

Vera v Dance Space Center

2008 NY Slip Op 33666(U)

October 6, 2008

Sup Ct, Bronx County

Docket Number: 17627-2004

Judge: Dominic R. Massaro

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 17

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

VERA, JEANNETTE

Index No. 0017627/2004

-against-

Hon. DOMINIC R. MASSARO (2)

DANCE SPACE CENTER INC.,

Justice.

The following papers numbered 1 to _____ Read on this motion, SUMMARY JUDGEMENT DEFENDANT
Noticed on May 28 2008 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2, 3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

*Ordered that Movant's motion for summary judgment dismissing the complaint and cross claims is Denied.
See Decision and order.*

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10, 6, 08

Hon. 
DOMINIC R. MASSARO (2), J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: CIVIL TERM PART IA-17

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 JEANNETTE VERA,

Plaintiff,

- against-

DECISION and ORDER

Index No. 17627-2004

DANCE SPACE CENTER, Inc., WARREN LESHEN,
 TRUSTEE UNDER WARREN LESHAN REVOCABLE
 TRUST of 1994, DUKANE FABRICS INTERNATIONAL,
 Inc , and CRALE REALTY, LLC,

Defendants.
 ----- x

BEFORE: Honorable Dominic R. Massaro

APPEARANCES: For Plaintiff

Luis A Muniz, Esq

For Defendant Dance Space Center, Inc.

Andrew Weltcheck, Esq

For Defendants Warren Lashen, Dukane Fabrics, and Crale Realty

Brian J Power, Esq.

In this negligence proceeding, corporate Defendants Dukane Fabrics International and Crale Realty and Trustee Warren Lashen seek summary judgment, dismissing Plaintiff's complaint, together with all cross claims against them. Movants are seeking summary judgment based upon lack of duty owed to Plaintiff in the incident that resulted in her serious injuries.

Plaintiff and Defendant Dance Space Center oppose summary judgment arguing in effect that, among other things, an out-of-possession landlord who, as here, reserves the right of reentry onto property retains sufficient control to impose liability for injuries caused by a dangerous condition arising on the premises (see generally, *Couluris v. Harbor Boat Realty, Inc* , 31 AD3d 686 [2nd Dept 2006])

This case involves Plaintiff Jeanette Vera's injuries that occurred on July 1, 2001, when, while participating in dance class, she tripped and fell on a rubber mat covering an area of uneven flooring in a dance classroom on the second floor of 451 Broadway in New York

County Plaintiff claims that she sustained serious injury because she fell on an upraised, uneven, unsafe, and hazardous mat that the dance school placed over an uneven floor while Plaintiff attended dance class and performed exercises.

Background

Plaintiff Jeanette Vera, a student at the dance school run by Dance Space Center, Inc., was an employee of the New York City Board of Education when she was injured in 2001. In her complaint, Plaintiff demands an unspecified amount in damages from the various Defendants for her physical injuries and other losses.

As relevant here, Movants are (1) Warren Lashen, trustee under the Warren Lashen Revocable Trust of 1994 which owns the building where the accident took place, (2) Dukane Fabrics International, Inc., a tenant in the building and a corporation owned by Lashen in his individual capacity, and (3) Crale Realty LLC, the building's managing agent. Collectively Movants filed an amended answer denying Plaintiff's allegations, and raising three affirmative defenses (contributory negligence, contribution, and collateral source) and cross claiming for contribution and indemnification against Dance Space Center. In the summary judgment motion, Movants seek dismissal of the complaint, costs, and disbursements incurred in defending this action.

Originally called "Dance Space Center," the remaining co-defendant is now known as Dance New Amsterdam, Inc. The dance school installed "marley mats" as a safety device at its premises before the accident during the period while Plaintiff was a dance student. In its answer, the dance school denies liability and alleges that Plaintiff was contributorily negligent. However, in its answering papers to the instant summary judgment motion, Dance Space Center supports Plaintiff's claim that Movants here are liable because of structural defects in the flooring on the second floor.

In disputing liability, Movants characterize any defects causing the accident as "nonstructural" and caused by the dance school because the tenant installed the mats in furtherance of its teaching activities. Attempting to place blame elsewhere, Movants say that the landlord had no notice of the mats' installation and consequently no obligation to inspect the flooring. Therefore, no liability can exist and no duty was owed to Plaintiff by the property owners.¹ Further, the dance school was obligated under the lease (or at least under an oral agreement) to install a shock proof floor, at its own expense, for noise control purposes and that such installation relieved Movants of any obligation to Plaintiff (see, Exhibit I, Transcript pp. 10 to 13).

In response, Plaintiff points out that all Defendants are liable to her because, while the rubber mat contributed to her fall, the uneven floor caused the accident (see generally, *McNelis v. Doubleday Sports, Inc.*, 191 AD2d 619 [2nd Dept. 1993]) The mat was taped together with duct tape and, as a result, the corners lifted up. When she fell, Plaintiff's hand was cut on the corners and further injury resulted from contact with the uneven floor (Transcript, pp. 28-29). Plaintiff says she had no notice of the condition because she had not danced in the room before because the dance school's practice was to use different rooms during sessions.

