

Fei Jian Ye v 200 Dyckman Assoc., L.L.C.

2011 NY Slip Op 30278(U)

February 9, 2011

Sup Ct, NY County

Docket Number: 103842/2008

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON MARTIN SHULMAN, J.S.C

PART 1

Index Number : 103842/2008

YE, FEI JIAN

vs

200 DYCKMAN ASSOCIATES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 103842/08

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ..A-P

Answering Affidavits — Exhibits 1-4

~~Notice of Cross-Motion~~

~~Replying Affidavits~~ — exhibits A-B

Answering Aff. — exh. 1

Replying Aff. Yes No

PAPERS NUMBERED

| |
|---|
| 1 |
| 2 |
| 3 |
| 4 |
| 5 |

Upon the foregoing papers, It is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED

FEB 10 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: February 9, 2011

HON MARTIN SHULMAN, J.S.C J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

FEI JIAN YE,

Plaintiff,

Index No. 103842/2008

-against-

DECISION & ORDER

200 DYCKMAN ASSOCIATES, L.L.C. and
STONECREST MANAGEMENT, INC.,
Defendants.

200 DYCKMAN ASSOCIATES, L.L.C. and
STONECREST MANAGEMENT, INC.,
Third-Party Plaintiffs,

Third-Party Index No.
103842/2008

-against-

SHU YING DONG d/b/a CHINA SEA
RESTAURANT, CHINA SEA RESTAURANT
and SHU YING DONG, individually,
Third-Party Defendants.

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

Defendants/third-party plaintiffs 200 Dyckman Associates, L.L.C. ("200 Dyckman") and Stonecrest Management, Inc. ("Stonecrest") (collectively "Movants") move for summary judgment in their favor dismissing the complaint and for summary judgment in their favor on the third-party complaint granting them indemnification and defense from the third-party defendants. Plaintiff Fei Jian Ye opposes the motion. Third-party defendants¹ oppose and cross-move for summary judgment in their favor dismissing the third-party complaint. Plaintiff and Movants oppose the cross motion.

On October 5, 2007 at approximately 8:00 p.m., Plaintiff allegedly sustained injuries when he tripped and fell down an interior staircase in the premises at 192-206 Dyckman Street, owned by 200 Dyckman, managed by Stonecrest and leased to third-party defendants. Plaintiff commenced the instant action on March 14, 2008 asserting

¹ The Chinese restaurant premises and operation are referred to as "China Sea".

a negligence cause of action. Ex. A to Motion. Movants commenced a third-party action on May 12, 2008, asserting causes of action for indemnification and defense in the main action. Ex. C to Motion.

Movants' Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the Movants' proffer of evidence establishing a prima facie case, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

As held in *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 (1st Dept), *lv denied* 88 NY2d 814 (1996):

A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.

Third-party defendants assumed the China Sea lease (Ex. O to Motion²), which was originally made in October 2004, in November 2006. It requires the landlord to “maintain and repair the public portions of the building . . . [while the tenant] take[s] good care of the demised premises.” Lease, ¶ 4. The landlord retained the right to enter the premises at any time in case of an emergency and, at other times, on reasonable notice, to inspect and make repairs as the landlord chooses. *Id.*, ¶ 13. Nothing in the lease makes Movants anything more than an out-of-possession landlord. Ordinary maintenance and repair are the tenant’s responsibility. Only if “liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision” may Movants, as an out-of-possession landlord, be held liable. *Johnson v Urena Serv. Ctr.*, *supra*; *Putnam v Stout*, 38 NY2d 607 (1976); *Davis v HSS Props. Corp.*, 1 AD3d 153 (1st Dept 2003), *lv denied* 1 NY3d 509 (2004); *McDonald v Riverbay Corp.*, 308 AD2d 345 (1st Dept 2003).

Plaintiff was deposed on August 13, 2009, using a Mandarin interpreter. Ex. J to Motion. At the time of the incident he was 47 years old and had been employed by third-party defendants for about one week. *Ye* Transcript at 49. He started there on Monday and the accident happened on Friday. *Id.* at 127. Plaintiff was carrying a bucket of vegetables to a refrigerator below when he tripped on stairs that led to the basement from China Sea’s kitchen. The staircase was only used by restaurant employees, not customers. He recalled going down the stairs 20 to 30 times before the incident. *Id.* at 50. He “was wearing anti-slippery shoes provided by the restaurant.” *Id.* No one else was on the staircase when he fell and he did not think that anyone saw

