Greenbaum v Sabel
2021 NY Slip Op 30244(U)
January 25, 2021
Supreme Court, Kings County
Docket Number: 506279/2017
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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SHINDEL GREENBAUM, NOYACH GREENBAUM and D.G., an infant, by his Parents and Natural Guardians, Shindel Greenbaum and Noyach Greenbaum, RACHEL SABEL, MOSHE SABEL, and R.S., an infant, by her Parents and Natural Guardians, Rachel Sabel and Moshe Sabel,

Plaintiffs,

– against –

JACOB SABEL, YALE ENTERPRISE, INC., and SAMUEL TAUBER,

Defendants.

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Index No.: 506279/2017
Motion Date: 01/20/2021
Motion Seq.: 04, 05

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 04) 55-66 and 88, and (Motion 05) 70-87, were read on these motions for summary judgment.

Defendants Samuel Tauber and Yale Enterprise, Inc. (hereinafter the Yale defendants) move for an Order (Motion 04) pursuant to CPLR § 3212 granting summary judgment and dismissing plaintiffs' complaint in its entirety; or, in the alternative, dismissing the claims against Mr. Tauber individually and granting summary judgment against co-defendant Jacob Sabel on their cross-claims. The plaintiffs cross-move for an Order (Motion 05) pursuant to CPLR § 3212 granting summary judgment on liability against the Yale defendants. For the reasons set forth below, the defendants' motion is granted and the plaintiffs' cross-motion is denied.

This action involves personal injuries sustained by the plaintiffs, Shindel Greenbaum, Noyach Greenbaum, Rachel Sabel, Moshe Sabel, and infants D.G. and R.S, on October 24, 2016 at 33 Yale Drive in Monsey, New York as a result of a second story outdoor deck collapse. The subject premises is owned by defendant Yale Enterprise, Inc. (hereinafter Yale), and leased to defendant Jacob Sabel pursuant to an oral agreement. Defendant Samuel Tauber is the sole officer at Yale. Mr. Sabel was hosting his family for the Jewish holiday of Sukkot, with nine people on the deck when the deck unexpectedly collapsed onto the cement patio one floor below.

The Yale defendants first argue that the case against them is barred by the doctrine of *res judicata* as the defendants were the subject of a prior litigation, *Samuels v Yale Enterprise, Inc. and Sabel*, Index No. 031623/2016 (Sup Ct, Rockland Cty 2017), where the Rockland County Supreme Court found that the informal and unwritten lease agreement between the Yale defendants and Mr. Sabel imposed no duty on the owner, Yale, to make repairs or maintain the subject premises, and that summary judgment in the Yale defendants' favor is therefore appropriate. Though the plaintiffs in the prior action were not the same, the Yale defendants

argue that the plaintiffs are in privity with each other as all claims arise from the same incident, which the prior motion court already determined was not the responsibility of the Yale defendants. In the alternative, if the Court were to find that *res judicata* is inapplicable, the Yale defendants argue that they were an out-of-possession landlord pursuant to the oral agreement of the parties, which both the Yale defendants and Mr. Sabel acknowledge exists and has been established by a long-running course of conduct. Furthermore, the Yale defendants assert that they never had actual or constructive notice of a defect in the deck, nor did they create a defect. In support of their motion, the Yale defendants submit, *inter alia*, the pleadings, the Bill of Particulars, the deposition testimony of Samuel Tauber and Jacob Sabel, the deed for 33 Yale Drive, and a copy of the Spring Valley Certificate of Use for the subject deck.

