

Landlord Liability

It was thought to be a black letter rule of law that an out of possession landlord could not be held liable for a defect in the premises where the lease did not give the landlord a right to reenter the premises. The First Department however endorsed a broader interpretation of premises liability in Bonifacio v. 910-930 Southern Boulevard LLC., 743 N.Y.S.2d 105 (1st Dep't 2002).

In Bonifacio, a tenant was injured when the elevator in his building fell four stories and sued the building owner. At the completion of discovery, the defendant/owner moved for summary judgment arguing that it was an out of possession owner with no control over the premises. In support of the motion, the defendant submitted a “triple net lease” between itself and a so-called “agent”, by which the agent agreed to assume sole responsibility for the operation of the premises. The defendant argued that despite Multiple Dwelling Law section 78, which requires the owner of a multiple dwelling to keep the building in good repair, it should not be liable because it was a net lessor that had not reserved a right of reentry, and had not been given notice of the alleged defective condition. The motion court denied the motion, finding that the defendant had failed to establish that it or its agents did not have notice of the asserted defect. The Appellate Division, affirmed, on different grounds.

The court begins by examining Section 78 of the Multiple Dwelling Law and found that it has always placed the responsibility for keeping a multiple dwelling in good repair on the owner. Furthermore, that responsibility is non-delegable. While that appears to say that an owner can never escape liability, the court is faced with years of cases that absolve the owner of responsibility where there was no notice and no right to reenter. In an effort to support its position, the court cites several older Court of Appeals cases, none of which explicitly held that

an owner can be held liable in the absence of a reentry provision in the lease. The cited cases however do state that an owner cannot contract away responsibility merely by leasing the property. Furthermore, the court held that in those cases where the owner has actually been held exempt from liability, it was not solely because the leases lacked a re-entry provision. Rather, those cases involved owners who had legal arrangements that irrefutably established that the owner had no responsibility regarding the building. In any event, the court held that the mere absence of a right of re-entry provision in the lease does not conclusively establish, in all circumstances, that the owner has completely parted with possession.

Despite what the Court says, it does appear that prior case law emphasizes the right of re-entry provision, and it is often a dispositive factor in such cases. Additionally, despite its alleged reliance on precedent, this case appears to be creating new law, and expanding owner liability. It is significant to note that the court's decision is largely fact specific. It appears from the description given, that the defendant was not acting in good faith. The defendant did not disclose the existence of the lease of the alleged tenant until it moved for summary judgment. As the Statute of Limitations had expired, had the defendant's motion been granted, the plaintiff would have been left without a remedy. As such, this case may ultimately be limited to its facts, It will be interesting to see how the First Department deals with future cases in this area.

Serious Injury Update

As we have noted in past issues, there have been a number of cases recently dealing with the proof necessary for a plaintiff to defeat a summary judgment motion on the threshold. The Court of Appeals revisited this issue in Toure v. Avis, 2002 N.Y. Lexis 1994 (July 9, 2002) and modified the analysis that courts had been using recently, reaffirming the old adage that it is

quality, not necessarily quantity.

Toure actually involves three separate cases, all of which involve the nature and extent of medical proof needed, an issue that has been discussed in numerous recent cases. The position taken by the courts is reflected in Bartley v. Salceda, New York Law Journal 10/12/01, which is discussed in our March newsletter. In Bartley, the plaintiff's proof was insufficient in that the plaintiff's doctor's affidavit "did not quantify the degree of restriction found in either the cervical or lumbar spine nor did the doctor state what objective tests he performed in arriving at his conclusions." That language is found in numerous other cases, and has had the effect of focusing judges attention on what percentage limitation of motion the doctor found. (For example, recently an associate in our office appeared in court on a threshold motion. The presiding judge interrupted the plaintiff's argument and inquired regarding the percentage of limitation. When the plaintiff said 39%, the court denied our motion. Presumably, we would have one our motion if the plaintiff had responded 10%). Clearly, the quantitative measure of restriction was become all important, and it appears the Court of Appeals realized a change needed to be made.

In Toure, the defendant moved for summary judgment, supporting the motion with the plaintiff's own medical records and an affirmation from the doctor who performed the IME. In opposition, the plainiff submitted an affidavit from a treating neurosurgeon who averred that:

even three years after the accident [the plaintiff] could lift only moderate weight objects with significant pain, experienced pain attempting to bend and use his lower back, was unable to sit for more than half an hour without great discomfort, could not walk moderate distances and had neck pain when turning his head.

The plaintiff also underwnt an MRI which showed one bulging and 2 herniated discs in the cervical spine. The examining doctor also found limited range of motion in the neck and

back. Based upon the plaintiff's complaints, his examination and the diagnostic tests, the doctor concluded that the plaintiff's injuries are:

permanent and result in restriction of use and activity of the injured areas and permanent limitation of his spine and peripheral nervous system. Moreover, the plaintiff's difficulties in sitting, standing and walking for extended periods of time and plaintiff's inability to lift heavy objects are a natural expected medical consequence of his injuries.

While the doctor's affidavit is quite detailed, no where does it contain a quantification of the restriction in movement of the cervical or lumbar spine. Given all the recent case law emphasizing the necessity of such, it is not surprising that the Supreme Court granted the defendant's motion and the Appellate Division, First Department affirmed.

The Court of Appeals however reversed, finding that the evidence offered by the plaintiff raised an issue of fact as to whether the plaintiff sustained a "serious injury." The Court acknowledged that while the physician's affidavit did not ascribe a specific percentage to the loss of range of motion in the plaintiff's spine, he sufficiently described the "qualitative nature" of plaintiff's limitations "based on the normal function, purpose and use of the body part. The physician further attributed limitations in the plaintiff's physical activities based upon the nature of the injuries sustained. The Court held that it could not say that the plaintiff's alleged limitations were so "minor, mild or slight" as to be considered insignificant within the meaning of the No-Fault law.