² A slightly more legible copy of the lease is attached as Ex. 3 to Medic Aff. in Opposition to Motion.

him fall. *Id.* at 52. He testified that he did not wear prescription eyeglasses, took no alcohol or drugs within 24 hours of the incident and never experienced blackouts, fainting spells or dizziness before the incident. *Id.* at 53-54. He said there were no handrails on the staircase. *Id.* at 55. He testified that he had "to squat and go down," bend his head and body or lower his head when entering the staircase on the way down. *Id.* at 57, 65, 140. He never observed any repairs being made to the steps and never complained to anyone about their condition. *Id.* at 81. Sweeping and mopping of the premises were done at the end of the day, at closing time, approximately 1:00 a.m.

Plaintiff remembered that he slipped on the third or fourth step down, but "it was very dark downstairs." *Id.* at 57. He believed that oil caused him to slip: "on the steps it's dark and then there's oil in it. It's very slippery." *Id.* at 60. "The first two steps are cleaner, but you walk down – you walk towards the basement, more you walk down, the more dirty the steps are." *Id.* at 62. He thought that "70 or 80 percent of the steps" had oil on them. *Id.* at 63. The bright kitchen lights illuminated the top few steps, but the staircase was "very dark ahead – after the third step." *Id.* at 66. However, he then said that he "could see the steps below that. . . . I could see it all the way. . . . I could see from the first step until the last step of the stairs." *Id.* at 68-70. He described the steps as metal, "pretty much black, covered by black." *Id.* at 75. He claimed that "when I woke up in the hospital, I saw oil on my clothes, a lot of oil on my clothes." *Id.* at 76. His clothes were cut off him at the hospital in order for him to be treated, and later thrown away. *Id.* at 51, 76, 96. He remembered that there were "patches and patches of oil" on his clothes, "[s]ome on the back and some on my butt area." *Id.* at 76. He had no idea what the source of the oil was. *Id.*

Avi Finkelstein, Stonecrest's property manager, testified on August 20, 2009 that he visited the building, which housed residential and commercial tenants, "virtually daily," but China Sea "more than 50 times in 2007." Finkelstein transcript at 16-17. He did not have a regular inspection schedule and did not keep a record of inspections. *Id.* at 18. He recalled going into China Seas' basement only once, however, either in 2007 or 2008. *Id.* at 17. He knew that a metal staircase connected the basement to street level, but he was unaware of when and by whom it was installed, that is, by an earlier tenant or the landlord. *Id.* at 21-22. He testified that the staircase had no handrail. *Id.* at 27. He knew of no complaints about use or condition of the staircase. *Id.* at 34. Stonecrest had no record of any problem with the staircase prior to commencement of this action. *Id.* at 35. Finkelstein said that "order and cleanliness issues" with China Sea did not rise to the "problematic" level. *Id.* at 31.

Hector Carrasco was deposed on October 21, 2009 with the aid of a Spanish interpreter. Stonecrest employed him as superintendent of the building. He bought food from the Chinese restaurant but he recalled only entering the basement once to make repairs to a heating pipe, "more or less" in 2007 during the winter. Carrasco transcript at 21-22. He entered and left the basement then through a door that connected to other parts of the building's basement. *Id.* at 22-23. He did not use the staircase at issue, which he said he saw for the first time when repairing the pipe in the basement. *Id.* at 24. He was not asked if he used the staircase on any subsequent

occasion. He identified the staircase as red from a photograph that he was shown.³ *Id.* at 26.

Shu Ying Dong, China Sea's owner, testified on August 13, 2010, with the assistance of a Mandarin interpreter, that she lives in an apartment in the residential portion of the building. China Sea's regular staff included a cook, Plaintiff and Dong. Dong Transcript at 12. Additionally, her 17-year old daughter worked on weekends and a delivery man worked part time. She signed the assignment and assumption of the lease for China Sea in November 2006 from the previous owner-operator. Although she could read no English, a lawyer who spoke Mandarin represented her and explained the basic principles to her. *Id.* at 17-19, 21-22. She had an insurance policy naming "the landlord" as an additional insured. *Id.* at 23.

Dong claimed that Plaintiff was responsible for sweeping and mopping while he was employed. *Id.* at 28, 74. The street level and the basement were swept each night at closing, but only the street level was mopped. *Id.* at 28-29. She said that she inspected the staircase about once a week, looking for loose parts and oil or water on the steps. *Id.* at 87. No one ever washed the steps. *Id.* at 88. Dong replaced light bulbs as needed. *Id.* at 38-39. Food deliveries were made at street level. *Id.* at 31. Then, her employees and/or she would wash and pack the items before placing them in the refrigerator in the basement. *Id.* at 32-33. All food preparation took place at street level. *Id.* at 34. Vegetable oil was used for frying, and stored at street level. *Id.* at 26. Dong claimed she never provided footwear to Plaintiff. *Id.* at 86-87.

