Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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ALEXANDRA PRATS,

Plaintiff,

Index No: 12676/05
Motion Date: 8/1/07
Motion Cal. No: 22
Motion Seq. No: 3

-against-

ROVER REALTY, LLC, BLISS GOURMET, INC., METROPOLITAN TRANSPORTATION, LONG ISLAND RAILROAD and PHOENIX BLUE, INC.,

Defendants.

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The following papers numbered 1 to 19 read on this motion by defendant Rover Realty, L.L.C., for an order (a) granting it summary judgment as against plaintiff, pursuant to CPLR 3212, and (b) granting it summary judgment on its cross claims as against co-defendant Phoenix Blue Inc. d/b/a Bliss Café Inc; and on this cross-motion by plaintiff Alexandra Prats for an order: (a) amending the caption to include Phoenix Blue as an additional defendant,[1] and (b) granting plaintiff leave to supplement and/or amend its verified bill of particulars to add additional statutes, rules and regulations breached by defendants.

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Upon the foregoing papers, it is ordered that the motion and cross motions are disposed of as follows:

By stipulation dated February 26, 2007, the parties stipulated to amend the caption to add Phoenix Blue, Inc., as a defendant. The caption is hereby amended to reflect that stipulation.

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff Alexandra Prats ("plaintiff"), as a result of a slip and fall that allegedly occurred on December 18, 2004, as plaintiff, while exiting the Bliss Café, which is owned by Phoenix Blue Inc. d/b/a Bliss Gourmet, Inc. ("Phoenix"), tripped over an indentation in the pavement on the sidewalk adjacent to the café, located at 82-60 Austin Street, Kew Gardens, New York. Defendant Phoenix is the owner of the Café; defendant Rover Realty, L.L.C. ("Rover") is the owner/lessor of the café space; and defendant Metropolitan Transportation, Long Island Railroad ("LIRR") is the owner-lessor of a portion of the sidewalk on the west side of the building that is leased to Rover.

Defendant Rover moves for summary judgment dismissing the complaint on the grounds that maintenance of the sidewalk where plaintiff fell was the responsibility of its tenant, Phoenix, as established by documentary evidence, and as an out-of-possession landlord, it has no liability, and has a right to be indemnified by defendant Phoenix. In support of the motion, Rover proffers deposition testimony of plaintiff and representatives of defendants. Plaintiff testified that she opened the door of the Bliss Café to leave, took two steps and fell "exactly in front of the Bliss door," diagonal to her right towards the LIRR train station. During the course of her deposition, she marked on a photograph the area of her fall, which was on the south side of the building. Koren Schroeder, managing agent at Harlington Realty Co., Rover's managing agent for the property located at 82-60 Austin Street, testified that pursuant to the August 21, 1997 lease agreement between Harlington Realty, as owner, and Phoenix, as tenant ("Lease"), Phoenix was responsible for maintaining the sidewalk at issue. Wendy Ismaili, the owner of Bliss Café, testified at her deposition that only Bliss and LIRR employees maintained the sidewalk. Rover contends that as the testimonial and documentary evidence establish that it is an out of possession landlord with no responsibility for the sidewalk, it is entitled to a grant of summary judgment in its favor and to contractual indemnification in accordance with the Lease.

It is well-established that summary judgment should be granted only when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra. It is also well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected (citations omitted)." Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 646 (1996). To establish a prima facie entitlement to summary judgment dismissing the complaint under the circumstances presented here, a owner must demonstrate that it relinquished

control of the leased premises, and that it was not obligated under the terms of the lease to maintain or repair the leased premises. Bouima v. Dacomi, Inc., 36 A.D.3d 739 (2nd Dept. 2007); Dunitz v. J.L.M. Consulting Corp., 22 A.D.3d 45 (2nd Dept. 2005).

