

Colon v 78-14 Roosevelt LLC
2014 NY Slip Op 33139(U)
September 17, 2014
Supreme Court, Queens County
Docket Number: 16312/10
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JOHNNY COLON,
Plaintiff,

-against-

78-14 ROOSEVELT LLC, MANGOS STEAKHOUSE
& BAKERY, INC., WILSON QUICENO and
GUIDO MOSQUERA

Defendants.

78-14 ROOSEVELT LLC,

Third-party Plaintiff,

-against-

WILSON QUICENO and GUIDO MOSQUERA,

Third-party Defendants.

The following papers numbered 1 to 30 read on this motion (Seq.#6) by defendant/third-party plaintiff 78-14 Roosevelt LLC (Roosevelt) and separate motion (Seq.#7) by defendant Mangos Steakhouse and Bakery, Inc. (Mangos) and defendant/third-party defendant Wilson Quiceno (Quiceno) (together, the Mangos Defendants) for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against the movants; a cross motion by Roosevelt for summary judgment on its cross-claim as against Mangos for a defense and contractual indemnification ; and an order to show cause (Seq.#8) by Roosevelt to stay the determination of the Mangos Defendants' summary judgment motion for consideration together with Roosevelt's cross motion (motion).

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Upon the foregoing papers it is ordered that these motions and cross motion are consolidated for purposes of disposition and determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained on May 21, 2010 when he fell on the premises located at 78-14 Roosevelt Avenue in Queens, New York, which operates as Mangos Steakhouse and Bakery. Roosevelt owned the subject premises and non-party Comjen Associates (Comjen) was its managing agent. Mangos was a tenant at the subject premises occupying the ground floor storefront pursuant to a lease dated July 10, 2006 (the Lease). Quiceno is the President and owner of Mangos. Colon alleges that he was walking along the sidewalk outside Mangos when he tripped on a metal cellar door.

On a motion for summary judgment, the proponent bears the burden of demonstrating prima facie entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to Roosevelt's summary judgment motion, an out of possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs (see *Denermark v 2857 W. 8th St. Assoc.*, 111 AD3d 660 [2013]; *Tragale v 485 Kings Corp.*, 39 AD3d 626 [2007]). Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect (see *id.* at 627; *Ingargiola v Waheguru Mgt.*, 5 AD3d 732, 733 [2004]).

Roosevelt first fails to establish that the cellar doors were

part of the premises demised to tenant under the Lease, which only refers to the ground floor store premises (see *Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633, 634 [2011]). Also, Paragraph 4 of the Lease, on which Roosevelt relies, provides that "the owner shall maintain and repair the public portions of the building both exterior and interior." Although the Lease requires the tenant to maintain the premises and adjacent sidewalks in good condition by "mak[ing] all non-structural repairs thereto," Paragraph 43(A) of the Rider to the Lease then provides that Roosevelt, as landlord, is responsible for necessary structural repairs. While the deposition testimony of Jack Cohen (Cohen), the President of Comjen and a member of Roosevelt, stated that the tenant Mangos, rather than Roosevelt, was responsible for maintenance and repair of the cellar doors, such provisions raise triable issues regarding whether the alleged defect in the cellar doors was structural and whether they were located in the public portion of the premises (see e.g. *Lee v Second Ave. Vil. Partners, LLC*, 100 AD3d 601 [2012]; *Greis v Eckerd Corp.*, 54 AD3d 895 [2008]; *Bouima v Dacomi, Inc.*, 36 AD3d 739 [2007]). Roosevelt thus fails to show that it was not obligated under the terms of the Lease to maintain and keep the cellar doors in good working order and/or repair the alleged hazardous condition (see *Pugach v Cohen Fashion Optical, Inc.*, 43 Misc 3d 1235[A]).

Additionally, Paragraph 13 of the Lease expressly grants Roosevelt access to the demised premises for inspection and making repairs and improvements. Insofar as Roosevelt retains a right to enter the premises, triable issues remain as to whether it violated New York City Administrative Code § 7-210, which charges property owners with a non-delegable duty to maintain and repair the sidewalk abutting their property and imposes liability for injuries resulting from a violation of the statute (see *Bonifacio v El Paraiso Food Mkt., Inc.*, 109 AD3d 454 [2013]). When read in conjunction with New York City Building Code § 19-152, it is clear that liability under Section 7-210 encompasses substantial defects to sidewalk hardware such as cellar doors (see *Langston v Gonzalez*, 39 Misc 3d 371, 377-378 [2013]).

