

Hernandez v 34 Downing Owners Corp.

2016 NY Slip Op 31954(U)

October 14, 2016

Supreme Court, New York County

Docket Number: 156644/12

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 57

MARIA DEL CARMEN HERNANDEZ,

Index No.: 156644/12

Plaintiff,

against

34 DOWNING OWNERS CORP.,

DECISION AND ORDER

Defendant.

SCHECTER, JENNIFER, J.:

Pursuant to CPLR 3212, defendant 34 Downing Owners Corp. (34 Downing) moves for summary judgment in this premises-liability personal-injury action. The motion is denied.

Background

Plaintiff Maria Del Carmen Hernandez worked at a Manhattan restaurant as a dish washer (Affirmation in Support [Supp], Ex E at 49-50). The restaurant primarily used its cellar for food preparation and storage (Supp, Ex E at 48-50). To access the cellar, one had to walk through two sidewalk doors that were perpendicular to the building and were usually left open. These two doors opened from the middle (Supp at ¶ 32, Ex E at 73-74). When food deliveries had to be made using a bicycle or when large deliveries would arrive at the restaurant, a third smaller door that was parallel to the building would have to be opened (Supp at ¶¶ 28-29, Ex E at 74-75). This door was sometimes affixed to a pipe with a rope to keep it open when it was being used (Supp, Ex E at 84, 88-90, 92-93). The rope was always supposed to be attached to

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the door but sometimes it would break and a new piece of rope would then be attached (Supp, Ex E at 106-107).

On July 2, 2012, Hernandez began descending the cellar stairs when the third small door fell shut and struck her on her head (Supp, Ex E at 11, 116-17). She commenced this action to recover for her personal injuries.

Defendant owned the building where the restaurant was located and leased the ground floor commercial space (Premises) to Manhattan Mansions, LLP pursuant to a master store lease (Master Lease) (Supp, Ex D at Ex 1). 29 Bedford, LLC--the operator of the restaurant that employed Hernandez--was the ultimate sublessee of the Premises. All of the subleases provided that they were subject to the Master Lease (*id.* at Ex 2 at ¶ 7, Rider at ¶ 44 [subject to Master Lease]; Ex H [Assignment of Lease]; Supp at ¶¶ 5-6, 15).

34 Downing had the right to inspect and make necessary repairs at the Premises (Supp, Ex D at Ex 1 at § 9.1). Significantly, the Master Lease further provided that it was the lessee's obligation "to take good care of the interior portion [of the Premises], the storefronts, store doors, and vaults [cellar] adjacent thereto" and to make "all interior, storefront and store door repairs, except structural (unless said structural repairs [were] necessitated by the acts of Lessee)" (*id.* at § 6.1). 34 Downing was responsible "at its

own cost and expense" to "keep in good order and repair all portions of the Building which [were] not Lessee's responsibility" (*id.* at § 6.2).

Defendant moves for summary judgment, urging that as an out-of-possession landlord, it cannot be held liable for Hernandez's injury. Hernandez opposes the motion, arguing that the cellar door was structurally defective contrary to Administrative Code §§ 17-210 and 19-152(6) (Memorandum in Opposition [Opp] at ¶¶ 14-19).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden,

bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

It is well settled that an out-of-possession landlord can be held liable for an accident on its premises if it 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" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]; *see also Gil v M. Sopher & Co., LLC*, 137 AD3d 508 [1st Dept 2016]; *Quing Sui Li v 37-65 LLC*, 114 AD3d 538 [1st Dept 2014]; *Brignoni v 601 W. 162 Assoc., LP*, 93 AD3d 417 [1st Dept 2012]).

The Master Lease required 34 Downing to make all structural repairs (unless necessitated by an act of the lessee) and to repair portions of the building that are not specifically designated as the lessee's responsibility (Supp Ex D at Ex 1 at §§ 6.1 and 6.2).^{*} Regardless of whether a

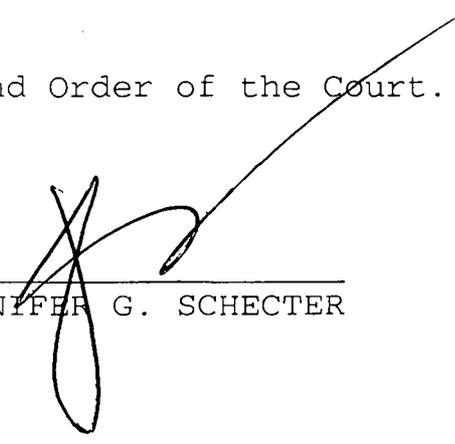
^{*} In specifically delineating the lessee's repair obligations, the Master Lease does not specifically include "vaults [cellars] adjacent" ⁵ of the Premises (Supp, Ex D at _{5 of 6}

specific statutory safety provision applies, 34 Downing failed to meet its burden because it did not establish that it was not contractually obligated to make repairs (*Brignoni*, 93 AD3d at 418 [duty to make structural repairs arose from lease provision and "a separate obligation" based on the reentry provision]). Nor did it show that the allegedly defective condition was not structural (*id.* at 417). Because defendant did not demonstrate that it cannot be liable, its motion is denied.

Accordingly, it is ORDERED that defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: October 14, 2016



HON. JENNIFER G. SCHECTER