Albishari v Saharas Turkish Cuisine
2009 NY Slip Op 32164(U)
September 17, 2009
Supreme Court, New York County
Docket Number: 603776-06
Judge: Judith J. Gische
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SCANNED ON 9/23/2009
[* 1]

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

PRESENT: HON. JUDITH J. GISCHE Justice PART 10

Index Number : 603776/2006
ALBISHARI, KHALED
VS
SAHARAS TURKISH CUISINE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
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 THE ACCOMPANYING MEMORANDUM DECISION.

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: Sept 17 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Khaled Albishari, Plaintiff (s), -against- Saharas Turkish Cuisine and Daniela Sarraf, Defendant (s).	**DECISION/ORDER** Index No.: 603776-06 Seq. No.: 002 **PRESENT:** Hon. Judith J. Gische J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def DF n/m 3212 w/DR affirm, DS affid, exhs	1
Pltf opp w/ SHS affirm, exhs	2
Def STC partial opp w/AS affirm, exhs	3
Def DF reply w/DR affirm	4
Def DF reply to STC opp w/DR affirm, exhs	5
Pltf's 7/21/09 letter	6

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff Khaled Albishari ("plaintiff") claims he sustained personal injuries when he fell into an open below ground vault, or basement ("basement"). Defendant Daniela Sarraf is the owner ("owner") of the building located at 513 2nd Avenue, New York, New York (the "premises") where plaintiff fell. Defendant Saharas Turkish Cuisine is her commercial tenant ("tenant" at times "restaurant"). Issue has been joined and plaintiff filed the note of issue on February 28, 2009. The owner has brought this timely motion for summary judgment, dismissing plaintiff's complaint. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Although the owner also moved for summary judgment

on her cross claim for indemnification against her tenant, she has since withdrawn that branch of her motion on consent. Stip 8/14/09.

Plaintiff opposes the owner's motion. At oral argument, defendant presented certain legal authority. Following oral argument, plaintiff sent the court correspondence containing other legal authority. The court has considered all legal authority presented by each side in deciding this motion; the court's decision is as follows:

Arguments presented

The owner and the tenant have a lease agreement for the store and basement at the premises. The tenant operates the Saharas Turkish Cuisine restaurant on the ground floor and uses the basement for deliveries and to remove trash at night. The owner contends that she is entitled to summary judgment dismissing plaintiff's complaint because not only is she an out of possession landlord, but plaintiff's accident was due to a sudden, unexpected dangerous condition, which she neither created nor had notice of.

The owner argues that although she visits the premises once a week, most of her interaction with her tenant is conducted either electronically or by mail. The owner denies she has any access to the basement, or any involvement in how her tenant conducts its day to day business affairs. The owner argues that even if she has the right of reentry under their lease, this general reservation of rights is to make necessary repairs and there was nothing wrong with the basement door that plaintiff fell into. Thus, the owner maintains that her reservation of rights is insufficient, as a matter of law, to impose legal liability upon her for the dangerous condition alleged by plaintiff.

The owner was deposed as was the plaintiff and the manager of the restaurant

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("Kocak"). The owner testified that she received no complaints from plaintiff or anyone else prior to the day of the accident about a dangerous condition. The owner also testified at her EBT that she does not have keys to the basement doors and only the restaurant employees have those keys.

At his deposition, the plaintiff testified that the accident happened at approximately 11:00 p.m. at night on February 9, 2006 as he uptown on 2nd avenue from 28th to 29th street. According to plaintiff, as he was passing in front of the restaurant, someone in the basement "suddenly" and "quickly" flung open the basement door closest to 29th street just as plaintiff was passing over the door closest to 28th street. When this happened, plaintiff was struck and he fell directly into the hole, landing on the steps below.

Kocak, the president of the restaurant's owner testified at his EBT that restaurant employees have access to and from the basement through locked doors. The employees have access to the keys, but the doors are kept unlocked (not open) when the restaurant is open for business. The basement is used for deliveries and trash and trash is usually brought up to the street at about 10:30 to 11:00 pm each night for the midnight pickup.