Further, the dance school argues in essence that summary judgment must be denied because factual issues exist concerning the dance floor's condition. Factual issues exist concerning Movants' notice concerning structural defects represented by the uneven floor and concerning Crale Realty's right of inspection and reentry to repair contained in the lease.

¹ Russell Bacine, Controller of Dukane Fabrics International, testified to the interrelation between the Warren Leshen Revocable Trust of 1954, Warren Leshen, Dukane Fabrics International, and Crale Realty (Exhibit I, Transcript, pp 6 and 7)

Legal Discussion

Summary judgment is proper where there are no issues of triable fact (see, *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]) Issue finding rather than issue determination is the Court's function here (see, *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]).

A summary judgment motion must be granted if, upon all the papers and proof submitted, a movant establishes that a plaintiff has no cause of action and a court is warranted, as a matter of law, to direct judgment in the movant's favor. Notwithstanding, a summary judgment motion must be denied where a party shows facts sufficient to require a trial of any factual issue (see, *Lan Duong v. City University*, 150 AD2d 349 [2nd Dept. 1989]). In determining the instant motion, the evidence must be viewed in a light most favorable to the nonmoving parties and least favorable to the movant (see generally, *Glennon v. Mayo*, 148 AD2d 580 [2nd Dept. 1989]).

A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (see generally, *Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept. 2008]). Movants failed to meet their burden in this regard. Specifically, Movants failed to address adequately the issue of whether they were responsible for the condition of the second floor, whether the condition existed before the mats were installed, and whether the floor's condition was the precipitating factor causing the injury. Further, a factual issue exists concerning actual or constructive notice.

Here, Plaintiff's case is based upon allegations that each Defendant controlled the premises to some extent, either as tenant, supervising agent, or landlord. Movants seem to be arguing that they cannot be liable because the condition that caused the accident was

transitional and caused solely by tenant dance school's placement of mats. Therefore, Movants were under no duty to Plaintiff that could result in liability under any circumstances.

Liability against a defendant landowner may be predicated only upon the owner's possession and control of the premises (see, *Butler v. Rafferty*, 100 NY2d 265 [2003]). An out-of-possession owner who did not create an unsafe condition will not be liable for injuries that occur on the premises unless it has either retained control over the premises or is otherwise contractually or statutorily obligated to maintain and repair the property (see, *Negron v Rodriguez & Rodriguez Storage & Warehouse, Inc.*, 23 AD3d 159 [1st Dept. 2005])

There are exceptions to the general rule that an out-of-possession landlord is not generally liable for injuries that occur on the premises. Among them is that an out-of-possession landlord may be found liable for failure to repair a dangerous condition on leased premises if the landlord: (1) assumes a duty to make repairs; and (2) reserves the right to enter to inspect or to make such repairs (see, *McDonald v. Riverbay Corp.*, 308 AD2d 345 [1st Dept. 2003])

Here, the lease in effect (Article 13) allowed Crale Realty to enter the leased premises at any time to effect emergency repairs (or normal repairs where the tenant fails to make repairs). Clearly, there is a dispute between Movants, Dance Space Center, and Plaintiff concerning responsibility for requiring "Marley mat" sound proof padding and whether the landlord required padding or Dance Space Center volunteered. Additionally, Plaintiff shows a factual issue concerning whether the dance floor was uneven, and whether such a defect was structural. In this regard, the Court rejects Movants' urging that the Court disregard the landlord's right to repair in considering their summary judgment motion and only consider the fact the Dance Space Center installed the mats. Clearly, on this record, a dispute exists about

the origin of any obligation to sound proof. The Court cannot find here that a transitory condition caused the accident. Further, factual issues remain concerning each Movant's relation to the real property in issue and their specific duty toward Plaintiff as a business invitee upon the property (see generally, *Basso v. Miller*, 40 NY2d 233 [1976]).

Conclusion

Upon consideration of the entire record, and viewing the evidence in a light most favorable to the nonmoving parties, the evidence does not support the instant Defendants' summary judgment motion. Plaintiff and Co-Defendant adequately rebut Movants' case to the extent that they have shown that certain factual issues remain concerning the nature of the flooring condition that caused Plaintiff's injury, Movants' relation to the tenant, and whether Movants received actual or constructive notice of the condition that caused the injury. Further, Plaintiff shows that the lease agreement between Dance Space Center and the landlord gave at least Crale Realty something more than a mere right to enter to inspect the property. Therefore, Movants' summary judgment motion is denied, there is no other conclusion except that issues of fact remain to be decided herein

Summary judgment should not be granted, unless there is no doubt as to the absence of triable issues (see, *Andre v Pomeroy*, 35 NY2d 361 [1974]). Under the circumstances, summary judgment in any party's favor is not appropriate. Factual issues remain. Clearly, various inferences can reasonably be drawn from the current record and that record must be viewed in the best light for the nonmoving party

BASED UPON THE FOREGOING, it is

ORDERED that Defendants Dukane Fabrics International's, Crale Realty's, and Warren Leshen's motion, pursuant to CPLR Rule 3212, for an Order. granting summary judgment and dismissal of the complaint and all pending cross claims, is DENIED

The foregoing constitutes the decision and order of this Court.

Dated: Bronx, New York
October 6, 2008



DOMINIC R. MASSARO
Justice of the Supreme Court