

Walker v Walsam EMP LLC

2008 NY Slip Op 31288(U)

April 23, 2008

Supreme Court, Nassau County

Docket Number: 6391-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

**TRIAL/IAS PART 5
NASSAU COUNTY**

ROBERT WALKER,

Plaintiff(s),

ORIGINAL RETURN DATE: 03/10/08
SUBMISSION DATE: 03/24/08
INDEX No.: 6391/06

-against-

**WALSAM EMP LLC, ZACHARY'S, S.B.C.L.,
INC. d/b/a ZACHARY'S, ZACHARY'S WIDA
PUB, INC., THE BANK OF NEW YORK,
RUSSELL WEISS, Individually, and as co-
executor of the Last Will and Testament of
Anna Lina Weiss, LENORA WHITE, Individually,
and as co-executor of the Last Will and Testament
of Anna Lina Weiss, LENORA WHITE, as co-
trustee of the Whit Family Trust created under the
Will of Kurt Weiss, GORDON WHITE, Individually,
and as co-trustee of the White Family Trust created
under the Will of Kurt Weiss, KIRK WEISS,
Individually, and as co-trustee of the Weiss Family
Trust created under the Will of Kurt Weiss and
LAURA REID, Individually, and as co-trustee of
the Weiss Family Trust created under the Will of
Kurt Weiss,**

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
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Motion by defendants herein, Walsam EMP LLC, the Bank of New York, Russell Weiss, individually, and as a former co-executor of the estate of Anna Lina Weiss, Lenora White, individually and as a former co-executor of the estate of Anna Lina Weiss and as co-trustee of the

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White Family Trust, Gordon White, individually and as co-trustee of the White Family Trust, Kirk Weiss, individually, and as co-trustee of the Weiss Family trust, Laura Reid, individually, and as a former co-trustee of the Weiss Family Trust (hereinafter collectively known as "Walsam"), for an order pursuant to CPLR 3212 granting it summary judgment dismissing all claims and cross-claims asserted against them and for indemnification against co-defendants S.B.C.L. Inc. d/b/a Zachary's Wida Pub, Inc. i/s/h/a Zachary's S.B.C.L., Inc., d/b/a Zachary's Wida Pub (hereinafter "Zachary's"), is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 6, 2005 at or about 3:20 a.m. The incident occurred in the premises located at 1916 Hempstead Turnpike, East Meadow, New York. The subject premises is owned by defendants Walsam and is occupied by tenants, co-defendants, Zachary's pursuant to a certain written lease.

On the date of the accident, plaintiff was a patron of the establishment known as Zachary's. As he was leaving the premises, plaintiff noticed that "[t]oward the stairway exit was a black curtain that appeared to be against a wall, hanging from the ceiling to the floor" (Spano Aff. ¶ 5). The curtain was covering a waterfall/pond that was built into the wall. Plaintiff allegedly leaned against the wall and fell through. Specifically, plaintiff testified, as follows:

- Q. When you leaned into it did you lean into it with one of your arms or your back or some other party of your body?
- A. Yeah, I think I leaned into it with my right arm and then I lost my balance, and I was trying to catch my balance and I hit the bottom. Like I say, it didn't go all the way to the ground. Had it gone to the ground I may have been able to catch my balance, but that's , like I say, when I flipped over the other side of the dark hole.

(Pl. Ex. A, p.36)

At his examination, Mr. Charles Wahler, the manager of Zachary's, testified that he personally hung the fabric over the pond/fountain. This was done while Zachary's was performing a cosmetic overhaul of the premises. Mr. Wahler testified that he did not seek approval from the landlord prior to the placement of the curtain. Mr. Wahler further testified that there were no prior falls in the area of the pond/fountain.

Michael Stemmer, the property manager of Walter & Samuels, Incorporated, was produced as a witness on behalf of defendants Walsam. Mr. Stemmer testified that Walsam EMP, LLC was the entity that owned the buildings on the property. Mr. Stemmer further testified that he had visited the premises on occasion regarding the collection of rent. He did not go to the basement area where the accident occurred nor was he aware of any complaints having been made from any source regarding the waterfall/pond.

