

Kaufman Adler Realty Corp. v F&G Pizza King Ltd.
2007 NY Slip Op 30439(U)
March 28, 2007
Supreme Court, New York County
Docket Number: 0113504
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

Index Number : 113504/2004

PART 12

SANCHEZ, JHONY IVAN LARA

vs

KAUFMAN ADLER REALTY

INDEX NO. 113504/04

Sequence Number : 003

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are decided in accordance with the accompanying memorandum decision.

FILED

MAR 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/07

BARBARA R. KAPNICK J.S.C.
J.G.

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 12

-----X
JHONY IVAN LARA SANCHEZ and ELEANA
LARA,

Plaintiffs,

-against-

KAUFMAN ADLER REALTY CORPORATION,
LUCAS BUILDING COMPANY, LLC and
KAUFMAN MANAGEMENT COMPANY, LLC
and KAUFMAN REALTY CORPORATION,

Defendants.

-----X
KAUFMAN ADLER REALTY CORPORATION,
KAUFMAN MANAGEMENT COMPANY, LLC
and KAUFMAN REALTY CORPORATION,

Third-Party Plaintiffs,

-against-

F&G PIZZA KING LTD., INC. d/b/a
PIZZA KING RESTAURANT, FRANCO
CAPUANO d/b/a PIZZA KING RESTAURANT
and GAETANO FORGIONE d/b/a PIZZA
KING,

Third-Party Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 113504/04
Motion Seq. Nos. 003
and 004

Third-Party
Index No. 591138/05

FILED
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Motions sequence numbers 003 and 004 are consolidated for disposition.

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Jhony Ivan Lara Sanchez, including second and third degree burns to his face, neck, chest and arms, on December 20, 2003 at the Pizza King Restaurant located at 36 Gramatan Avenue in Mount Vernon, New York. At the time of the accident, plaintiff was carrying with both hands a steel bucket of boiling hot soup down a set of stairs in the rear of the kitchen

which led to the basement, when he was caused to slip and fall down the stairs. Plaintiff was employed as a dishwasher by third-party defendants F&G Pizza King, Ltd., Inc., d/b/a Pizza King Restaurant, Franco Capuano d/b/a Pizza King Restaurant and Gaetano Forgione d/b/a Pizza King which leased the space.

The building is owned by defendant Lucas Building Company, LLC and allegedly managed by defendants/third-party plaintiffs Kaufman Adler Realty Corporation, Kaufman Management Company, LLC and/or Kaufman Realty Corporation.

Defendants/third-party plaintiffs now move (under motion sequence number 003) for summary judgment dismissing plaintiffs' complaint and all cross-claims against them.

The third-party defendants cross-move for summary judgment dismissing the third-party complaint.

Defendant Lucas Building Company, LLC moves (under motion sequence number 004) for summary judgment dismissing plaintiffs' complaint and all cross-claims against it.

That portion of defendants/third-party plaintiffs' motion seeking summary judgment dismissing plaintiffs' complaint and all cross-claims against defendants Kaufman Adler Realty Corporation and Kaufman Management Company, LLC is granted, as it appears that said entities neither owned nor managed the subject building.

Defendant/third-party plaintiff Kaufman Realty Corporation admits that it was the property manager for the building but argues that it is also entitled to summary judgment on the grounds that it was not responsible for managing the stairwell inside the restaurant, and that it never received any complaints regarding the condition of the stairs. Rather, defendant/third-party plaintiff contends that Pizza King Restaurant had the sole responsibility for maintaining and/or repairing the stairwell, which was an area that had been in the exclusive control of the restaurant since 1988.

Defendant Lucas Building Company, LLC likewise moves for summary judgment, arguing that: (a) plaintiff's conduct and actions were the sole proximate cause of his accident; (b) plaintiff assumed the risk of injury in attempting to carry a bucket of boiling soup down a stairway in a dangerous manner; (c) plaintiff has been unable to identify the substance on which he purportedly slipped, and (d) the accident was not the result of any negligence on the part of defendant Lucas, an absentee landlord.

Plaintiff disputes that Lucas, which maintained a right to re-enter the premises under the lease, was an 'absentee' landlord, since the building superintendent (Henry Aquasvivas) hired by Lucas allegedly used the stairs on a number of occasions.

In addition, plaintiff has annexed an affidavit from Stanley H. Fein, P.E. who is of the opinion that the staircase violated

section 765.4(c)(2) of the New York State Building Construction Code ("State Code") because it did not have a guardrail on the open side or a screen enclosure. Mr. Fein is also of the opinion based on his review of photographs and his estimate of the width and height of the stairs that the stairs violated good and accepted engineering safety practice and Table IV-765 of the State Code because the step geometry of the staircase should not be less than 70 inches or more than 77½ inches. However, he estimates that the step geometry of the subject staircase was 80 inches.

It is well settled that

[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 re-enter, 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. (citation omitted).

Johnson v. Urena Service Center, 227 A.D.2d 325 (1st Dep't 1996),
lv. to app. denied, 88 N.Y.2d 814 (1996).

"[O]nly a significant structural or design defect in violation of a specific statutory safety provision will furnish a basis for such liability (citations omitted)." Quinones v. 27 Third City King Restaurant, Inc., 198 A.D.2d 23, 24 (1st Dep't 1993).

Defendants contend that plaintiffs have failed to establish such a violation since the statutory provision cited by Mr. Fein - i.e., New York State Building Code § 765.4(c)(2) - has been repealed and, in any event, related solely to exterior stairways. Likewise, Table IV-765 has been repealed.

Defendants further argue that Mr. Fein's opinions are "entitled to 'no probative force whatsoever'" (Canales v. Hustler Manufacturing Co., 12 A.D.3d 392 [2nd Dep't 2004]; see also, Chieffet v. New York City Transit Authority, 10 A.D.3d 526 [1st Dep't 2004]) because Mr. Fein never conducted a personal inspection of the premises (see, Khan v. Bangla Motor and Body Shop, Inc., 27 A.D.3d 526 [2nd Dep't 2006], app. disp'd, 7 N.Y.3d 864 [2006]).

"An expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor". Reyes v. City of New York, 29 A.D.3d 667 (2nd Dep't 2006). The expert's "[o]pinion evidence must be based on facts in the record or personally known to the witness'." Santoni v. Bertelsmann Property, 21 A.D.3d 712, 714-715 (1st Dep't 2005). See also, Oboler v. The City of New York, 31 A.D.3d 308 (1st Dep't 2006), aff'd, N.Y.3d, 2007 WL 844862.

Based on the papers submitted and the oral argument held on the record on October 25, 2006, this Court finds that the opinions

of plaintiffs' expert lack this required factual foundation, and thus fail to make the requisite showing of a significant structural or design defect.

The motion by defendant/third-party plaintiff Kaufman Realty Corporation and the motion by Lucas for summary judgment are, therefore, granted.

The Clerk may enter judgment dismissing plaintiffs' complaint with prejudice and without costs or disbursements.

The cross-motion by the third-party defendants for summary judgment is, therefore, denied as moot.

This constitutes the decision and order of this Court.

Dated: March 28, 2007



Barbara R. Kapnick
J.S.C.
BARBARA R. KAPNICK
J.S.C.

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