Cooper v Starrett City Inc.
2013 NY Slip Op 33817(U)
November 13, 2013
Supreme Court, Bronx County
Docket Number: 260514/08
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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Bryant Cooper, as Administrator of the Estate of Ellis Tony Cooper, Deceased

Plaintiff,

-against-

Starrett City Inc., and Grenadier Realty Corp.,

Defendants.

----------X

Index No. 260514/08

Present:
Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion and Exhibits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers this motion is decided as follows:

Defendants' motion for summary judgment seeking to dismiss plaintiff's complaint pursuant to CPLR 3212 is granted in accordance with the annexed Decision and Order of the same date.

Dated: November 13, 2013

SHARON A.M. AARONS. J.S.C.

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DECISION and ORDER

Hon. SHARON A. M. AARONS:

Defendant moves for summary judgment dismissing the complaint pursuant to CPLR 3212. The plaintiff submits written opposition to the motion. The motion is granted, as follows.

Plaintiff's decedent Ellis Tony Cooper (hereinafter Ellis) resided with his mother, Bertha Cooper, and brother, Thomas Cooper, at 1310 Pennsylvania Avenue Apt #8B, Brooklyn, New York, which is a twenty-floor building located within the complex commonly known as Spring Creek Towers, owned and managed by defendants Starrett City Inc. and Grenadier Realty Corp. (hereinafter Starrett). The plaintiff Bryant Cooper, as administrator of Ellis' estate, commenced this action to recover damages for personal injuries and wrongful death against Starrett alleging negligent operation and maintenance of their property, in that Starrett failed, in the middle of a heat wave, to provide air conditioning at the subject property, causing Ellis, who was wheelchair bound, to be exposed to high temperatures, resulting in his death.

Starrett provided heating and cooling for every building in the Spring Creek Towers complex through a power plant that used one set of pipes – thus, only after the heating system is shut down can defendants begin the process of changing from providing heat to the production of cool air.[1] Although plaintiff does not dispute the process that defendants use to provide the cool air throughout the complex, plaintiff argues that defendants failed to timely start up the changeover from heating to cooling, even though they were aware that a dangerous heat wave was approaching, and that it would take several days for the system to cool down before providing air conditioning. Defendants dispute plaintiff's claim, and now moves to dismiss plaintiff's complaint, contending that they acted reasonably when providing air conditioning to their tenants, and that Ellis' care givers failed to respond to his condition, which was an intervening cause of his death.

In support of their motion, defendants submit a copy of the pleadings, verified bill of particulars, Ellis' death certificate, medical and home care records, National Weather service record for the month of June 2008, the handwritten log notes from the engineering and electrician unit of defendants Starrett, deposition transcript of John Friel on behalf of defendant Starrett, incomplete copy of Clement McIntosh's deposition transcript, deposition transcripts of Bryant Cooper, Thomas Cooper, and Bertha Cooper, the lease agreement between

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[1] In order to provide cool air to the complex, defendants shut the heating system and drained 250,000 gallons of water from the pipes, so that the pumps can be inspected and cleaned and the parts serviced or replaced if necessary. Once the maintenance process is complete, the pipes are re-filled with 250,000 gallons of water which have been pumped through the refrigeration units. The cool water chills the air which then circulates through the pipes, supplying the cool air to the apartments.

defendants Starrett and non-party Bertha Cooper, and the affidavit of Dr. Charles V. Wetli.

Defendants argue that they exercised reasonable care during the conversion process from heat to cool air and point to the testimony of John Friel, manager and operator of the power plant. Mr. Friel testified that the power plant, which is staffed 24 hours a day 365 days a year, furnishes heat that cannot be shut until after May 31 in conformity with the Administrative Code of the City of New York § 27-2029[2]. According to Mr. Friel, after the heat is shut, they would inspect, clean and maintain the power plant equipments and if necessary, replace parts utilized for the changeover from heat to cool. He stated that it would generally take two to three weeks for the maintenance of the power plant to be complete and a day or two for the testing of the equipment including the refill of water to be chilled. Mr. Friel's testimony was corroborated by Clement McIntosh, maintenance supervisor of 1310 Pennsylvania Avenue, who testified that generally by May 1, the heating system is turned off, and on or around June 15, the air-conditioning system is turned on. Defendants also argue that although the conversion process from heat to cool generally could take up two weeks, in the summer of 2008, the changeover was completed by June 9, 2008. Defendants again point to Friel's testimony who testified that although he did not recall when in 2008 the changeover

