

Saffaf v Lincoln Ctr. for the Performing Arts
2016 NY Slip Op 30312(U)
February 23, 2016
Supreme Court, New York County
Docket Number: 153783/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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VERKIN SAFFAF and AHMAD SAFFAF, individually
as husband and wife,

Plaintiffs,

-against-

Index No. 153783/15

Motion seq. no. 001

DECISION AND ORDER

LINCOLN CENTER FOR THE PERFORMING ARTS,
INC. and METROPOLITAN OPERA ASSOCIATION,
INC.,

Defendants.

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BARBARA JAFFE, J.:

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This action arises from an accident inside the Metropolitan Opera House in Manhattan, where plaintiff Verkin Saffaf slipped and fell when descending stairs located on the orchestral level. (NYSCEF 8).

By notice of motion, defendant Lincoln Center for the Performing Arts, Inc. moves pursuant to CPLR 3211(a)(1) for an order dismissing the complaint as against it. Plaintiffs oppose.

I. BACKGROUND

On June 1, 1966, Lincoln Center, the owner/lessor, and defendant Metropolitan Opera Association, Inc. (the Met) entered into a lease for the premises, which the Met has used and occupied continuously. The lease provides, in pertinent part, as follows:

8.01. The [Met] covenants throughout the term of this Lease, at the [Met's] sole cost and expense,

1. to take good care of the Opera House and to keep the same in good order and condition, and to promptly make all necessary repairs thereto and renewals thereof, interior and exterior, structural and non-structural, ordinary as well as extraordinary, foreseen as well as unforeseen;

. . . .

9.01. Lincoln Center agrees, at Lincoln Center's sole cost and expense, to maintain the Areas of the Opera House Building under the control of Lincoln Center, and the grounds, Public Areas and Common Facilities in the Lincoln Center Complex owned by Lincoln Center, in a state of good order and repair and in accordance with high standards of cleanliness and appearance and operation, to take such steps as may be reasonably necessary to insure the proper maintenance and repair of the other improvements located in the Lincoln Center Complex and of the contents, equipment, furnishings, fixtures, and appliances therein.

. . . .

19.01. The [Met] shall provide access to the portions of the Opera House Building under the control of Lincoln Center, and to such other portions of the Opera House Building as may be necessary in order to inspect, operate, maintain and repair all piping and other mechanical connections, machinery and equipment . . . , to Lincoln Center personnel engaged in such inspection , operation, repair and maintenance of such areas, along the routes in the Opera House designated [in annexed exhibits herein]

(NYSCEF 7, Exh. 1). According to color-coded schematics and other exhibits attached to the lease, portions of the premises that are controlled by Lincoln Center include the fourth cellar, third cellar, second cellar, first cellar, plaza level, promenade, cooling towers, paint shop, and main roof, along with access to certain pathways and elevators to the extent necessary to reach those areas. (*Id.*).

According to an accident report dated January 26, 2013, Saffaf was "walking downstairs[,] lost footing and fell" on the premises in an area identified as "orchestra [front of] stairs." (NYSCEF 8). On April 6, 2015, plaintiffs commenced this action, advancing a claim of negligence and a derivative claim of loss of consortium. (NYSCEF 1). The Met interposed an answer with affirmative defenses. (NYSCEF 5).

II. DISCUSSION

In support of its argument that plaintiff's accident occurred in an area under the Met's exclusive control, Lincoln Center alleges that the lease obligates the Met to inspect, maintain, and repair the premises including the orchestra level, while it retains the right only to reenter and the obligation to maintain other limited, nonpublic areas. (NYSCEF 10).

In opposition, plaintiffs maintain that Lincoln Center's motion is premature as discovery is necessary to uncover a course of conduct notwithstanding the parties' rights and obligations as set forth the lease. In any event, they claim that an out-of-possession landlord may only be held liable if it had notice of the dangerous condition and a duty to repair the premises. (NYSCEF 13).

In reply, Lincoln Center asserts that plaintiffs' demand for discovery to defend this motion relies on speculation, and argues that the cases on which plaintiffs rely are inapplicable or were decided in different procedural postures. (NYSCEF 15-16).

A party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. (CPLR 3211[a][1]). The motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]). And pursuant to CPLR 3211(d), the court may deny a motion to dismiss as premature if it "appear[s] from affidavits submitted in opposition to the motion . . . that facts essential to justify opposition may exist but cannot then be stated," especially where the facts are in the exclusive control of the moving party. (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974]).

Generally, an out-of-possession owner may not be held liable for injuries caused by a defective condition absent a contractual or statutory duty to maintain and repair the premises. (*Nieves v Burnside Assocs., LLC*, 59 AD3d 290, 290 [1st Dept 2009]). If the owner contractually reserves the right to reenter the premises, it may be charged with constructive notice of the dangerous condition existing in violation of an applicable safety statute. (*Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 566 [1987]; *Peck v 2-J, LLC*, 56 AD3d 277, 278 [1st Dept 2008]; *see also Lucero v DRK, LLC*, 111 AD3d 578, 578 [1st Dept 2013]). Even in the presence of a contract, however, the court shall “look not only to the terms of the agreement but to the parties’ course of conduct . . . to determine whether the [owner] in fact surrendered control over the property.” (*Gronski v County of Monroe*, 18 NY3d 374, 381 [2011]; *Contreras v Randi’s Enter., LLC*, 126 AD3d 1199-1200 [3d Dept 2015]; *Milham v Port Auth. of New York & New Jersey*, 117 AD3d 694, 695 [2d Dept 2014]).

Plaintiffs demonstrate that additional discovery may reveal a course of conduct between the Met and Lincoln Center to establish the latter’s control over the subject area of the premises. (*See eg, Colon v Mandlebaum*, 244 AD2d 292, 293 [1st Dept 1997] [notwithstanding lease, issue of fact as to whether defendants “assumed responsibility” to make repairs based on course of conduct, precluding dismissal]; *Sharples v Shurgett LLC*, 2016 WL 629158, *1 [Sup Ct, Queens County 2016] [allowing plaintiff additional discovery to develop course of conduct theory despite triple net lease]). In any event, while the documentary evidence on which Lincoln Center relies establishes undisputedly that the accident occurred on the orchestra level, the specific site is not identified, and it is impossible to discern the orchestra level on the annexed diagrams.

Consequently, Lincoln Center's motion is premature and the lease does not dispose of plaintiffs' claim against it as a matter of law.

III. CONCLUSION

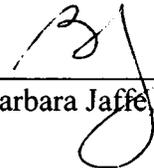
Accordingly, it is hereby

ORDERED, that defendant Lincoln Center for the Performing Arts, Inc.'s motion dismissing the complaint as against it is denied without prejudice to renew upon completion of discovery; it is further

ORDERED, that defendant Lincoln Center for the Performing Arts, Inc. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that counsel are directed to appear for a preliminary conference in Room 279, 80 Centre Street, on March 23, 2016, at 2:15 PM.

ENTER:



Barbara Jaffe, JSC

DATED: February 23, 2016
New York, New York