An out-of-possession property owner, such as Rover, is not liable for injuries that occur on the property unless the owner exercised some control over the sidewalk or was contractually obligated to repair the unsafe condition (see Flores v. Baroudos, 27 A.D.3d 517, 811 N.Y.S.2d 757; Beda v. City of New York, 4 A.D.3d 317, 772 N.Y.S.2d 339)." Rocco v. Marder, 42 A.D.3d 516 (2nd Dept. 2007); Nikolaidis v. La Terna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007); Bouima v. Dacomi, Inc., supra; Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept. 2006). "[A]n out-of-possession landlord is not liable for negligence with respect to the condition of property unless the landlord is contractually obligated to make repairs, maintain the premises, or has a contractual right to reenter to inspect and make needed repairs. Guzman v Haven Plaza Hous. Dev. Fund. Co., 69 N.Y.2d 559 (1987); Knipfing v V & J, Inc., 8 A.D.3d 628 (2nd Dept. 2004); Schiavone v 382 McDonald Corp., 251 A.D.2d 486 (2d Dept. 1998); Johnson v Urena Serv. Ctr., 227 A.D.2d 325, lv denied 88 N.Y.2d 814 (1996). In sum, as a general proposition, an out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect that proximately caused the injury. Spencer v. Schwarzman, LLC, 309 A.D.2d 852(2nd Dept. 2003). See, also, . Briggs v. Country Wide Realty Equities, Ltd., 276 A.D.2d 456 (2nd Dept. 2000)["Constructive notice may be found where an out-of-possession landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists"]; Dunitz v. J.L.M. Consulting Corp., 22 A.D.3d 455 (2nd Dept. 2005); see, also, Rosas v. 397 Broadway Corp., 19 A.D.3d 574 (2nd Dept. 2005); Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005); D'Orlando v. Port Auth. of New York & New Jersey, 250 A.D.2d 805 (2nd Dept. 1998); Stark v. Port Authority of N.Y. & N.J., 224 A.D.2d 681 (2nd Dept, 1996); Dalzell v. McDonald's Corp., 220 A.D.2d 638 (2nd Dept. 1995); Pirillo v. Long Island Railroad, 208 A.D.2d 818 (2nd Dept. 1994) Roveto v. VHT Enters., Inc., 17 A.D.3d 341 (2nd Dept. 2005). The right of reentry alone, however, is insufficient to establish liability, which must be based on a significant structural or design defect that is contrary to a specific statutory safety provision (Lane v Fisher Park Lane Co., 276 AD2d 136 [2000]; Johnson v Urena Serv. Ctr., supra; Deebs v Rich-Mar Rlty. Assocs., 248 AD2d 185 [1998]; Velazquez v. Tyler Graphics, 214 AD2d 489 [1995]). With respect to a sidewalk, an out of possession owner cannot be held liable unless he exercised some control over the sidewalk or was contractually obligated to repair the unsafe condition (see, Flores v. Baroudos, 27 A.D.3d 517, 811 N.Y.S.2d 757; Beda v. City of New York, 4 A.D.3d 317, 772 N.Y.S.2d 339)." Rocco v. Marder, __ A.D.3d __, 839 N.Y.S.2d 803, 804-805 (2nd Dept. 2007).

Here, Rover established its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it by demonstrating that it relinquished control of the leased premises, and that it was not obligated under the terms of the lease to maintain or repair the sidewalk, which it alleged was Bliss' responsibility under the lease agreement. It showed that the only control exercised over the sidewalk was exercised by Bliss, that shoveled one half of the