[2] The Administrative Code of the City of New York § 27-2029 provides that "During the period from October first through May thirty-first, centrally-supplied heat, in any dwelling in which such heat is required to be provided, shall be furnished so as to maintain, in every portion of such dwelling used or occupied for living purposes . . ."

from heating to cooling was complete, he referred to the defendant's engineer logbook which showed that the pumps were distributing cool air throughout the system by June 9, 2008.

Defendants also contend that they do not owe a special duty to plaintiff to provide individual air-conditioning during the heat wave absent some notice or request by the plaintiff or care givers. According to Mr. McIntosh's testimony during the week of June 8, 2008, he was not aware of complaints regarding high temperatures in the tenant's apartments. Defendants do not dispute that June 2008 was a particularly hot summer month, but claim that it was unusual weather as demonstrated by the National Weather Service records which showed that it had been 34 years since New York City experienced a similar high temperature. As a result, defendants opened a cooling center at the complex and posted notices to inform tenants of its location.

Defendants maintain that tenants were permitted to install individual air conditioners if they requested one but additional charges would be incurred so if a tenant wanted instantaneous cool air the day after the heat was shut off, tenant could request the same to the management office. The lease agreement states that tenants may install individual air conditioners with the prior written approval of the landlord, and the execution of an Air Conditioning Agreement, which sets forth additional charges to the lease. Defendants point to deposition testimony by Ellis' son, Bryant Cooper, who testified that although his father's apartment was hot, he did not make a complaint about the condition of the apartment, or ask management or the super to supply an air conditioner in the apartment. Defendants also point

to the testimony of Bertha and Thomas Cooper, neither of whom complained about cool air, nor requested placing an air conditioner unit in their apartment.

Defendants next argue that they did not proximately cause plaintiff's death, as there was an intervening act by plaintiff's care givers, Bertha Cooper, Thomas Cooper and the home attendant who observed Ellis' condition deteriorate and did not take him to the hospital or cooling center. Defendants first point to Bryant Cooper's testimony who testified that he last visited his father on June 8, 2008 and observed that his father was not his usual cheery self. He testified that on June 8, 2008 while cutting his father's hair, he touched his face and it was warm but did not take his temperature. Defendants then submit the deposition transcript of Bertha Cooper who testified that although she noticed Ellis was getting weak and was hot "like a fever", she did not notice any changes in the plaintiff or that anything was wrong. She further testified that during the ten days before his death, she would feed and bathe the plaintiff and noticed that he was hot and would place a cloth with cold water on his arms, legs and put the fan on him. She stated that although Ellis' home attendant complained that the apartment was hot, the home attendant will only turn on the fan. A week before Ellis passed away, he had been examined by a doctor who found his overall condition was improving. Defendants also submit the deposition transcript of Thomas Cooper who testified that he cared for his brother overnight while the home attendant assigned to Ellis worked from 8:00 a.m. to 5:00 p.m.. The home attendant washed and cleaned Ellis while Thomas cleaned plaintiff's feeding tube and provided his medication. He stated that plaintiff was unable to communicate if he was not feeling well; therefore, they had to closely watch for plaintiff's condition. During the week

of June 1 to June 10, 2008, Thomas observed that plaintiff was not his normal self as he was not opening his eyes, speaking a single word, and he was leaning over the chair; however, Thomas did not call anyone about his brother's condition. He further stated that he gave his brother fluids but does not remember how much fluids or water he gave plaintiff on June 8, 2008. From the time plaintiff was released from the nursing home in 2007 to the time of his death Thomas never saw the home care attendant take the plaintiff's temperature and stated that no one at the nursing home or plaintiff's primary care doctor informed him that he needed to take plaintiff's temperature.

