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

PRESENT: _____ PART _____
Justice

Index Number : 101699/2004
OLENER, JEFFREY
vs
JFB REALTY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his 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 is consolidated with motion Sequence 001 and is decided with the ~~accompanying~~ accompanying memorandum decision

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

Dated: 8/9/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

----------X

JEFFREY OLENER,

Plaintiff,

-against-

JFB REALTY LLC, JOSEPH FRANCO, LENGE JAPANESE RESTAURANT and EATON PROPERTIES, INC.,

Defendants.

----------X

Index No. 101699/2004
Seq. 001, 002

TOLUB, J.:

Motion sequences 001 & 002 are consolidated for disposition and resolved in the accompanying memorandum decision.

By motion sequence 001, defendants Lenge Japanese Restaurant and Eaton Properties Inc. (collectively, "the Tenants") move for summary judgment and dismissal of plaintiff Jeffrey Olener's complaint pursuant to CPLR § 3212.

By motion sequence 002, defendants JFB Realty LLC and Joseph Franco (collectively, "the Landlords") move: (1) for summary judgment and dismissal of plaintiff Jeffrey Olener's complaint pursuant to CPLR § 3212, (2) for leave to amend their answer to add a cross-claim for contractual indemnification against the Tenants pursuant to CPLR § 3025(b), and (3) for summary judgment on their cross-claims against the Tenants pursuant to CPLR § 3212.

Background

Defendant JFB Realty LLC ("JFB") is the owner of the property located at 200 Columbus Avenue (also know as 101 West 69th Street), New York, New York ("the property"). Joseph Franco is the managing agent for the property.

On November 1, 1997, defendant JFB leased the property to Eaton Properties, Inc. ("Eaton") and Lenge Saimin, Ltd. Both Eaton and Lenge Saimin, Ltd. are New York City corporations that do business as Lenge Japanese Restaurant ("the restaurant").

Plaintiff alleges that on October 21, 2003, while walking towards the restaurant between 9:30 and 10 p.m., he was injured when he fell through the open cellar doors of the restaurant. Plaintiff, who was walking to view the restaurant menu posted in the window, claims that he did not see the open cellar doors. Plaintiff subsequently initiated this action against both the Tenants and the Landlords of the premises, alleging that the Tenants and the Landlords negligently allowed the cellar doors to remain open, creating a dangerous condition, and failed to warn him of the danger. Plaintiff further alleges that the Tenants and Landlords' negligence caused him to sustain severe, permanent personal injuries from which he continues to suffer pain.

Discussion

In motion sequence 001, the Tenants seek summary judgment against Plaintiff. "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Di Menna & Sons v. City of New York, 301 N.Y. 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 A.D. 1019), or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522)" Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 403 (1957).

Tenants' summary judgment motion is predicated upon the contention that they had no duty to warn or protect Plaintiff, because the open cellar doors presented an open and obvious condition. Plaintiff argues that the open cellar doors were not "open and obvious," claiming that when open, the cellar doors came to roughly the same height and were painted the same color as the base of the sidewalk cafe immediately behind the cellar doors. Plaintiff further claims that the area around the cellar doors was not sufficiently lit. The court notes that it is disputed whether on the night of the accident restaurant staff turned on the five lights above the sign for the restaurant, or whether there were any cones, caution signs, or other warning devices by the open cellar doors.

In support of their assertion that the condition was open and obvious, Tenants cite both Tarrazi v. 2025 Richmond Ave. Assoc., 260 A.D.2d 468, 688 N.Y.S.2d 220 (2nd Dep't 1999) and Jones v. Presbyterian Hosp., 3 A.D.3d 225, 771 N.Y.S.2d 109 (1st Dep't 2004). However, these cases are distinguishable from the action at bar.

In Tarrazi, the plaintiff had fallen down a dark, unlit staircase. However, "at her examination before trial, [she] testified that she knew before she reached the subject stairway that it was 'very dark'", and that she was warned by "her [coworker] . . . to '[w]atch how dark it is'". The Tarrazi court thus concluded that it was clear, "not only that the danger was obvious to all, but that the plaintiff was expressly aware of the danger posed." Id. at 469. In the instant case, Plaintiff claims that he was not aware of the open cellar doors.

In Jones, the plaintiff fell while descending two steps in an auditorium, but he "[did] not dispute that he was already aware of the existence of stairs." Id. at 227. But in the instant case, Plaintiff's claim is precisely that he was not aware of the open cellar doors.

"Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question (see, e.g., Bolm v. Triumph Corp., 33 N.Y.2d 151, 159-160)." Liriano

v. Hobart Corp., 92 N.Y.2d 232, 242, 677 N.Y.S.2d 764, 770 (1998); see also Palsgraf v. Long Island R. Co., 248 N.Y. 339 (1929).

Inasmuch as there remains a question as to whether the condition was open and obvious, the Tenants' motion for summary judgment must therefore be denied.

In motion sequence 002, the Landlords seek summary judgment against Plaintiff, arguing that as out of possession landlords, they are not liable to Plaintiff. Summary judgment is appropriate when "none of the material elements of the claim or defense are in dispute." Barr, Altman, Lipshie, and Gerstman; *New York Civil Practice Before Trial*, James Publishing 2007, § 37:80.