³ The photographs shown to Carrasco and Dong at their depositions are reproduced in color as Exhibits 1, 2 and 3 attached to Medic Affirmation in Opposition to Motion and Exhibit 1 attached to Medic Affirmation in Opposition to Cross Motlon.

Dong heard Plaintiff calling out in pain after he fell, and she went down the stairs without any problem. *Id.* at 50. She stated that she never saw grease, oil or debris on the staircase then, or at any other time. *Id.* at 30, 50. The staircase was never painted while she owned China Sea and she never had any repairs or alterations made to it. *Id.* at 37, 70, 72. The staircase was red, as shown by photographs she identified. *Id.* at 71. She claimed that the staircase had a handrail, but admitted it was placed at the street-level doorway and did not descend the full length of the staircase. *Id.* at 78-85. She never complained to the landlord about the absence of a handrail along the staircase. *Id.* at 94.

According to Dong, Finkelstein came to China Sea to order food. They did not speak because of her lack of English, but she saw him go down the staircase. *Id.* at 91-92. She did not remember whether his purpose was to inspect the staircase and basement. *Id.* at 92-93. She did not state the number of times Finkelstein walked down to the basement in the year prior to the accident. She testified that Carrasco used the stairs to the basement about five times in that year. *Id.* at 95-96.

Plaintiff's verified bill of particulars (Ex. F to Motion, ¶ 7 [d]) placed the hazard on the third step of the staircase, stating that the staircase:

posed a dangerous and hazardous condition in that there were no banisters/handrails on either side of the staircase; the staircase did not meet reasonable engineering or building code standards in that it did not have any bannisters/handrails on either side of the staircase, was not properly illuminated, was overly steep and was not made of proper non-slip friction-causing materials.

In paragraph 11 of the verified bill of particulars, which is almost two pages long, Plaintiff expands on his theory of causation and charges that defendants were negligent:

in failing to clean and/or adequately clean the dirt, food, grease, beverage spillage and other slippery substances that had accumulated on the staircase to the basement . . . [and] in causing, permitting and allowing dirt, food, grease, beverage spillage and other accumulated slippery substances to be, become and remain in the stairwell to the basement.

In opposition to the motion, Plaintiff submits a report by Robert L. Schwartzberg, P.E. (Ex. 4 to Medic Aff. in Opposition to Motion), who visited the premises on September 16, 2009. Schwartzberg's opening sentence offers a theory of the accident and the report continues in pursuit of this theory. "Fei Jian Ye was caused to lose his balance and to fall while descending the subject interior stairway . . . Mr. Ye was caused to lose his balance, to fall and to be injured owing to the configuration of the subject stairway and the conditions thereat." Since transitory conditions that may have caused the accident might not have remained in place 23 months later, Schwartzberg deals almost entirely with the staircase's configuration, discussing tread widths, riser heights and the materials and manner of its construction, all of which he finds deficient in law and/or practice. Additionally, he comments on the purported inadequacy of the lighting to illuminate the entire staircase.

However, Plaintiff's testimony, in contrast to Schwartzberg's theory, clearly identifies the proximate cause of his accident. Plaintiff did not lose his balance, which implies that the structure of the steps made his footing unsafe. He allegedly slipped on oil on the steps. Plaintiff never suggests any other possibility. He offers two diametrically opposed descriptions of the illumination of the staircase, but only blames the oily slippery surface as the cause of his accident. It is unavailing to pursue measurements of the steps, the height and width of treads, as Schwartzberg does,

because it was the transitory condition of the oil-coated steps, rather than their original construction or current condition due to wear and tear, that brought harm to Plaintiff.

The words oil, oils and oily appear dozens of times on 12 different pages in Plaintiff's deposition transcript, according to its index. A typical exchange follows:

Q. When you sustained your accident, did you slip, did you trip or was it something else that caused you to fall?

A. The stairs is oily, slippery.

Ye transcript at 55-56. Plaintiff had no problem with his balance until he allegedly reached a slippery spot.

Q. As you went down those first few steps before you actually slipped, did you have any trouble with those steps?

A. No.

Id. at 58.