Defendants submit the affidavit of their expert Dr. Charles V. Wetli, a medical examiner who after review of plaintiff's bill of particulars, medical records, home care records, death certificate as well as the deposition transcripts of Bryant, Thomas and Bertha Cooper, opined that plaintiff suffered from an arteriovenous malformation of the brain which may have led plaintiff to suffer brain seizures that "may lead to strokes and death at anytime." He stated that plaintiff, a wheelchair bound disabled person, was dependent on his care givers to sustain his life and as a result they had to ensure that he was hydrated. He indicates that plaintiff's son and brother did not seek help when they noticed, in the middle of the heat wave, plaintiff was not his usual self and was less responsive and sought no help. He concludes that based on the medical record and the plaintiff's relatives testimony the failure of plaintiff's care givers to respond to his deteriorating condition in the middle of unusual heat wave was the intervening cause of plaintiff's death despite his advanced debilitating disease. He further opined that the death certificate indicates that plaintiff passed away on June 10, 2008 as a result of a heat

stroke caused by high environmental temperatures in his apartment from June 8, 2008 through June 10, 2008 and that atherosclerotic disease was a significant contributing factor; however, the death certificate does not state that high environmental temperatures were exclusively inside plaintiff's apartment.

Plaintiff in opposition submits the affidavit of Mark L. Kramer, the affidavit of Klas C. Haglid including National Weather Service reports from various years including 2008, the deposition transcript of Gary Dorestant, Ellis' death certificate, defendants' response to plaintiff supplemental combined demands and a Daily News article titled "Starrett sweats it while awaiting AC." Plaintiff contends that defendants were negligent in the operation and maintenance of the cooling system in that it slowly commenced the change from heat to cool in light of the fact that they had notice of a hazardous condition-heat wave with risk of heat stroke on its residents which defendants disregarded, while at the same time prevented the tenants from using individual air conditioning.

In support, plaintiff points to Friel testimony who testified that defendants did not take weather conditions into account like a heat wave when the transition was taking place. Plaintiff argues that defendants knew of the impending heat wave no later than June 3, 2008 and did not assign additional employees to accelerate the changeover so that cool air would be on when the heat wave arrived. The failure to take the heat wave into account was not reasonable as evidence by the affidavit of plaintiff's expert, Klas C. Haglid an occupational safety engineer expert with experience with environmental issues such as overheating, who

states that after reviewing the engineer's log of defendants' premises, the initial efforts to chill the water system to provide air conditioning did not occur until June 7, 2008 which was the start of the heat wave. Mr. Haglid contends that no explanation was provided by the defendants for the delay as they could have commenced the changeover from May 31, 2008, particularly since it was well understood that this large system needed several days to cool down before it began to work and this demonstrated a very late and reckless response to the weather forecast in view of the risk to tenants. Mr. Haglid claims that defendants left the changeover to the last minute since once maintenance was caught up, the work to turn on the air conditioning could have been done within a day or two. In contrast to defendants' claim that the pumps were distributing cool air by June 9, 2008, plaintiff points to the Daily News article as proof that on June 9, 2008, tenants were complaining of the hot conditions in their respective premises. Plaintiff also argues that defendants' engineer's logbooks are inadmissable as they have not been transcribed and it is simply defendants' counsel interpretation of what the logs show; therefore, if "the turbines began coming on line on June 8, 2008 and by June 9 they were fully functional" does not mean that cooling had occurred throughout the complex as it would take days for the apartments within the complex to cool.

