

Rodriguez v 565 Realty Co., LLC

2009 NY Slip Op 32256(U)

September 29, 2009

Supreme Court, New York County

Docket Number: 110400/06

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number: 110400/2006

RODRIGUEZ, JOSE

VS.

565 REALTY

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING PERSONAL SERVICE

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING PERSONAL SERVICE

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/29/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

-----x
JOSE RODRIGUEZ,

Plaintiff,

- against -

565 REALTY CO, LLC, ABRO MANAGEMENT CORP.,
and 1280 FOOD CORP.,

Defendants.
-----x

Index No. 110400/06

Mot. Seq. No. 003

FILED
OCT 01 2009
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NEW YORK

HON. WALTER B. TOLUB, J.:

In this personal injury action, defendants 565 Realty Co., LLC ("565 Realty") and ABRO Management Corp. ("ABRO") move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and all cross-claims against them.

BACKGROUND

Plaintiff, Jose Rodriguez, commenced this action seeking to recover damages for personal injuries he allegedly sustained on December 19, 2003, when he tripped and fell while walking down a staircase located inside the building at 1280 St. Nicholas Avenue, also known as 565 West 174th Street, in Manhattan (the "subject premises"). 565 Realty owns the subject premises and ABRO serves as the manager. Defendant 1280 Food Corp. ("1280 Food") occupied the subject premises and operated a deli/grocery business on the first floor and basement of the premises under commercial lease agreement with 565 Realty.

Pursuant to the commercial lease agreement, in effect from July 1, 2003 to June 30, 2010, 1280 Food agreed, *inter alia*, to

"take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; [and] make all repairs in and about the same necessary to preserve them in good order and condition" (Lease, Not of Mot, Exh D, 2nd Covenant). 1280 Food also agreed to "execute and comply with all laws, rules, orders, ordinances and regulations at any time issued or in force (except those requiring structural alterations), applicable to the demised premises or to Tenant's occupation thereof, and Federal, State and Local Governments ..." (*id.*). 1280 Food further agreed to "permit at all times during usual business hours, the Landlord and representatives of the Landlord to enter the demised premises for the purpose of inspection, and ... [to] suffer the Landlord to make repairs and improvements to all parts of the building" (*id.*).

Sometime after occupying the leased premises, 1280 Food performed certain renovations thereto, including, *inter alia*, installing an interior staircase that connected the first floor and basement. 1280 Food vacated the subject premises in October 2006.

As stated, plaintiff claims that he tripped and fell on December 19, 2003, while descending the interior staircase on his way to the basement of the subject premises. The Complaint essentially alleges that the incident and plaintiff's injuries

were caused solely by the negligence of defendants in the ownership, management, and maintenance of the subject premises. Plaintiff alleges that defendants were negligent in, *inter alia*, causing a trap to exist at the subject premises; failing to provide handrails; failing to maintain the subject premises in a reasonably safe condition; and violating applicable regulations, statutes, and ordinances. The Bill of Particulars contains similar allegations and lists plaintiff's injuries, which include a right ankle fracture.

In their Answer, 565 Realty and ABRO generally deny the allegations in the Complaint, assert numerous affirmative defenses, and allege cross claims for contribution or indemnification against 1280 Food. Defendants essentially maintain that 1280 Food cut a hole in the concrete floor of the subject premises and constructed the staircase without seeking or obtaining their permission.

1280 Food has not appeared in this action. By Order, entered July 24, 2007, this Court granted plaintiff's motion for a default judgment against it.

565 Realty and ABRO now seek summary judgment dismissing the Complaint and any cross claims against them.

DISCUSSION

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, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, Complaint alleges a negligence claim against defendants. Negligence consists of the breach of a duty owed by the defendant to the plaintiff, resulting in injury to the plaintiff (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

At an examination before trial ("EBT") held on September 25, 2007, plaintiff testified that he had frequented the subject premises because it was near his residence (Transcript of Rodriguez EBT, Not of Mot, Exh I, p. 15). He also stated that he had walked down the interior staircase leading from the deli to the basement many times before the alleged incident, as a group often gathered there to play dominos (*id.*, p. 16). He further stated that prior to the alleged incident, he had descended the interior staircase of the subject premises to

watch his cousin and others play dominos, and that he had gone back up the staircase to the deli to buy a drink for his cousin (*id.*). He testified that while he was on his way back down the staircase, carrying a container of water, his foot slipped, after the second or third step, causing him to fall and sustain injuries (*id.*, p. 18). He stated that he did not see what caused his foot to slip (*id.*). He also testified that he had been looking down at the steps as he descended the staircase; that there were nine or ten steps on the staircase, and that there were no handrails or lighting (*id.*, pp. 17, 18, 20).

Plaintiff seeks to impose liability on defendants based on alleged defective construction of the staircase, including the absence of handrails or lighting, in violation of the various sections of the Administrative Code of the City of New York ("Administrative Code") regulating the duties of owners and tenants of property located in Manhattan. The Administrative Code charges the owner with responsibility "at all times for the safe maintenance of the building and its facilities" (Administrative Code § 27-128). The owner must maintain "[a]ll buildings and all parts thereof", including "all service equipment, means of egress, devices and safeguards that are required in the building by the provisions of this code ..." in good working order (Administrative Code § 27-127). With respect to interior staircases, the Administrative code requires

handrails providing a specified finger clearance (see Administrative Code § 27-375). In addition, the Administrative code requires that corridors and exits be equipped with "artificial lighting facilities" (Administrative Code § 27-381).

It is well established that:

A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to the tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, 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

(*Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]). Here, that the moving defendants expressly retained a contractual right to reenter, inspect, and make needed repairs to the subject premises is not disputed. Furthermore, on review of the submissions, the Court concludes that triable issues of fact exist as to whether liability may be imposed on the moving defendants based on a significant structural or design defect, pertaining to the interior staircase where the alleged incident occurred, that is contrary to the above-mentioned provisions of the Administrative Code. As such, the moving defendants have not made a prima facie showing of entitlement to summary judgment dismissing the claims against them.

The assertions that plaintiff fails to establish what

caused the alleged incident, or that the moving defendants neither created nor had actual or constructive notice of the claimed dangerous condition is insufficient to establish entitlement to judgment as a matter of law. Plaintiff asserts that he tripped and fell on the interior staircase of the subject premises. Even absent any evidence that the moving defendants had actual notice of the alleged defective condition of the staircase, the contractual right to reenter the subject premises is sufficient to charge them with constructive notice (see *Guzman v Haven Plaza Hous. Dev. Fund. Co.*, 69 NY2d 559, 566 [1987]). Their failure to remedy the alleged defect as they could have done under the commercial lease agreement is the basis for liability under the various provisions of the Administrative Code (*id.* at 566-567).

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

Counsel for the parties are directed to appear as scheduled for a pre-trial conference on October 2, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 9/29/09

ENTER:

Walter B. Tolub J.S.C.

FILED
 OCT 01 2009
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 NEW YORK