

Carberry v Mimi's Rest. Corp.

2007 NY Slip Op 33432(U)

October 18, 2007

Supreme Court, New York County

Docket Number: 0106673/2005

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT:

Index Number : 106673/2005

CARBERRY, JAMES

vs

MIMI'S RESTAURANT

Sequence Number : 002

SUMMARY JUDGMENT

PART 12

INDEX NO.

106673/05

MOTION DATE

MOTION SEQ. NO.

002

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
OCT 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/18/07

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
JAMES CARBERRY,

Plaintiff,

- against -

MIMI'S RESTAURANT CORP., MARMIN REALTY
CORP. and THATCH, RIPLEY & CO., LLC.,

Defendants.

-----X
MARMIN REALTY CORP. and
MIMI'S RESTAURANT CORP.,

Plaintiffs,

- against -

ADMIRAL INDEMNITY COMPANY and
CLERMONT SPECIALTY MANAGERS, LTD.,

Defendants.

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

DECISION/ORDER
Index No. 106673/05
Motion Seq. No. 002
Action No. 1

Index No. 108089/05
Action No. 2

In Action No. 1, plaintiff James Carberry seeks to recover damages for personal injuries he sustained on January 25, 2004 when he fell down the stairway between the main and lower levels of Mimi's Restaurant at 984 Second Avenue, New York, New York.

The premises were owned by defendant Marmin Realty Corp. and leased to defendant Mimi's Restaurant Corp.

There were no witnesses to plaintiff's accident. Although

there is no dispute that plaintiff fell at the restaurant, plaintiff, who admits that he becomes confused and forgetful "at times", gave different accounts as to what actually happened during his deposition.

Defendants now move for an order: (i) granting summary judgment dismissing plaintiff's Complaint on the grounds that there is no evidence with respect to the cause of the accident and/or that defendants were negligent; (ii) alternatively, granting summary judgment dismissing plaintiff's Complaint with respect to defendant Marmin Realty Corp. on the ground that it is an out-of-possession landlord; and (iii) directing a hearing on the competency of plaintiff to proceed to trial.

In support of their motion, defendants have submitted an Affidavit from Bernard Lorenz, P.E., who inspected the stairway and is of the opinion that "the stair geometry provided a safe means for persons to ascend and descend the stairway. Any allegation that the stairway violates the current Code is incorrect, as the stairway was constructed prior to the effective date of the Code."

Mr. Lorenz is also of the opinion that "[t]he illumination was at a safe level for persons to clearly recognize and see the stairway system configuration, including its component parts and

skid treads. The two foot candles of illumination which plaintiff's expert alleges were required is a requirement of the current Building Code which is not applicable to the stairway."

He further concludes that "the stairs were properly maintained with no broken or damaged areas or missing sections, or missing non-skid strips. Both handrails were positioned in a manner to be easily grasped and provided a safe means of support while ascending or descending the stairs."

In opposition to the motion, plaintiff has submitted an Affidavit in which he states that he was born on June 14, 1926, making him currently 82 years old, and denies that he is incompetent. He argues that although he became confused at his deposition, he has "continually stated that I slipped and fell on the sixth step from the bottom of the stairs at MIMI'S." He further notes that "the deposition was very long and covered two separate days" and that "[t]he lawyer who questioned me was not nice and was very intimidating."

Plaintiff's wife, Flora Carberry, has also submitted an Affidavit in which she recounts being told by an employee of the restaurant that her husband had fallen and was at the bottom of the stairs. According to Mrs. Carberry, Mr. Carberry "was bleeding

from his head and a large bump appeared on his head." She also claims to have "slipped a little on the steps" on several occasions prior to the accident.

Plaintiff has also submitted an Affidavit from Stanley H. Fein, P.E., who represents that he inspected the stairway on March 30, 2005. He is of the opinion that: (a) "[t]he subject steps were made of marble, an inherently slippery material, and contained worn out nonskid strips", in violation of section 27-375(h) of the New York City Building Code; (b) "[t]he unequal riser heights at the 6th and 7th step and the sloping condition of the steps also contributed to the occurrence", and constituted a violation of section 27-375(a) of the Code; and (c) "[t]he area of the occurrence, at floor level, had readings of between 1 and 1.25 footcandles. The poorly condition of the subject stairs made the steps difficult to see", and constituted a violation of section 27-381 of the Code.

Based on the papers submitted and the oral argument held on the record on September 25, 2007, this Court finds that the conflicting affidavits of the parties' experts raise triable issues of fact as to whether the stairs were in a defective condition and whether said condition was a substantial factor in causing plaintiff's accident.

That portion of the motion seeking summary judgment dismissing plaintiff's Complaint on the ground that there is no evidence with

respect to the cause of the accident and as to defendants' negligence is, therefore, denied.

Defendants alternatively move to dismiss plaintiff's Complaint against defendant Marmin Realty Corp. on the ground that Marmin Realty Corp. was an out-of-possession landlord with no statutory duty to repair alleged defects in the premises.

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: (1) is contractually obligated to make repairs or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (citations omitted).

Vasquez v. The Rector, 40 A.D.3d 265, 266 (1st Dep't 2007).

Pursuant to paragraph 13 of the subject Lease,

Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times during business hours to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to the demised premises ...

Thus, defendant Marmin Realty Corp. had a contractual right to reenter, inspect and make needed repairs to the property.

In addition, as discussed above, plaintiff's claim for liability is based on alleged structural and design defects that, according to plaintiff's expert, violated specific provisions of the New York City Building Code and for which the landlord would be responsible.

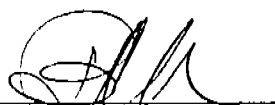
Accordingly, that portion of the motion seeking to dismiss plaintiff's claim against defendant Marmin Realty Corp. is also denied.

Finally, a review of the record, including the transcript of Mr. Carberry's deposition, does not demonstrate a need for a competency hearing at this time.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street on November 14, 2007 at 9:30 a.m. as previously scheduled.

This constitutes the decision and order of this Court.

Dated: October 18, 2007



BARBARA R. KAPNICK
J.S.C.

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