Plaintiff next argues that an issue of fact exists as to whether defendants knew or should have known of the likelihood of the hazardous condition at the premises including the risk of heat stroke due to the approaching heat wave based on the National Weather Service forecasts and the volume of complaints received from other tenants as evident in the Daily News article. Plaintiff submits the affidavit of Mark L. Kramer, a consulting forensic meteorologist, who

stated that the National Weather Service (NWS) forecast showed that from June 1 to June 10, 2008 there were three days (June 8, 9, 10) with maximum air temperatures above 90 degrees F with heat wave warning. He states that NWS issued by June 7, 2008 a heat advisory and by June 9, 2008 an excessive heat watch and warning. He opined that based on the NWS forecasts and warnings, a heat wave commenced on June 8 and continued until June 10, 2008 with temperatures exceeding 90 degrees with a heat index mostly classified as extreme caution with the risk of heat stroke. Mr. Kramer further stated that heat advisories warnings were issued by NWS to New York City residents "directing residents to call 911 . . . to identify cooling centers in their area . . . to drink plenty of fluids . . . to stay in air-conditioned room . . . to check up on relatives and neighbors."

With respect to defendants' claim that plaintiff could have requested an individual air conditioner during the changeover from heat to cool, plaintiff maintains that the general understanding at the complex was that individual air conditioner were not permitted at the complex even though defendants submit a lease with language to the contrary. Plaintiff argues that there is an issue of fact as to whether the guarantee stated in the lease was just window dressing for a policy of de facto prohibition. Plaintiff submits the testimony of Gary Dorestant, a maintenance dispatch for the defendant in charge of allocating calls regarding maintenance, repairs and complaints, who testified that during the changeover from heat to cool air if he received a call that air conditioning is not working, he would inform tenant that the cool air is not yet on and no work ticket is generated; except that if after the central air is on and he receives a call that air conditioning is not working, he would generate a written record. He did

not advise tenants that they may be eligible for individual units on an emergency basis. Between May 31 and June 10 of 2008 no tenants' applications were received by defendants requesting individual air conditioners. Dorestant further testified that typically eight or nine days after heat is turned off, air conditioning is available to the tenants. Every year during the transition period, he would generally receive complaint from tenants that there is no cool air.

Plaintiff also rejects Dr. Wetli report, defendants' expert, contending that the report was first exchanged as part of the instant summary judgment motion as such it is untimely. Plaintiff argues that Dr. Wetli's conclusions are based on assumptions as said expert assumed that plaintiff exhibited outward signs that would have prompted his family to seek medical attention. With respect to defendants contention that the care givers alleged inaction to check on plaintiff's condition and take him to a cooling center or notify defendants of plaintiff's condition, plaintiff contends that there is no cross claim against the care givers which means that no negligence should be place on them. Plaintiff points to Mr. Haglid's report who stated that defendants knew plaintiff was wheelchair-bound who during the heat wave needed a place where he could cool off and recover or be sent to a hospital. He opined that by simply moving plaintiff to an air condition area and giving him water, he would have been saved and if that did not work to call an ambulance.

To establish a cause of action for common-law negligence, "a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries" (*Schindler v. Ahearn,* 69 A.D.3d 837, 838 [internal

quotation marks omitted]). "If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant" (*Mojica v. Gannett Co., Inc.,* 71 A.D.3d 963, 965; *see Pulka v. Edelman,* 40 N.Y.2d 781, *rearg. denied* 41 N.Y.2d 901). The issue whether one person owes a duty of care to "reasonably avoid injury" to another is a question of law for the courts (*Purdy v. Public Adm'r of County of Westchester,* 72 N.Y.2d 1, 8, *rearg. denied* 72 N.Y.2d 953). Accordingly, "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339 (1928). In the case at hand "a landowner has a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition under the circumstances" (*Galindo v. Town of Clarkstown,* 2 N.Y.3d 633, 636 [2004]; *Kush v. City of Buffalo,* 59 N.Y.2d 26, 29–30 [1983]). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of the injury on the plaintiff (*Kush v. City of Buffalo,* 59 N.Y.2d 26, 29–30 [1983]; *Basso v. Miller,* 40 N.Y.2d 233, 241[1976]). However, a landlord is not an insurer of tenant safety (*Nallan v. Helmsley–Spear, Inc.,* 50 N.Y.2d 507, 519 [1980]; *Raghu v. 24 Realty Co.,* 7 A.D.3d 455 [2004]).