Furthermore, Roosevelt fails to establish, prima facie, that it neither created nor had actual or constructive notice of the alleged hazardous condition (see *Healy*, 87 AD3d 1112; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). In this regard, it fails to demonstrate that the alleged condition existed for an insufficient length of time to discover and remedy it because Cohen provides no testimony as to when the cellar doors were last inspected prior to the accident (see *Jackson v Jamaica First Parking, LLC*, 91 AD3d 602 [2012]). A defendant must affirmatively demonstrate the merit of its defense, rather than

merely point to gaps in plaintiff's proof (see *Mondello v DiStefano*, 16 AD3d 637 [2005]).

Thus, Roosevelt fails to meet its prima facie burden of demonstrating that it did not maintain control of the cellar doors and was not contractually obligated to maintain it in safe condition (see *Healy v Bartolomei*, 87 AD3d 1112 [2011]; *Deerr'Matos v Ulysses Upp, LLC*, 52 AD3d 645 [2008]). As Roosevelt did not meet its prima facie burden, it is not necessary to consider the sufficiency of the opposition papers (see *Gerbi v Tri-Mac Enters. of Stony Brook, Inc.*, 34 AD3d 732 [2006]; *Tchjevaskaia v Chase*, 15 AD3d 389 [2005]).

The court next turns to the Mangos Defendants' summary judgment motion. In the interest of judicial economy, the court deems Roosevelt's arguments in opposition to the Mangos Defendants' motion timely and properly made (CPLR 2001). Even when a landlord has explicitly agreed in the lease to maintain the premises, the tenant nevertheless has a common-law duty to keep the premises it occupies in a reasonably safe condition (see *Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1145 [2011]; *Cohen v Central Parking Sys., Inc.*, 303 AD2d 353 [2003]). A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Melnikov v 249 Brighton Corp.*, 72 AD3d 760, 760 [2010]; *Prusak v New York City Hous. Auth.*, 43 AD3d 1022 [2007]). Even if Mangos was not in exclusive control of the cellar doors, as the Mangos Defendants allege, they likewise present no evidence regarding when the cellar doors were last inspected prior to the accident (see *Petersel v Good Samaritan Hosp. of Suffern*, 99 AD3d 880 [2012]; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909 [2011]); *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598 [2008]). Moreover, the Mangos Defendants' allegation that the alleged condition was open and obvious does not preclude a finding of liability against them (see *Bradley v DiPaterio Mgt. Corp.*, 78 AD3d 1096 [2010]). Therefore, Mangos does not meet its prima facie burden, and summary judgment is unwarranted regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]).

Finally, the court turns to Roosevelt's cross motion for a defense and indemnification from Mangos based on Paragraph 47, pertaining to insurance requirements, and on Paragraph 46 of the Lease, which requires the tenant to defend and indemnify the landlord for all claims

"resulting from or in connection with [any damage] arising . . . out of or from or on account of any occurrence [on] the Demised premises or occasioned wholly or in part through the use and occupancy of the Demised Premises . . . or by any act or omission or negligence of Tenant...."

A party seeking contractual indemnification must prove its freedom from negligence, as it cannot be indemnified for any its own negligence (General Obligations Law § 5-322.1; see *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2009]; *Reynolds v County of Westchester*, 270 AD2d 473 [2000]). Here, Roosevelt's application is premature because there are outstanding issues of fact regarding whose negligence, if any, caused plaintiff's accident (see *McAllister v Constr. Consultants L.I., Inc.*, 83 AD3d 1013 [2011]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). Similarly, as Mangos is not an insurer and its duty to defend is not broader than its duty to indemnify, Roosevelt is not entitled to a defense at this juncture (see *Id.* at 931).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, Roosevelt's motion for summary judgment dismissing the complaint and cross motion for summary judgment on the defense and contractual indemnification cross-claim are denied. The Mangos Defendants' summary judgment motion is also denied. Roosevelt's Order to Show Cause to stay is denied as moot.

Dated: September 17, 2014

J.S.C.