

Berkeley v 89th Jamaica Realty Co., L.P.

2009 NY Slip Op 30833(U)

April 14, 2009

Supreme Court, Queens County

Docket Number: 22545/2006

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
Justice

IA Part 12

STEPHEN BERKELEY x

Index
Number 22545 2006

- against -

Motion
Date November 5, 2008

89TH JAMAICA REALTY COMPANY, L.P.,
et al.
x

Motion
Cal. Number 3
Motion Seq. No. 2

The following papers numbered 1 to 13 read on this motion by defendant 89th Jamaica Realty Company, L.P. (Jamaica Realty) for summary judgment in its favor dismissing plaintiff's complaint and all cross claims against it and to amend the caption to include Hong Yu Corp. as a defendant.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on July 17, 2005, at approximately 6:40 P.M., when a security gate at the entrance to premises known as 89-01 165th Street, Jamaica, New York struck him in the head as he was exiting the premises. Plaintiff testified that when he entered a store known as Green Farm at the subject premises it was near closing time and that he noticed an employee on the right side of the entrance holding a chain for the store's security gate. Plaintiff also testified that it was clear that it was near closing time since fruit stands outside the store were being brought inside the store by employees. According to plaintiff, after he made his purchase and proceeded to exit the store, he noticed the gate was lower than it had been when he entered, but that it was still high

enough for people to pass through. He also stated that he saw the same person holding the security chain as when he entered. Plaintiff further testified that as he was passing through the threshold of the door the gate came down on him.

The subject premises are owned by defendant Jamaica Realty and leased to defendant Sung Yu Corp. According to the terms of the lease, defendant Sung Yu Corp. is to "take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto", and "to make all nonstructural repairs thereto as and when needed to preserve them in good working order and condition" (Ex. L, para. 4).

Shirley T. Salzman, a general partner of defendant Jamaica Realty and a member of nonparty STJ Management Company (STJ), which managed defendant Jamaica Realty's property, testified that the tenant, defendant Sung Yu Corp., opened up the front of the subject premises creating an entrance and installed the security gates. She also testified that defendant Jamaica Realty is responsible for performing structural repairs concerning the outer area of the building, such as the roof and sidewalks, but not the store itself. She further testified that defendant Jamaica Realty was not responsible for entrances and exits of the leased premises. In an affidavit accompanying the moving papers (Ex. N), Ms. Salzman avers that neither defendant Jamaica Realty nor nonparty STJ received any complaints regarding the security gates or their mechanisms on or before the date of the accident; that neither defendant Jamaica Realty nor nonparty STJ performed any maintenance, repairs, or alterations to the security gates or their mechanisms during the term of the subject lease which began in 1998; and that neither defendant Jamaica Realty nor nonparty STJ operated the security gates during the term of the subject lease up to and including the date of the accident.

Hosang Yu, the manager of defendant Sung Yu Corp. and the vice-president and manager of nonparty Hong Yu Corp., both companies of which are owned by his father, Sung Bong Yu, testified that defendant Sung Yu Corp. operated a fish market, known as Kings Fish Market, at the rear of the subject premises and that nonparty Hong Yu Corp. operated a fruits and vegetables market, known as Green Farm, at the front of the subject premises. Hosang Yu also testified that the subject security gate is manually operated by using a chain located on the side of the doorway. He further testified that if one were to let go of the chain when raising or lowering the gate, the gate would stop in place. According to Hosang Yu, the subject security gate always worked properly, there were no prior complaints regarding the security gate and he was unaware of any problems with or maintenance to the security gate.

Bruce Nam, the produce manager of Green Farm, also testified that they had received no prior complaints related to the subject security gate and that he was unaware of any problems with or maintenance to the security gate. He also testified that Green Farm did not make any complaints to the landlord regarding the security gate.

Defendant Jamaica Realty seeks to amend the caption to include Hong Yu Corp. as a defendant since the parties stipulated to add Hong Yu Corp. as a party defendant.

CPLR 1003 governs the addition of parties to an action and provides:

Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.