"In moving for summary judgment, the defendant [bears] the initial burden of establishing that it maintained its premises in a reasonably safe condition, had no actual or constructive knowledge of the [condition] and did not create the allegedly dangerous condition." *Petrell v. Victory Markets, Inc.,* 283 A.D.2d 955 (4th Dept.2001); *Grant v.*

Radamar Meat, 294 A.D.2d 398, 398 (2nd Dept.2002); *Atkinson v. Golub Corporation Company,* 278 A.D.2d 905, 906 (4th Dept.2000). Here defendants argue that they did not owe a duty to the plaintiff, and even if a duty was owed to plaintiff, that duty was not breached, and, even if the duty was breached, the breach was not the proximate cause of the harm to Ellis.

This Court after a careful review of the evidence submitted finds that although the circumstances surrounding the decedent's death were truly tragic, the defendants satisfied their initial burden on the motion for summary judgment. The deposition transcripts of the director of the power plant, John Friel, the deposition transcript of Clement McIntosh (the maintenance supervisor of the premises at issue) and the engineer's logs established that defendants were required to heat the complex until May 31 of every year, and could not shut the heat until after that day as required by law. (See, Administrative Code of the City of New York § 27-2029.) According to Friel and Mr. McIntosh, it would generally take two to three weeks for the maintenance of the power plant to be complete as parts would need to be replaced and a day or two for the testing of the equipment. The engineer's logbook which Mr. Friel referred to in his deposition as the document that would indicate the exact time when the pumps distributing cool air were functioning showed that by June 9, 2008, cool air was being distributed. In opposition to defendants' prima facie demonstration of entitlement to judgment as a matter of law, plaintiff failed to raise a triable issue of fact that the changeover process was unreasonable. Plaintiff in opposition disputes Friel's assertion and relies upon his expert, Klas C. Haglid who opined that defendants should have taken the heat wave into account when it began the changeover as they were negligently slow in maintaining the plant and should have

accelerated the process as they could have commenced the process on May 31; however said assertion is not supported by any probative evidence.

Plaintiff further argues that summary judgment should not be granted because there exists a genuine issue of material fact as to whether the defendants had notice of the hazardous heat wave with risk of heat stroke and disregarded the effect that such heat wave would have on their tenants specially on a disabled wheelchair bound tenant while the changeover was in progress without the tenants ability to place an individual air condition unit in their apartments. Defendants again met their prima facie showing of entitlement to judgment as a matter of law that they did not breach a duty of care to the plaintiff as defendants point to the undisputed facts that a cooling center was available to the tenants during the heat wave and that plaintiff's care givers did not notify the defendants of plaintiff's condition nor did they request that an air conditioner be placed in the apartment at issue.

Plaintiff in opposition claims that although the decedent's care givers did not request an air conditioner, or complain about the lack of cool air in their apartment, there was a de facto prohibition of an individual air conditioner in tenants apartment. In support plaintiff noted the deposition testimony of Gary Dorestant, maintenance dispatch employee for defendants, who testified that when receiving tenants complaint for lack of cool air, he did not advise them that they could request an authorization to place individual air conditioner units in their apartments. Plaintiff also noted that between May 31 and June 10 of 2008, defendants did not receive any tenants' applications for said units. As to the fact that plaintiff was not

taken to a cooling center, plaintiff points to Mr. Haglid's report where he stated that defendants should have taken the decedent to a cooling center, or simply call an ambulance if he was not feeling well.

Plaintiff's suggestion that it was incumbent upon the defendants, the landlord and managing agent of a residential complex, to remove a tenant from his or her apartment and take him or her to a cooling center or a hospital, is an extraordinary proposition which this Court notes has no legal precedent. Plaintiff's counsel fails to cite any authority for said proposition. Since this Court finds that defendants have not breached their duty of care to the plaintiff, the issue of proximate cause will not be addressed.

Accordingly, defendants' motion seeking summary judgment dismissing the complaint is granted. It is hereby

ORDERED that the complaint against defendants Starrett City Inc., and Grenadier Realty Corp., is hereby dismissed.

The foregoing shall constitute the of the Court.

Dated: 11/13/13

SHARON A.M. AARONS, J.S.C.