

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D36280
T/kmb

_____AD3d_____

Argued - March 30, 2012

PETER B. SKELOS, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SANDRA L. SGROI, JJ.

2011-05606

DECISION & ORDER

Gabriel Lugo, plaintiff-appellant, v Austin-Forest Associates, et al., defendants, Mowry Realty Associates, respondent, Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant, defendant-appellant.

(Index No. 21747/08)

Annette G. Hasapidis, South Salem, N.Y., for plaintiff-appellant.

Nicoletti Gonson Spinner & Owen, LLP, New York, N.Y. (Edward L. Owen III, Elana Schachner, and Pauline E. Glaser of counsel), and Goldberg Segalla LLP, White Plains, N.Y. (William T. O'Connell of counsel), for defendant-appellant (one brief filed).

Perez & Varvaro, Uniondale, N.Y. (Edgar Matos of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant, appeals from an order of the Supreme Court, Queens County (Sampson, J.), dated March 10, 2011, which granted the motion of the defendant Mowry Realty Associates for summary judgment dismissing the complaint and all cross claims insofar as asserted against that defendant and for conditional summary judgment on that defendant's cross claim for contractual indemnification against it, and the plaintiff separately appeals, as limited by his brief, from so much of the same order as granted that branch of the motion of the defendant Mowry Realty Associates which was for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the appeal by the defendant Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant, from so much of the order as granted that branch of the motion of the defendant Mowry Realty Associates which was for summary judgment dismissing the

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complaint insofar as asserted against it is dismissed, as the defendant Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant, is not aggrieved by that portion of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144); and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the defendant Mowry Realty Associates, payable by the plaintiff and the defendant Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant.

The plaintiff allegedly sustained injuries when he was struck by an open cellar door as he descended the stairs leading from the sidewalk to the cellar of a building owned by the defendant Mowry Realty Associates (hereinafter the defendant landlord) and leased to the defendant Pisco Restaurant Associates, LLC, doing business as Mardi Gras Restaurant (hereinafter the defendant tenant). The defendant landlord moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, contending that, as an out-of-possession landlord, it could not be held liable for the plaintiff's injuries. It further sought summary judgment on its cross claim against the defendant tenant for contractual indemnification. The defendant tenant and the plaintiff opposed the motion. The Supreme Court granted the motion.

“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” (*Repetto v Alblan Realty Corp.*, 97 AD3d 735, 737; *Madry v Heritage Holding Corp.*, 96 AD3d 1022; *Goggins v Nidoj Realty Corp.*, 93 AD3d 757; *Seawright v Port Auth. of N.Y. & N.J.*, 90 AD3d 1017; *Santos v 786 Flatbush Food Corp.*, 89 AD3d 828, 829; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18; *Mercer v Hellas Glass Works Corp.*, 87 AD3d 987, 988). Here, the defendant landlord established its prima facie entitlement to judgment as a matter of law by demonstrating that it was an out-of-possession landlord, that it was not contractually obligated to maintain the subject cellar doors, that it did not endeavor to maintain the cellar doors, and that it did not owe the plaintiff a duty by virtue of any statute upon which the plaintiff relied before the Supreme Court (*see Madry v Heritage Holding Corp.*, 96 AD3d at 1023; *Vialva v 40 W. 25th St. Assocs., L.P.*, 96 AD3d 735; *Goggins v Nidoj Realty Corp.*, 93 AD3d at 758; *Mercer v Hellas Glass Works Corp.*, 87 AD3d at 988).

In opposition to the defendant landlord's prima facie showing, the plaintiff and the defendant tenant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We note that the defendant tenant's argument that the defendant landlord violated Administrative Code of the City of New York § 19-119 is improperly raised for the first time on appeal, and therefore is not properly before this Court (*see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696; *Whitehead v City of New York*, 79 AD3d 858).

Further, the Supreme Court properly granted that branch of the defendant landlord's motion which was for conditional summary judgment on its cross claim for contractual indemnification against the defendant tenant. The defendant landlord established its prima facie entitlement to judgment as a matter of law on this cross claim by demonstrating that it was entitled

to contractual indemnification pursuant to section 64 of the lease between it and the defendant tenant and, in opposition, the defendant tenant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d at 562).

The remaining contentions of the plaintiff and the defendant tenant are without merit.

SKELOS, J.P., FLORIO, BELEN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court