Mr. Stemmer further testified that Walsam did not have any responsibilities regarding the interior of Zachary's premises. Zachary's was not obligated to consult Walsam before it performed any renovations. Although Walsam might re-enter on occasion, it would not barge in. Walsam did retain the right to fix things like the sewer and to perform periodic insurance inspections.

The relevant portions of the lease in question provide as follows:

Repairs: 4. Landlord shall maintain and repair the public portions of the building, both exterior and interior . . . The tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein and at its own cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition. . .

8. . . . Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Landlord and Tenant against claims of bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. . .

Access to Premises: 13. Landlord or Landlord'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, to examine the same and to make such repairs, replacements and improvements as Landlord may deem necessary and reasonably desirable to the demised premises or to any other portion of the building . . .

50. Repairs

Landlord shall not be required to make any repairs, improvements of any kind upon the demised premises except for necessary exterior structural repairs. . .

57. Indemnity

(a) Tenant shall indemnify Landlord and save it harmless from suits, actions, damages, liability and expense in connection with loss of life, bodily or personal injury or property damage arising from or out of any occurrence in, upon or at or from the Demised Premises or the occupancy or use by Lessee of said premises or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, invitees, licensees or concessionaries. . .

60. Insured Parties, Waiver, Notice

Any insurance procured by Tenant shall be issued in the name of Landlord and Tenant together with such other party or parties as may be named by Landlord, as their interest may appear, by a company licensed to do business in the State of New York . . .

(Pl. Ex. D)

Walsam moves for summary judgment on the grounds that it did not breach any duty to plaintiff and, hence, cannot be held liable for plaintiff's injuries. Walsam further claims that it neither created the allegedly dangerous condition nor had any actual or constructive notice of the claimed defective condition.

Plaintiff opposes the motion, claiming that the submitted evidence raises questions of fact in that the defendant Walsam, as an out-of-possession landlord, pursuant to its lease with Zachary's, retained broad rights of re-entry and owed a duty to inspect, maintain and make repairs to the subject premises; and questions of fact exist regarding the degree of control retained by Walsam. Plaintiff further alleges that questions of fact exist as to whether the dangerous condition was part of a fixture to the building and whether Walsam may be held liable for the plaintiff's injuries under the theory of constructive notice.

While Zachary's concurs with Walsam's contentions, Zachary's asserts that if the court finds that a question of fact exists as to Walsam's negligence and, hence, denies Walsam's request to dismiss the complaint against Walsam, then the alternative relief of contractual indemnity should be denied.

Under the facts extant, this Court finds that Walsam is entitled to summary judgment dismissing the complaint. As a general principle, an out-of-possession owner or lessor is not liable for injuries on the premises unless the owner or lessor has retained control or is contractually obligated to repair or maintain the premises. *Dalzell v McDonald's Corp.*, 220 AD2d 638 (2d Dept. 1995). In contrast, liability will be imposed on an out-of-possession landlord who reserves the right to enter the leased premises to make repairs and a significant structural or design defect which violates a specific statutory safety provision (*Sangiorgio v Ave Towing & Recovery*, 13 AD3d 433 (2d Dept. 2004); *see also Coluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 (2d Dept. 2006); *Lowe-Barrett v City of New York*, 28 AD3d 721 (2d Dept. 2006); *Ingargiola v Waheguru Mgt.*, 5 AD3d 732 (2d Dept. 2004).

Further, a landowner has a duty to maintain his premises in reasonably safe condition under the circumstances (*Basso v Miller*, 40 NY2d 233 (1976)), and to use reasonable care in preventing foreseeable harm. *Sanchez v State*, 99 NY2d 247, 253 (2002). Control is the measure of a party's liability in tort. *Ritto v Goldberg*, 27 NY2d 887, 889 (1970). Even an out-of-possession landlord owes a duty of maintenance and repair if he retains control, undertakes such obligations, or has a right of duty. *Putnam v Stout*, 38 NY2d 607, 617 (1976). Such duties are imposed by a specific statutory provision. *Guzman v Haven Plaza House*, 629 NY2d 559 (1987); *Bouima v Dacomi Inc.*,

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36 AD3d 739 (2d Dept. 2007); *Spencer v Schwarzman*, 309 AD2d 852 (1st Dept. 2002); *Hernandez v 7 Fried Food*, 292 AD2d 343 (2d Dept. 2002); *Nikolaidis v La Terna Rest*, 40 AD3d 827 (2d Dept. 2007).