In this case, plaintiff did not timely amend his pleadings as of right, and although defendant Jamaica Realty demonstrated that on February 14, 2008, defendants Jamaica Realty and Sung Yu Corp. entered into a stipulation adding Hong Yu Corp. as a party defendant, a review of the court records reveals that thereafter plaintiff neither filed that stipulation (see generally Peterkin v City of New York, 293 AD2d 244 [2002]), nor filed the supplemental summons and amended complaint with the clerk of the court. (See CPLR 305[a].) In addition, it appears from the papers submitted by defendant Jamaica Realty¹ that prior to the date of that stipulation, plaintiff served a supplemental summons and amended complaint adding Hong Yu Corp. as a defendant, without leave of court, pursuant to CPLR 1003 and 3025(b), which renders the pleadings jurisdictionally defective. (See Dauernheim v Lendlease Cars, Inc., 202 AD2d 624 [1994].) Moreover, plaintiff did not file that supplemental summons and amended complaint with the clerk of the court, or proof of service thereof upon defendants Jamaica Realty, Sung Yu Corp. and nonparty Hong Yu Corp.

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Defendant Jamaica Realty annexed to its motion papers copies of a supplemental summons and amended complaint dated December 13, 2007, and its answer thereto.

Accordingly, the branch of defendant Jamaica Realty's motion to amend the caption to include Hong Yu Corp. as a defendant is denied.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (See Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; see also Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (See Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; see also Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra.)

A property owner or possessor is not liable in negligence unless it created the allegedly dangerous condition or had actual or constructive notice of its existence. (See Rosas v 397 Broadway Corp., 19 AD3d 574 [2005]; see also Winby v Kustas, 7 AD3d 615 [2004]; Voss v D&C Parking, 299 AD2d 346 [2002].) While an out-of-possession owner or lessor is generally not liable for injuries that occur on its premises, one who retains control of the premises, or contracts to repair or maintain the property may be liable for defects. (See Ever Win, Inc. v 1-10 Industry Assocs., LLC, 33 AD3d 845 [2006]; see also Winby v Kustas, supra; Eckers v Suede, 294 AD2d 533 [2002].) Control may be evidenced by lease provisions making the owner or landlord responsible for repairs or by a course of conduct demonstrating that the owner or landlord has assumed responsibility to maintain a particular portion of the premises. (See Winby v Kustas, supra.)

In this case, in light of the provision in the lease whereby defendant Jamaica Realty agreed to maintain and repair the public portions of the building, both exterior and interior, defendant Jamaica Realty failed to meet its burden of establishing as a matter of law that it was an out-of-possession landlord with no control over the subject premises. (See Ever Win, Inc. v 1-10 Industry Assocs., LLC, supra; see also Danielson v Jameco Operating Corp., 20 AD3d 446 [2005]; Langer v Orenstein, 295 AD2d 574 [2002].) Nevertheless, defendant Jamaica Realty presented competent evidence demonstrating its entitlement to summary judgment as a matter of law. This evidence, which included the parties' examinations before trial testimony and Shirley T. Salzman's affidavit, established that defendant Jamaica Realty did not create the alleged dangerous condition or have actual or constructive notice of its existence. (See Ever Wing Inc. v 1-10

Industry Assocs., LLC, supra; see also Metzger v Yorktown Jewish Center, 283 AD2d 466 [2001]; cf. Danielson v Jameco Operating Corp., supra.)

Plaintiff and defendant Sung Yu Corp., in opposition, failed to submit sufficient evidence to establish the existence of a triable issue of fact. (See Zuckerman v City of New York, supra.) Their unsupported assertions that defendant Jamaica Realty created or had actual or constructive notice of the alleged dangerous condition are speculative and insufficient to raise a question of fact. (See Carvano v Morgan, 270 AD2d 222 [2000].)

Accordingly, the branch of defendant Jamaica Realty's motion for summary judgment is granted and plaintiff's complaint and all cross claims against it are dismissed.

Dated: April 14, 2009

J.S.C.