Lorenzo v Story Ave. Condominium
2020 NY Slip Op 35319(U)
May 28, 2020
Supreme Court, Bronx County
Docket Number: Index No. 27960/2018E
Judge: Robert T. Johnson
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Dated: _May 28, 2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 12

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GALIS LORENZO,

Plaintiff **Index No. 27960/2018E**

-against- **HON. ROBERT T. JOHNSON**

Justice Supreme Court

STORY AVENUE CONDOMINIUM and NEW YORK CITY PARTNERSHIP HOUSING DEVELOPMENT FUND,

Defendants

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This motion is decided in accordance with the attached Decision and Order.

Dated:_May 28, 2020_____

HON. ROBERT T. JOHNSON , J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	x CASE STILL ACTIVE
2. MOTION IS.....	X GRANTED ☐ DENIED	☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

_____X

Galis Lorenzo

Plaintiff(s),

DECISION

Index # 27960/2018E

-against-

Story Avenue Condominium and New York City

Partnership Housing Development Fund Company Inc.,

Defendant(s).

_____X

HON. ROBERT T. JOHNSON:

In this matter plaintiff Galis Lorenzo ("plaintiff") alleges that he was injured on January 6, 2018 when he slipped on snow and ice on the sidewalk in front of 921 Elder Avenue in the Bronx. Defendant New York City Partnership Housing Development Fund Company Incorporated ("the partnership") now moves for summary judgment and for dismissal of the complaint against it. This motion was not opposed by co-defendant Story Avenue Condominium.

The partnership argues that it did not own nor operate the premises in question at the time of plaintiff's fall. Specifically, it alleges that on January 12, 1989 it acquired Block 3651, Lot 1 from Deluxe Development of New York Incorporated. On October 26, 1989 a plan for condominium ownership by co-defendant Story Avenue Condominium was filed for the entire

lot, after which 22 condominium buildings were constructed, each of which contained three condominium units. Three of these units were in 921 Elder Avenue and were designated "921A", "921B" and "921C". All of the units in that building were conveyed to private owners in the year 1990. Therefore, the partnership argues that it had no ownership interest in 921 Elder Avenue at the time of plaintiff's fall, and that the sidewalk adjoining it was owned by the codefendant. In support of the motion, the partnership has submitted the relevant deeds, condominium plan and ACRIS documents.

Plaintiff opposes the motion on two grounds: (1) that the motion is premature, and (2) the documents submitted by the partnership indicate a triable issue of fact since the ACRIS documents failed to demonstrate that the lot for 921 Elder Avenue was ever legally divided.

On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 30,324 [1986]) and then only if, upon the moving party's meeting of this burden, the non-moving party fails "to establish the existence of material issues of fact which require a trial of the action" (*id.*). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Plaintiff argues that the summary judgment motion is premature and should be denied under CPLR § 3212 (f). That section states:

> f) Facts unavailable to opposing party**.** Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

However, plaintiff fails to demonstrate that any information it might need to oppose the motion for summary judgment would be explicitly within the control of the partnership. Instead, plaintiff seems to argue that 921 Elder Avenue and Block 3561, Lot 1 are one and the same. He argues that since the ACRIS documents do not show that 921 Elder Avenue was subdivided into three lots "it is entirely possible that the [partnership] still owns whenever remains of the original property known as 921 Elder Avenue, Block 3651, Lot 1. It is also entirely possible that, in dividing the property, other subdivisions exist. It is entirely plausible that 921D=921Z Elder Avenue exist". This confuses the description of the property, and the partnership has

demonstrated that Block 3651, Lot 1 was the *entire* plot of land upon which all of the condominiums were built, not just 921 Elder Avenue.

Additionally, arguing that something may be "entirely possible" is to engage in speculation, and does not render the instant motion as premature. (*see Fulton v. Allstate Ins. Co.*, 14 A.D.3d 380, 381, 788 N.Y.S.2d 349 [1st Dept. 2005]; *Denby v. Pace Univ.*, 294 A.D.2d 156, 156–157, 741 N.Y.S.2d 408 [1st Dept. 2002]). *Crimlis v City of New York*, 179 AD3d 575, 576 [1st Dept 2020] [plaintiff's assertion that further discovery may uncover facts essential to establish opposition is was based on nothing more than speculation; plaintiff failed to show that evidence necessary to defeat the motion was within the defendant's exclusive control].

As to the second argument raised by plaintiff, the documents submitted by the partnership establishes its prima facie entitlement to summary judgment. Through the existence of the filed condominium plan, and the recorded deeds to individual owners for the respective units, it has demonstrated that it had no ownership interest or control of the area where plaintiff is alleged to have fallen. The fifth article of the condominium plan, which established co-defendant Story Avenue Condominium specifically lists the sidewalks as among the common areas within the condominium plan. The argument made by the plaintiff that, in some way, the partnership may have retained some ownership interest in the premises is speculative and, is belied by the documentary evidence presented by the partnership.

The motion for summary judgment and dismissal of the complaint as against Defendant New York City Partnership Housing Development Fund Company Incorporated is granted.

This constitutes the decision and order of the court.

Dated: May 28, 2020

Robert T. Johnson JSC