Plaintiff opposes the owner's motion, arguing that she has made a special use of the sidewalk in front of the premises and that her duty to keep the premises safe is non-delegable. Plaintiff alleges that no key is needed to get into the basement and therefore the owner could have gone into the basement if she wanted to. Furthermore, the owner has a super and he could have notified her of the dangerous condition. Finally, plaintiff argues that plaintiff was obligated to repair or replace the basement

doors, but failed to do so despite having constructive notice that they were dangerous.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). Where a landlord is out of possession, however, the landlord is generally not liable in negligence with respect to the condition of the demised property. Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 569 (1987); Vasquez v. The Rector, 40 AD3d 265, 266 (1st Dept 2007); Johnson v. Urena Serv. Ctr., 227 AD2d 325, 326 (1st Dept 1995) *lv denied* 88 NY2d 814 (1996). There are two exceptions to this general rule. One exception is where the landlord is contractually obligated under the lease to make repairs or maintain the premises. Another exception is where the landlord has a contractual right under the lease to reenter, inspect and make needed repairs to the premises. Lane v. Fisher Park Lane Co., 276 A.D.2d 136 (1st Dept 2000).

The owner has established that she leased the store and basement to the

restaurant and is an out of possession landlord. The lease between the defendants, however, has a repair clause and the owner retained the right to reenter to make such repairs. Here, however, there is no evidence that plaintiff's accident was due to a dangerous condition that required repairs. There is no evidence that the basement doors were working improperly, defective or malfunctioned. They did not, for example, buckle under this weight. Consequently, there is no evidence that the accident was due to the owner failing to keep the premises in a safe condition by not making a necessary repair. Although defendant makes much of the fact that the doors were unlocked most of the time, and the owner could have opened them and gone into the basement area to look around, there is no evidence (or triable issue of fact) that the doors were themselves a dangerous condition.

There is also no evidence that the owner had notice of or created a dangerous condition, or that such defects were visible and apparent. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1st dept. 2000); Segretti v. Shorenstein Company East, LP, 256 AD2d 234 (1st dept. 1998). To constitute constructive notice, a defect must not only be visible and apparent, it must have also existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*.

Plaintiff's own testimony is that the basement door was flung open from below suddenly and quickly just as he was approaching it. This happened without any forewarning. Plaintiff was so surprised by this, that it was impossible for him to stop his forward movement in time to catch himself from falling. Under those circumstances, the owner did not have a sufficient opportunity, within the exercise of reasonable care, to

remedy the dangerous condition that plaintiff claims existed at the time of this accident. *see* Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 (1986); Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 (1984) *aff'd* 64 N.Y.2d 670 (1984); *see* Mercer v. City of New York, 223 A.D.2d 688, 689 (1996), aff'd 88 N.Y.2d 955 (1996).

The owner has also proved that she did not create the dangerous condition alleged. *see* Gordon v. American Mus. of Nat. Hist., *supra*; Lewis v. Metropolitan Transp. Auth., *supra*; *see* Mercer v. City of New York, *supra*. She did not fling the door open or instruct anyone to do so. There are no triable issues of fact that complaints were made prior to plaintiff's accident and plaintiff did not complain to the owner about the basement door.

Plaintiff did not fall into the basement because of some code violation which could be evidence of negligence. see, NYCAC § C26--226.0; *compare* Khamis v. CG Foods, Inc., 49 A.D.3d 606 (2 dept. 2008) *(basement doors flattened back and basement exposed)*. Until the door was flung open by an employee, the doors were shut and the basement was concealed, i.e. the door could be walked on by passers-by.

The owner has established that is an out of possession landlord, there was no dangerous condition at the premises, but even if there was, the owner did not have notice of it. Reid v. 320 E. 81st Street Corp., 19 A.D.3d 471 (2nd Dept 2005). The owner did not create the dangerous condition, if there was one. Plaintiff has failed to raise triable issues of fact that there was a dangerous condition at the premises, or that even if there was, that it existed for a sufficient period of time for the owner to do anything about it. *compare,* Xu v. 688 Sixth Avenue Realty Co., 19 AD3d 687 (2nd Dept

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2005). The plaintiff has also failed to raise triable issues of fact that she controlled the manner in which employees used the basement door. Since the owner has established her defenses, she has proved she is entitled to summary judgment dismissing the complaint against her.

This action continues against the restaurant, as do the cross claims since they pertain to defense costs. Plaintiff shall serve a copy of this decision and order on the Office of Trial Support so this case can be scheduled for trial.

Conclusion

The motion by defendant-owner Daniela Sarraf for summary judgment dismissing the complaint against her is granted. The claims against Sarraf are hereby severed and dismissed. The case continues against the defendant-restaurant, Saharas Turkish Cuisine as do the cross claims for defense costs, etc.

Plaintiff shall serve a copy of this decision/ order on the Office of Trial Support so this case can be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

Dated: New York, New York
September 17, 2009

So Ordered:

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Judith J. Gische, J.S.C.