sidewalk, and LIRR, that shoveled the other half. This position gained support from paragraph 40 of the lease that provided that all repairs, except structural repairs, "including. . . the roof and sidewalk," were the responsibility of the tenant, Bliss. Paragraph 73 of the lease further defined structural "as the building foundation, separating walls enclosing the leased premises (excluding the store front), vertical supporting beams, horizontal supporting beams of the floor and roof." Rover concludes that because it was an out-of-possession landlord, it is entitled to summary judgment in its favor and the dismissal of the complaint as to it; the express and unambiguous language of the lease supports Rover's contention that it was an out-of-possession landlord with a limited right of reentry, and thus entitled to summary judgment against plaintiff on that issue. See, DeLeon v Port Authority of N.Y. and NJ, 306 A.D.2d 146 (2nd Dept. 2003); see also D'Orlando v Port Authority of N.Y. and NJ, 250 A.D.2d 805 (2nd Dept. 1998); Love v Port Authority of N.Y. and NJ, 168 A.D.2d 222 (2nd Dept. 1990). It further concludes that because responsibility for the sidewalk reposed exclusively in Bliss, it is entitled to summary judgment in its favor and against defendant Bliss. See, Thompson v. Port Authority of New York and New Jersey, 305 A.D.2d 581 (2nd Dept. 2003)["There was no evidence that it retained a sufficient degree of control over the premises to provide a basis for liability."] Having established its prima facie entitlement to summary judgment, the burden then shifted to plaintiff and Bliss to raise a triable issue of material fact.

To defeat summary judgment, plaintiff and Bliss had to raise a triable issue of fact not only as to whether Rover retained a right to enter the premises, thereby showing that it at minimum had constructive notice, but also whether the alleged defect constituted a significant structural or design defect which violated a specific statutory safety provision that breached its duty to maintain and repair the sidewalk. See, Lowe-Barrett v. City of New York, 28 A.D.3d 721 (2nd Dept. 2006); Farmer v. City of New York, 25 A.D.3d 649 (2nd Dept. 2006); Jordan v. City of New York, 23 A.D.3d 436 (2nd Dept. 2005); Zektser v. City of New York, 18 A.D.3d 869 (2nd Dept. 2005). Plaintiff contends that Rover violated section 78 of the Multiple Dwelling Law, which directs that "[e]very multiple dwelling . . . and every part thereof and the lot upon which it is situated, shall be kept in good repair," as well as various provisions of the Administrative Code of the City of New York ("Code"). It is undisputed that the owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition. It is also acknowledged that this duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 643 (1996); Mas v. Two Bridges Associates by Nat. Kinney Corp., 75 N.Y.2d 680 (1990).

Similarly, a landlord's reservation of the right to re-enter, inspect, and make repairs, may subject a landlord to liability, provided the plaintiff shows that the landlord breached specific provisions of the Administrative Code of the City of New York. Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept. 2006). Under such circumstances, those provisions that impose a specific duty have the force of statute. Juarez by Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 646 (1996). Plaintiff contends that Rover violated provisions of the Administrative Code of the City of New York that impose a nondelegable duty on building owners to maintain their premises in a safe condition. Weiss v. City of New York, 16 A.D.3d 680 (2nd Dept. 2005). Specifically, plaintiff claims that Rover violated sections 7-210, 27-128 and 27-370 of the Administrative Code of the City

of New York.("Code"). Section 7-210(a) of the Code provides that "It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition;" and subdivision (b) imposes liability "for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." The section defines "failure' to "include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags. . ." Section 27-128 of the Code provides that the "owner shall be responsible at all times for the safe maintenance of the building and its facilities." And, section 27-370 of the Code provides that "[e]xit passageways shall be maintained free of obstructions at all times."

On the issue of the applicability of the Multiple Dwelling Law, Rover refutes the claim that the statutory provision applies, and refers, as does plaintiff, to section 47(A) of the Multiple Dwelling Law that provides that "[a] multiple dwelling is a dwelling which is rented, leased, let, or hired out to be occupied or is occupied as a residence or home of three or more families living independent of each other." Rover argues that the property at issue is not a multiple dwelling because it consists of only two residential units on the second floor and the commercial property on the first floor leased to Bliss. This Court agrees that the Multiple Dwelling Law does not apply because the premises at issue do not fit the definition of a multiple dwelling, which is confirmed by reference to the Certificate of Occupancy, which classifies the premises as "store & dwelling."

