. Gold*, 78 A.D.3d 908 (2nd Dept. 2010), the plaintiff was one of 16 students on a deck that collapsed, while they were on it. Mahon suffered injuries as a result. The Appellate Division reversed the Trial Court's denial of the defendant home-owner's application for Summary Judgment, and dismissed the case against the defendant homeowners. In this case, the court held that an owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition . See *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]; See further *Applegate v. Long Is. Power Auth.*, 53 AD3d 515, 516 [2008]; *Powell v. Pasqualino*, 40 AD3d 725 [2007]; *Singer v St. Francis Hosp.*, 21 AD3d 469 [2005]]. To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the defendant] to discover and remedy it". See *Gordon v. American Museum of Natural History*, 67 NY2d at 837). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection". See *Curiale v. Sharrotts Woods. Inc.*, . 9 AD3d 473, 475 [2004]; see further *Scoppettone v. ADJ Holding Corp.*, 41 AD3d 693, 694 [2007]; *Lai v Ching Po Ng* 33 AD3d 668 [2006]).

ANALYSIS

In the instant case, defendants JASON OLESON and PAUL HAIRSTON have clearly established that they had no notice, either actual or constructive, of the defect which caused the accident. Further, in this matter, there were no actions made by defendants JASON OLESON or PAUL HAIRSTON, which caused or contributed to the happening of the subject incident. As plaintiff HENRY JENKINSON and as defendants JEAN BAPTISTE BRUNO, ROSA BRUNO, 670 BUSHWICK AVE. RENTAL and KMP DESIGN AND ENGINEERING PLLC have failed to come forward with any evidence of negligence or breach of duty on the part of defendant JASON OLESON and PAUL HAIRSTON, Furthermore, defendants BRUNO and 670 BUSHWICK AVE. RENTAL have not submitted any admissible evidence to support that these Defendants caused or contributed to the collapse of the deck, and thus, they cannot be found

negligent at all.

CONCLUSION

As Plaintiff HENRY JENKINSON , defendants JEAN BAPTISTE BRUNO, ROSA BRUNO, 670 BUSHWICK AVE. RENTAL and KMP DESIGN AND ENGINEERING PLLC. have failed to come forward with any evidence of negligence or breach of duty on the part of Defendant JASON OLESON and PAUL HAIRSTON, all direct, cross and third-party claims as against JASON OLESON and PAUL HAIRSTON are hereby dismissed.

This constitutes the Decision and Order of this Court,

February 5, 2020



BRUCE M. BALTER, J.S.C.

**HON. BRUCE M. BALTER
JUSTICE SUPREME COURT**

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