It has been held that either lease provisions or course of conduct may evidence requisite control. *Wimby v Kustas*, 7 AD3d 615 (2d Dept. 2004); *Gelardo v Asthma Realty*, 137 AD2d 787-8 (2d Dept. 1988); *Cherubini v Testa*, 130 AD2d 380 (1st Dept. 1987).

While Walsam did not completely divest itself of the right to enter and make repairs, the injury herein was not caused by "a significant structural or design defect that is contrary to a specific statutory safety provision." *Davis v HSS Properties Corporation*, 1 AD3d 153 quoting *McDonald v Riverbay Corp.*, 308 AD2d 345, 346; see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 (1987).

As noted above, pursuant to the terms of the lease, the responsibility for the interior of the premises rested with the tenant Zachary's. Indeed, the manager of Zachary's testified that he did not seek the approval of Walsam prior to the renovation project. Walsam's mere reservation of the right to enter the leased premises does not render the landlord responsible for non-structural defects. See *Davis v HSS Properties Corp.*, *supra*; *Guzman v Haven Plaza House Dev. Fund Co.*, *supra*.

Nor can it be said as a matter of law that Walsam had actual or constructive notice of the allegedly defective condition. Mr. Wahler testified that he personally put up the curtain and he did not provide any notice to the landlord. Mr. Stemmer testified that he had no notice of the condition.

In order to sustain a cause of action for negligence, a plaintiff must prove that a legal duty was owed to him, that this duty was not performed or was improperly performed and that injury resulted as a result thereof. *Holodook v Spenier*, 43 AD2d 129 (3d Dept. 1973), *aff'd*. 36 NY2d 35 (1974).

To establish a *prima facie* case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created a condition which caused the accident or that the defendant had actual or constructive notice of the dangerous condition. *Goldman v Waldbaum, Inc.*, 248 AD2d 436 (2d Dept. 1998), *lv to app den.* 92 NY2d 805 (1998); *Bradish v Tank Tech Corp.*, 216 AD2d 505 (2d Dept. 1995). Actual notice means that the defendant knew about the dangerous condition. Constructive notice means that the dangerous condition was visible and apparent and that it existed for a sufficient period of time prior to the accident to permit the defendant, in the exercise of reasonable care, to discover and remedy the condition. *Gordon v American Museum of Natural History*, 67 NY2d 831 (1986); *Maguire by Maguire v Southland Corp.*, 245 AD2d 347 (2d Dept. 1997). In the absence of any evidence of how long an alleged dangerous condition existed prior to the accident, plaintiff may not rely on a theory of constructive notice. *Grimes v Golub Corp.*, 188 AD2d 724 (3d Dept. 1992).

No such notice existed here.

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In view of the foregoing, Walsam's motion for summary judgment dismissing the complaint and all cross-claims asserted against it is granted. In light of this determination, the Court need not address the branch of the motion which seeks dismissal of all cross-claims for indemnification against Zachary.

Accordingly, the caption of this action is amended as follows:

"ROBERT WALKER,

Plaintiff,

-against-

ZACHARY'S, S.B.C.L. INC. d/b/a ZACHARY'S,
and ZACHARY'S WIDA PUB, INC.

Defendants."

This constitutes the order and judgment of the Court.

Dated: 4-23-08

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RUSSELL WEISS, Individually, and as co-
executor of the Last Will and Testament of
Anna Lina Weiss, LENORA WHITE, Individually,
and as co-executor of the Last Will and Testament

ENTERED
APR 28 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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of Anna Lina Weiss, LENORA WHITE, as co-trustee of the Whit Family Trust created under the Will of Kurt Weiss, GORDON WHITE, Individually, and as co-trustee of the White Family Trust created under the Will of Kurt Weiss, KIRK WEISS, Individually, and as co-trustee of the Weiss Family Trust created under the Will of Kurt Weiss and LAURA REID, Individually, and as co-trustee of the Weiss Family Trust created under the Will of Kurt Weiss

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