In their affirmation in opposition to the Yale defendants' motion for summary judgment and in support of their cross-motion for summary judgment on liability, the plaintiffs advance several arguments in support of their claim that the Yale defendants are liable for the injuries sustained in this action. First, plaintiffs assert that the Yale defendants created the dangerous condition when the deck was first built, and that they had actual or constructive notice of the defective condition because the condition existed at the time the deck was constructed. The plaintiffs also argue that the moving defendants retained a right of reentry to make repairs and, specifically, to make repairs to the deck. The plaintiffs further assert that the Yale defendants are not actually "out-of-possession" because they occupy the bottom floor of the premises and make frequent visits to the premises. The plaintiffs also state that at least one of the defects represents a building code violation in that the deck lacked "flashing" protection, and that these violations were either a substantial factor or solely responsible for the deck separating from the building structure and falling to the ground. In support of their motion, the plaintiffs submit, *inter alia*, photographs of the collapsed deck, Spring Valley Building Department documents, and a wood deck construction guide. The plaintiffs also offer the affidavit of a professional engineer, Jeffrey Ketchman, who asserts that the lack of flashing protection was a substantial factor that contributed to the collapse of the deck.

Co-defendant Jacob Sabel also files a partial opposition to the Yale defendants' motion for summary judgment, arguing that if the Court finds that a question of fact exists and denies the motion, then the Court must also deny the Yale defendants' cross-claim for common law indemnification against Mr. Sabel. Notably, the plaintiffs have already settled their claims with Mr. Sabel in June 2020.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a *prima facie* showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the *prima facie* burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally,

the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

Res judicata is inapplicable in the instant case as the prior Rockland County Supreme Court action involved different plaintiffs who are not in privity with the current plaintiffs. Significantly, the prior litigation against the defendants in Rockland County involved a completely different accident that occurred *two years prior* to the deck collapse that is the subject of this litigation. A plaintiff in the prior action allegedly tripped and fell on the cement landing leading up to the front door of the premises. Accordingly, the plaintiffs' action would not be barred by the doctrine of *res judicata* as the current claims do not arise out of the same transaction and the plaintiffs in this action did not have a full and fair opportunity to be heard in the prior action against the defendants. *See Parolisi v Slavin*, 98 AD3d 488 (2d Dept 2012); *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 (1979).

However, the Yale defendants are entitled to summary judgment as Yale is an "out-of-possession" landlord with no duty to maintain the premises. Premises liability begins with duty, the existence and extent of which is a question of law. *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 (2d Dept 2011); *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 (1994). Liability based on the theory of constructive notice may be imposed on an out-of-possession landlord when the landlord reserves a right to reenter the premises for the purposes of inspection and maintenance or repair and a specific violation of the building code exists. *See Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 (1987); *Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489 (1st Dept 1995). "An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or by a course of conduct by the landlord giving rise to a duty." *Lugo v Austin-Forest Assoc.*, 99 AD3d 865, 866 (2d Dept 2012) quoting *Repetto v Alblan Realty Corp.*, 97 AD3d 735, 736 (2d Dept 2012). The Appellate Division, Second Department has also held that where the plaintiff's pleadings did not allege a violation of any particular statute, the defendant landlord can demonstrate its *prima facie* entitlement to judgment as a matter of law by establishing that it was an out-of-possession landlord which was not bound by contract or a course of conduct to maintain the premises. *Reynoso v Ahava 750, LLC*, 185 AD3d 1074 (2d Dept 2020).

Both the tenant, co-defendant Jacob Sabel, and Mr. Tauber testified that Mr. Sabel has lived at the subject premises for 26-27 years pursuant to an oral agreement the two parties had with each other. This oral agreement was never memorialized in a lease or any other document, however Mr. Sabel has been living in this home with his family and paying monthly rent to Mr. Tauber for nearly three decades based on this agreement. Mr. Tauber testified that when Yale purchased the premises in the 1980s, it had an old deck which he had a contractor replace approximately one year after the purchase date. Mr. Tauber was not present at the house when the new deck was built. Mr. Tauber indicated that pursuant to the oral agreement with Mr. Sabel, he did not have a key to the house, but he was allowed to store items in the basement, and had access to the home if the garage door was left open. Mr. Tauber indicated that he does a "pass by" of the premises every two weeks because he visits his son who also resides in Monsey, and that he views the outside of the home and notices that the "grass is cut." Mr. Tauber further

testified that Mr. Sabel was responsible for maintaining the building, and had the responsibility of replacing the deck after the accident. Mr. Tauber indicated that Mr. Sabel "fixes everything" and that if something breaks, Mr. Sabel has to fix it.