"[C]ontrol is the test which measures . . . the responsibility in tort of the owner of real property", Ritto v. Goldberg, 27 N.Y.2d 887, 889, 317 N.Y.S.2d 361 (1970), because the person in possession and control of property is best able to identify and prevent any harm to others. See Prosser and Keeton, Torts § 57, at 386 (5th ed.). Following the principle that the tenant, having "[chosen] to take possession and control of property is fairly charged with the responsibility of maintaining it", Butler v. Rafferty, 100 N.Y.2d 265, 270, 762 N.Y.S.2d 567 (2003),"[a] landlord's limited right of re-entry

does not give rise to liability, unless there exists a significant structural or design defect which violates a specific statutory provision." Gavallas v. Health Ins. Plan of Greater N.Y., 2006 NY Slip Op 9553; 35 A.D.3d 657; 829 N.Y.S.2d 131 (2nd Dep't 2006).

The Tenants had control of and were responsible for maintaining the premises, including the adjacent sidewalks and the "vault space" or cellar, under Article 4 of the lease and Article 17 of the rider. Plaintiff argues that the Landlords may be held liable based on their retention in Article 13 of the lease of a limited right to re-enter the premises in order to make repairs. Article 13 provides that the "[Landlord] . . . shall have the right (but shall not be obligated) to re-enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs . . . as [the Landlord] may deem necessary . . . ." In support of his claim that the Landlords are liable, Plaintiff cites Guzman v. Haven Plaza Housing Dev. Fund Co., 69 N.Y.2d 559, 516 N.Y.S.2d 451 (1987), a case in which the plaintiff was injured when her hand was caught in a defective handrail causing her to fall down the steps.

In Guzman, the landlord retained "'a right to enter the demised premises at all times' for the purpose of inspection",

and the handrail which caused plaintiff's injury was in violation of the Administrative Code of the City of New York, which provides that "[handrails] shall provide a finger clearance of 1 1/2 in." Because the language of the lease in the Guzman case gave the landlord the right to enter at "all times" for the purpose of inspection, the landlord was charged with constructive knowledge of the defective handrail.

In the instant case, Plaintiff has alleged only that the cellar doors were improperly left open and that the area surrounding the doors was inadequately lit. Plaintiff has failed to allege a structural or design defect in the cellar doors, or to allege any specific statutory violation that would constitute a structural or design defect.

In an attempt to establish that the cellar doors were defective, Plaintiff cites two statutes. The first statute cited by Plaintiff, section C26-226.0 of the New York City Building Code dated 1938, states that "[a cellar] door shall be kept in good repair, and shall not be permitted to remain open, except when in actual use for ingress or egress of persons or the loading or unloading of things out of or into such cellar . . ." This statute concerns the proper use of the cellar doors, and thus applies to the Tenants, but not to the Landlords, who were not in possession. The second statute cited

by Plaintiff, section 19-152 of the New York City Department of Transportation rules, states that "a substantial defect shall include any of the following: 6(ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous unsafe condition." This statute applies to conditions present in the doors themselves, as evidenced by the listed examples, and thus has no relevance in this case.

A structural or design defect must be shown to exist in order to establish the Landlords' liability. In light of Plaintiff's failure to allege any such defect, the portion of the Landlords' motion for summary judgment against Plaintiff is granted.

In motion sequence 002, the Landlords also seek leave to amend their answer to assert a cross-claim against the Tenants for contractual indemnification based on Article 8 of the lease. The answer asserted a common law indemnification claim, but it failed to include an indemnification claim based on the lease.

Pursuant to CPLR § 3025(b), "leave to amend a pleading is freely granted as a matter of discretion in the absence of prejudice or surprise," Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590, 591 (1st Dep't 1990) [citing Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18 (1981)]. Neither prejudice

nor surprise exist here, because in a letter dated January 10, 2005, the Landlords' counsel put the Tenants' counsel on notice that it would seek to enforce Article 8 of the lease. The court notes that the Tenants do not oppose the Landlords' application for leave to amend their answer.

The portion of the Landlords' motion seeking leave to amend their answer is granted.

Finally, in motion sequence 002, the Landlords seek conditional summary judgment on their cross-claim against the Tenants for contractual indemnification based on Article 8 of the lease. Since the Landlords motion for summary judgment against the Plaintiff is granted, the portion of the Landlords motion seeking contractual indemnification from the Tenants is denied as moot.

Accordingly it is

ORDERED that motion sequence 001, Tenants' motion to dismiss Plaintiff's complaint in its entirety, is denied; and it is further

ORDERED that motion sequence 002, Landlords' motion to amend, is granted; and it is further

ORDERED that motion sequence 002, Landlords' motion for summary judgment against Plaintiff, is granted; and it is further

ORDERED that motion sequence 002, Landlords' motion for summary judgment on the cross-claims against the Tenants, is denied as moot.

DATED: 7/9/07

WALTER B. TOLUB J.S.C