Accepting all of Schwartzberg's findings about the non-transitory condition of the staircase when he observed it does not establish a triable issue of material fact regarding Movants' liability. *Ohdan v City of New York*, 268 AD2d 86, 89 (1st Dept), *lv denied* 95 NY2d 769 (2000) ("The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the negligence determination. A defendant may act negligently without that negligence constituting a proximate cause of the accident"). Movants were too far removed from the scene, legally and factually, to be responsible for oily steps on the way down to the basement on October 5, 2007. *Wrubel v Rose Boutique II, Inc.*, 13 AD3d 264, 265 (1st Dept 2004) ("Whether the owner may have been responsible for the structural condition of the stairs is irrelevant. Plaintiff's fall was not attributable to any structural defect"); *Deebs v Rich-Mar Realty Assocs.*, 248 AD2d 185, 186 (1st Dept 1998) (summary

judgment for an out-of-possession landlord is warranted even when the absence of a handrail entails a possible building code violation, because "plaintiff is not claiming that her injury resulted from the lack of a handrail on the stairway, but rather from a crack in a step"). Movants' motion for summary judgment dismissing the complaint is granted under these circumstances.

Movants also request summary judgment in their favor on the third-party complaint, which asserted causes of action for common-law and contractual indemnification and defense. China Sea's lease states, at paragraph 8:

Owner or its agents shall not be liable for . . . any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees. . . . Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury. . . . Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney fees, paid, suffered or incurred as a result of any breach by Tenant . . . or the consequences, negligence or improper conduct of the Tenant.

The lease rider at paragraph 69 requires the tenant to obtain public liability insurance in the amount of \$1 million, naming "the Landlord" as an additional insured.

The court has found herein that Plaintiff's injuries were not caused by Movants' negligence. Thus, Movants are entitled to the benefits of the insurance coverage against claims for bodily injury that third-party defendants were required to maintain.⁴

Over and above that insurance coverage, Movants' are entitled to be contractually

⁴ No actual insurance documents are submitted by any party. However, a letter to Movants dated June 16, 2010 from Continental Casualty Company (Ex. B to Cross Motion) denies coverage to Stonecrest under third-party defendants' policy "since there is no insurance procurement or indemnification provision in the lease favoring them."

indemnified and held harmless in the instant action. With the dismissal of the complaint, Movants are not exposed to liability for Plaintiff's injuries. However, Movants have incurred actual "costs and expenses" in this action, and are entitled to be reimbursed pursuant to paragraph 8 of the lease.

Third-Party Defendants' Cross Motion for Summary Judgment

Third-party defendants argue that Plaintiff "is alleging a full blown structural defect case against 200 Dyckman as well as a case in which building code violations are alleged against 200 Dyckman." South Aff. at ¶13. In such event, third-party defendants would have no liability for Plaintiff's injuries. However, as discussed above, Plaintiff offers a straightforward explanation of the cause of his accident, oil on the steps to the basement. Such a transitory condition is not the responsibility of an out-of-possession landlord but may be the responsibility of third-party defendants, as occupant of the premises. Their cross motion is, therefore, denied.

Accordingly, it is

ORDERED that the portion of defendants/third-party plaintiffs' motion for summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed; and it is further

ORDERED that the portion of defendants/third-party plaintiffs' motion for summary judgment on the third-party complaint is granted on the first cause of action for contractual indemnification and the issue of reasonable attorney's fees and disbursements shall be referred to a Special Referee to hear and report by separate order; and it is further

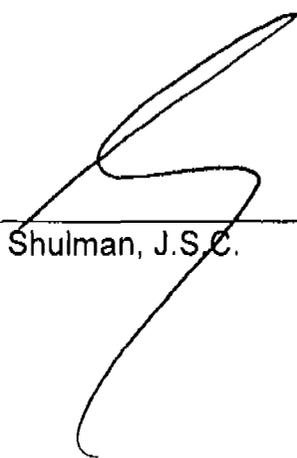
ORDERED that counsel for the defendants/third-party plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,⁵ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the cross motion by third-party defendants Shu Ying Dong d/b/a China Sea Restaurant, China Sea Restaurant and Shu Ying Dong, individually, for summary judgment dismissing the third-party complaint is denied.

The Clerk is directed to enter judgment accordingly.

Any relief not expressly granted is otherwise denied. This is the decision and order of the court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
February 9, 2011



Martin Shulman, J.S.C.

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⁵ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/suptctmanh under the "References" section of the "Courthouse Procedures" link).