Mr. Sabel confirmed that as the tenant, he has always been the one responsible for all the maintenance and repairs of the house, both interior and exterior, including the roof, the boiler, and the deck. Mr. Sabel stated that he is the one who calls the plumber or the electrician when repairs need to be made within the house. Mr. Sabel testified that he took it upon himself to make repairs to the deck approximately 12 years ago when he changed the vertical beams that support the deck, and he could not even remember if he notified Mr. Tauber about installing the new beams. Mr. Sabel also stated that he installed new railings on the deck, and also had a company install a metal wheelchair ramp for his handicapped father in or about 2011 or 2012. Mr. Sabel also had the same company take down the wheelchair ramp after his father passed away. Mr. Sabel further testified that Mr. Tauber did not have a key to the house, and that he uses the basement for storage. Notably, Mr. Sabel testified that he has his own Allstate insurance policy for the subject premises.

It is clear from the testimony of both Mr. Sabel and Mr. Tauber that although the oral agreement gave Mr. Tauber the limited right to re-enter the premises, there is no evidence that it imposed any duty to inspect, repair or maintain the premises on the Yale defendants. Furthermore, the Yale defendants were not bound by a course of conduct to maintain the premises. *See Reynoso*, 185 AD3d 1074. In the 26-27 years that Mr. Sabel lived on the premises, it was always understood that Mr. Sabel, as the tenant, was the one responsible for maintenance and repairs so long as he lived there. The maintenance and repairs of the premises are generally performed by Mr. Sabel without the knowledge of Mr. Tauber. It is also significant to note that the only alteration to the deck that Mr. Tauber was aware of prior to the instant accident was that Mr. Sabel installed a wheelchair ramp for his father, which Mr. Sabel later removed after his father's passing. Furthermore, the plaintiffs' pleadings, including the Bill of Particulars, do not allege any specific statutory violation and the alleged Building Code violations are not a statute that imposes liability on the Yale defendants.

The plaintiffs' contention that the Yale defendants are liable because they created the defective structure as they were involved in building the deck in 1987, and therefore have constructive notice of a latent defect, is unavailing. "A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected." *Nicoletti v Iracane*, 122 AD3d 811, 812 (2d Dept 2014); *see also Schnell v Fitzgerald*, 95 AD3d 1295 (2d Dept 2012). However, constructive notice may not be imputed when a defect is latent and would not be discoverable upon a reasonable inspection. *Nicoletti* at 812. The Yale defendants sufficiently demonstrated that they did not cause or create the defective condition. The evidence establishes that Yale had the deck installed in 1987, and that it was inspected by the Village of Spring Valley and qualified for a Certificate of Use. Shortly thereafter, the premises was leased to Mr. Sabel, who took responsibility for the maintenance and repair. Both Mr. Tauber and Mr. Sabel testified that there was no way to see any defect connected to the deck and that Mr. Tauber was not aware of any lack of flashing in the construction of the deck, and as such had no way of warning Mr. Sabel about it. Moreover, it is well established that "[t]he general rule is that an

employer who hires an independent contractor is not liable for the independent contractor's negligent acts." *See Robinson v Jewish Hosp. & Med. Ctr. of Brooklyn*, 275 AD2d 362, 363 (2d Dept 2000), quoting *Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668 (1992). Here, the record is clear that the deck was originally built by an independent contractor, not the defendant Mr. Tauber himself, and there is no applicable exception in the instant matter upon which to base liability. *See Robinson* at 363-364.

The Yale defendants have established entitlement to summary judgment as a matter of law and the plaintiffs have failed to raise a triable issue of fact in opposition. Furthermore, the plaintiffs have failed to set forth a *prima facie* showing of entitlement of summary judgment as a matter of law with respect to the issue of liability.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the Yale defendants' motion for summary judgment (Motion 04) is GRANTED; and it is further

ORDERED, that the plaintiffs' cross-motion for summary judgment (Motion 05) is DENIED.

This constitutes the decision and order of the Court.

DATED: January 25, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.