Toure was decided with 2 companion cases. In the first, Manzano v. O'Neil, the plaintiff prevailed at trial, however the Appellate Division reversed. The Court of Appeals, applying the new "qualitative" test, reversed. Again, although the medical expert did not assign a quantitative percentage to the loss of range of motion in the plaintiff's neck or back, he described the qualitative nature of plaintiff's limitation based on the normal function, purpose and use of the

body parts. Additionally, the expert related the plaintiff's injuries to her inability to perform daily tasks. The Court found that the limitations were not so insignificant as to bar the plaintiff's recovery.

The final case, Nitti v. Clerrico appears to reach a somewhat inconsistent conclusion. At trial, the plaintiff's expert was the chiropractor who examined the plaintiff at the request of the No-Fault carrier. The chiropractor found that the plaintiff had muscle spasm and based upon his examination and the review of an MRI report, he determined that the plaintiff was partially disabled and unable to perform her normal daily functions.

Based upon a reading of the two prior cases, one would expect the Court of Appeals to affirm the Appellate Division finding that the plaintiff met her burden. The Court of Appeals reversed however, rejecting the expert's testimony that he found spasm, because he did not indicate what test, if any, he performed to induce spasm.

Overall, it appears that these cases have made it somewhat easier for a plaintiff to meet his or her burden. They do not however provide clear guidance. The Court of Appeals emphasized the lack of objective findings in Nitti, yet emphasized the plaintiffs' alleged limited activities in the other two cases, which is a subjective finding. What is clear is that the Court of Appeals is not finished refining its analysis in this area.

Contractual Liability to Third Parties

In the typical snow and ice case involving a commercial landowner, one potential defendant is the snow removal contractor hired by the landowner. In Espinal v. Melville Snow Contractors, 2002 N.Y. Lexis 1501 (June 4, 2002), the Court of Appeals was called on to determine whether a contractor of that type owes a duty to a third person, such as the plaintiff.

In Espinal, the plaintiff slipped and fell in a parking lot owned by her employer. The plaintiff sued Melville Snow Contractors, the company under contract to plow and remove snow from the premises. She alleged, typically, that Melville “created the icy condition by negligently removing snow from the parking lot.” Melville moved for summary judgment, contending that it owed no duty of care to the plaintiff.

The Supreme Court denied the motion, concluding that Melville had failed to show that there was a reasonable explanation for the existence of the ice. The Appellate Division reversed, holding that Melville owed no duty of care to the plaintiff. The Court of Appeals affirmed.

The Court begins its analysis by stating that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. That is essentially a policy consideration, as imposing liability under such circumstances could open the contracting parties up to a tremendous amount of potential liability. The Court acknowledged however that there are certain circumstances where tort liability may be imposed on one of the contracting parties.

The Court examined the relevant cases and found that there were three instances when a party to a contract to render services owes a duty of care to third persons. These are:

1. Where the putative wrongdoer, in failing to exercise reasonable care in the performance of his duties “launches a force or instrument of harm”;
2. Where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant’s failure to perform those obligations causes injury to the plaintiff; and
3. Where the contract is “comprehensive and exclusive” to such a point that the contracting party has entirely displaced the other party’s duty to safely maintain the premises.

The plaintiff attempted to defeat the motion by arguing that this case fell under the third exception, namely that the snow removal contract is “comprehensive and exclusive.” The Court

disagreed. Under the contract, Melville was obligated to “clear, by truck and plow, snow from vehicular roadways, parking and loading areas, entrances and exits of the captioned property when snow accumulations exceed three inches.” Melville also agreed that upon request, it would salt and sand certain areas of the property. The contract also specified during what hours Melville was supposed to remove the snow.

In reaching its decision, the Court emphasized that by the express terms of the contract, Melville was obligated to plow only when the snow accumulation had ended and only when it exceeded three inches. Additionally, the contract stated that “it is the responsibility of the property manager or owner to decide whether an icy condition warrants the application of salt or sand.” Based upon those provisions, the Court held that the contractual undertaking was not the type of “comprehensive and exclusive” property maintenance agreement contemplated by the prior case law. The Court noted that while Melville did undertake to provide snow removal services under specific circumstances, the owner at all times retained its landowner’s duty to inspect and safely maintain the premises. Specifically, Melville was under no duty to monitor the weather to see if melting and re-freezing would occur and create an icy condition.

As the plaintiff did not allege detrimental reliance on Melville’s continued performance of its contractual obligations the Court did not examine that exception, but did look to see whether Melville “launched a force or instrument of harm.” The plaintiff argued that Melville’s snow removal activities created a “dangerous icy condition” or “increased the snow-related hazard which caused the plaintiff to slip and fall.” The only evidence of this however was the testimony of Melville’s deposition witness that snow plowing operations can sometimes leave “residual snow and ice” on the plowed areas and that failure to salt and sand could possibly cause snow to melt and re-freeze. The Court found however Melville merely plowed the snow

as required by the contract and did not “launch a force or instrument of harm.”

We note that the contractual language present in Espinal is fairly typical of the language in the contracts we see in our practice. As such, it appears that the majority of snow removal contractor defendants will have a basis for summary judgment motions, assuming the plaintiff cannot present evidence that the case should fall under one of the exceptions. Additionally, while Espinal deals with snow removal contract, it would be equally applicable to providers of security services, who often find themselves involved in litigation because someone slipped or tripped and fell in the vicinity of one of their security officers.