However, reference to the Code compels a different result. Section 7-210 of the Code imposes upon the owners of property abutting the public sidewalk the affirmative duty to maintain the sidewalk, including removal of snow and ice, and makes the owner liable in tort for injuries arising out of its breach of this duty. Here, plaintiff and Bliss each allege a violation of a specific statutory safety provision and a significant structural defect as the cause of plaintiff's injuries. The evidence submitted in opposition to Rover's summary judgment motion thus was sufficient to raise a triable issue of fact as to whether the allegedly dangerous condition which caused her injuries was a significant structural or design defect and statutory violation for which an out-of-possession landlord could be held liable. See, Rhian v. PABR Associates, LLC, 38 A.D.3d 637 (2nd Dept. 2007); Yadegar v. International Food Market, 37 A.D.3d 595 (2nd Dept.,2007); Roveto v. VHT Enterprises, Inc., 17 A.D.3d 341 (2nd Dept. 2005)l; Ingargiola v. Waheguru Management, Inc., 5 A.D.3d 732, 734 (2nd Dept. 2004); Stark v. Port Authority of New York and New Jersey, 224 A.D.2d 681 (2nd Dept. 1996). See, also, Thompson v. Port Authority of New York and New Jersey, 305 A.D.2d 581 (2nd Dept. 2003) ["The reservation of the right to enter the premises for inspection and repair may constitute sufficient control to permit a finding that the owner or lessor had constructive notice of a defective condition provided a specific statutory violation exists and there is a significant structural or design defect"]; Eckers v. Suede, 294 A.D.2d 533 (2nd Dept. 2002)["Mere reservation of a right to enter the premises for the purpose of inspection and repair is insufficient to charge the owner or lessor with liability for a subsequently arising dangerous condition unless the defect violates a specific statutory provision and there is a significant structural or design defect."]. As the duty imposed by section 7-210 upon the owner of property is nondelegable, Rover can be held to answer to plaintiff for the injuries she sustained on her trip and fall on the sidewalk, unless it is determined that the defect in the sidewalk was not "significant,"

which, as urged by plaintiff and Bliss, is an issue of fact to be determined by a jury.

The remaining branch of Rover's motion seeks summary judgment in its favor against Bliss on the issue of contract indemnification, pursuant paragraph 8 of the lease, which requires the tenant to:

> . . . indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims and costs and expenses from which Owner shall not be reimbursed by insurance, including reasonable attorneys fees paid, suffered or incurred as a result of any breach by tenant. . . of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the tenant. . .

"[T]he indemnification provision in the contract is enforceable as a matter of law if [Rover] is found to be free of any negligence as regards the plaintiffs' claim (see Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 658 N.Y.S.2d 903, 680 N.E.2d 1200; Brown v. Two Exch. Plaza Partners, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430; see also Davis v. All State Assoc., 23 A.D.3d 607, 806 N.Y.S.2d 669)." Watters v R.D. Branch Assoc., LP, 30 AD3d 408 (2nd Dept. 2006). Since Rover failed to establish as a matter of law that it was free from any negligence with regard to the plaintiff's accident, summary judgment on its claim for contractual indemnification is premature (see Gil v Manufacturers Hanover Trust Co., 39 A.D.3d 703 (2nd Dept. 2007), and that branch of the motion seeking summary judgment on that issue is denied.

Inasmuch as the relief sought by plaintiff on her cross-motion for an order amending the caption to include Phoenix Blue as an additional defendant was agreed to pursuant to stipulation of the parties, that branch of the cross motion is granted. Plaintiff also is granted leave to supplement and/or amend her verified bill of particulars to add additional statutes, rules and regulations breached by defendants, in the form annexed to the moving papers.

Dated: September 10, 2007

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J.S.C.