SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4372-16T1

SAYAT NOVA, LLC,

Plaintiff-Appellant,

v.

F. WILLIAM KOESTNER, JR.,

Defendant-Respondent.

---

Submitted February 26, 2018 – Decided March 20, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7831-15.

Ballon Stoll Bader & Nadler, PC, attorneys for appellant (Kateryna Stupnevich, on the briefs).

Hueston McNulty, PC, attorneys for respondent (John F. Gaffney, on the brief).

PER CURIAM

Plaintiff appeals from the summary judgment dismissal of its negligence complaint, seeking damages arising out of a plumbing failure in defendant's building, which flooded plaintiff's restaurant. We reverse.

We discern the following facts from the record, extending to plaintiff all favorable inferences. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). For many years, plaintiff has operated its restaurant in space it has leased from defendant. On May 1, 2015, water from a third-floor apartment flooded the restaurant. Plaintiff alleges that defendant's negligence in maintaining the building's plumbing caused the damage that plaintiff incurred from the flood. According to the parties' lease, defendant was not liable for any plumbing failures unless "due to the negligence of the landlord, [or his] agents, servants or employees."

The May 2015 incident was not the first time the building's plumbing failed. Four times, between 2010 and 2013, water entered the restaurant from the ceiling in the same general area, near a stage. The first time, a tenant was able to shut off the water before substantial damage was done. Each successive incident involved more water and more damage than the previous incident. Plaintiff's managing member, Shahe Hagopian, notified the landlord each time. In 2012, Hagopian hired contractors to make repairs because of the landlord's unresponsiveness. The landlord never compensated plaintiff for the resulting losses.

In the incident that gives rise to plaintiff's complaint, water entered like a "waterfall," according to Hagopian, from the

ceiling above a different area of the restaurant. Moments later, the building's superintendent, Eddy Alcala, entered the restaurant with a man unfamiliar to Hagopian. Alcala was not a licensed plumber. Hagopian asked if his companion was one. Alcala replied, "No, no, no. I'm sorry. By mistake we broke the pipe." He was apparently referring to a pipe in a third-floor apartment with a hair-clogged tub. Defendant admitted the water came from there.[1] Hagopian quoted Alcala to say, "We try to fix the fixture, and the guy by mistake break the pipe." The landlord then called in a professional licensed plumber. When asked what happened, the plumber told Hagopian that "they burst the pipe." The water damage forced plaintiff to close for several days for repairs.

Thereafter, plaintiff filed its complaint alleging negligence and breach of contract. Plaintiff claimed over $65,000 in damages consisting of repair costs, replacement of damaged chairs and fixtures, and lost income from cancelled parties and from past and future closures, including an anticipated thirty-day period for mold prevention work. After a period of discovery, defendant filed its motion for summary judgment, and plaintiff filed a cross-motion on the issue of liability.

[1] Hagopian testified that after Alcala spoke to the landlord, he changed his story, and claimed that he was trying to fix a leak. However, defendant admits in his statement of material facts that Alcala "broke the pipe by mistake."

The court granted the former, and denied the latter. The court held that plaintiff needed an expert to establish that defendant was negligent in the repair and maintenance of the plumbing that failed. The court rejected plaintiff's argument that a reasonable jury could infer negligence from the five plumbing failures in five years, and from Alcala's admissions that he broke the pipe "by mistake."

In considering plaintiff's appeal from the grant of summary judgment, we employ the same standard as the motion judge under Rule 4:46-2(c). Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We consider whether the evidence, in the light most favorable to the non-moving party, "suff[ices] to permit a rational factfinder to resolve the alleged disputed issue in [the non-moving party's] favor." Brill, 142 N.J. at 540. As applied here, the issue is whether, absent expert testimony, a rational jury could find defendant negligent.[2] We conclude a jury could.

Among other elements, plaintiff was obliged to prove that defendant or his agents breached an existing duty of care. See Townsend v. Pierre, 221 N.J. 36, 51 (2015) (stating elements of negligence action). As we recently explained, "expert testimony

[2] Plaintiff's contract claim also sounds in negligence, as the lease relieves defendant of any liability for plumbing failures, unless caused by its negligence or that of its "agents, servants or employees."

is not always required to assess whether a particular defendant acted negligently." Jacobs v. Jersey Cent. Power & Light Co., ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 18). "The test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982).

As we discussed in Jacobs, experts may be essential to assist jurors in assessing whether a licensed professional has breached a duty of care. Id. at ___ (slip op. at 18). Likewise, an expert may be needed in a case involving a "complex instrumentality." Id. at ___ (slip op. at 20). On the other hand, a jury did not need an expert to determine whether a utility failed to exercise reasonable care in shielding the public from the danger of a hole it left in the ground. Id. at ___ (slip op. at 22).

Applying this standard, we conclude that while an expert would be helpful, a jury may rely on its own common knowledge and experience to determine that defendant or his agent breached a duty of care. Once Alcala and his anonymous cohort attempted to repair the clogged tub in the third-floor apartment, they were obliged to do so with reasonable care. See Dowler v. Boczkowski, 148 N.J. 512, 516 (1997) (stating "when the landlord voluntarily undertakes to perform a repair, the landlord 'is obligated to

perform the work in a reasonably careful manner and is liable in damages for his failure to do so'" (quoting Bauer v. 141-149 Cedar Lane Holding Co., 24 N.J. 139, 145 (1957)).

"Negligence may be established by proof of circumstances in all cases." Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 607 (1958). While defendant may contend Alcala acted with reasonable care, a jury could infer the opposite conclusion under the circumstances. Based on defendant's assertion that the water came from a clogged bathtub, a jury could surmise that the problem was not a pipe that supplied water, but a pipe that drained water. Presuming the flood was caused by breaking a drain pipe, then the water must have come from a full tub. That suggests that Alcala apparently did not bother to empty the tub before working on it.[3] A jury needs no expert to infer that was negligent.

However, a jury need not determine exactly what kind of pipe or fixture broke. Alcala and his cohort were not licensed plumbers. Rather than call one, they attempted to clear the clog themselves — something familiar to every do-it-yourself homeowner with a plunger. Yet, presumably outside the average homeowner's experience, Alcala and his cohort evidently used a tool or

[3] He could have done so with buckets, draining it into a sink or toilet.

otherwise exerted such force on a pipe that it burst. Alcala admitted they made a "mistake."

Plaintiff was not obliged to establish exactly how Alcala broke the pipe – whether he used the wrong tool, or used the right tool wrongly – to establish he did so without reasonable care. The occurrence bespeaks negligence. See Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 398-400 (2005) (describing res ipsa loquitur doctrine). Simply put, a jury could infer that, more likely than not, Alcala acted without reasonable care. See id. (noting that the res ipsa loquitur doctrine "'permits an inference of negligence that can satisfy the plaintiff's burden of proof'" and is available "'if it is more probable than not that the defendant has been negligent'" (quoting Eaton v. Eaton, 119 N.J. 628, 638 (1990) and Myrlak v. Port Auth. of New York and New Jersey, 157 N.J. 84, 95 (1997))). If defendant has evidence to the contrary, defendant was obliged to present it. See Kahalili, 26 N.J. at 607 (stating "in proper cases, the jury may be permitted to infer negligence from the accident and the attending circumstances in the absence of an explanation").

Reversed and remanded. We do not retain jurisdiction.