

Remes v 513 W. 26th Realty, LLC

2009 NY Slip Op 32888(U)

December 4, 2009

Supreme Court, New York County

Docket Number: 108902/05

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 108902/2005
REMES, MAIJA-LEENA
 vs.
513 WEST 26TH REALTY
 SEQUENCE NUMBER : 007
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/8/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

<u>1-3</u>
<u>4-15</u>
<u>16-18</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits none

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision and order annexed hereto.


M.B. -- pre-trial conf. scheduled for 4/11/10 at 2 PM.

FILED

DEC 10 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/4/09



 J.S.C.
JANE S. SOLOMON

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 55

-----X

MAIJA-LEENA REMES,

Index No. 108902/05

Plaintiff,

DECISION AND ORDER

-against-

513 WEST 26TH REALTY, LLC and
ATELIER 14 CORP.,

Defendants.

-----X

513 WEST 26TH REALTY, LLC

Third Party Plaintiff,

-against-

ATELIER 14 CORP.,

Third Party Defendant.

-----X

513 WEST 26TH REALTY, LLC

Second Third Party Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.,
ANDREW ONG DESIGN and MURDOCH
YOUNG ARCHITECTS,

Second Third Party Defendant.

-----X

ATELIER 14 CORP.,

Third Third Party Plaintiff,

-against-

INTEGRITY CONTRACTING, INC.,
ANDREW ONG DESIGN and MURDOCH
YOUNG ARCHITECTS,

Third Third Party Defendant.

-----X

SOLOMON, J.:

FILED
DEC 10 2009
NEW YORK
COUNTY CLERK'S OFFICE

FACTS

Plaintiff, Maija-Leena Remes (Remes), suffered a fractured ankle on April 2, 2005 when she fell in the lobby of a building owned by defendant 513 West 26th Realty, LLC (Owner). Remes had just left premises occupied by defendant Atelier 14 Corp. (Atelier), which operated an art gallery in the basement, where she had attended a party.

Remes commenced this negligence action against Owner, which sued Atelier for contribution and common law and contractual indemnity in a third party action. Remes then sued Atelier directly. Owner and Atelier each sued third-party defendants Integrity Contracting, Inc. (Contractor), Andrew Ong LLC s/h/a Andrew Ong Design (Designer) and Murdoch Young Architects, PLLC s/h/a Murdoch Young Architects (Architect). Owner sued the third-party defendants for common law contribution and indemnification and contractual indemnification; Atelier sued them for common law indemnification. On these motions (sequence numbers 07, 08 and 09), all defendants and third-party defendants move or cross-move for summary judgment.

In motion 07, Owner moves for summary judgment dismissing the complaint and Atelier's cross-claim against it; Designer and Contractor cross-move for summary judgment. In motion 08, Architect moves for summary judgment dismissing plaintiff's complaint. And in motion 09, Atelier moves for

summary judgment dismissing the complaint and cross-claim as against it.

Remes attended a party at the Atelier gallery, and as the party wound down, she and other guests came up a ramp from the basement to the building lobby. She waited in the lobby for a friend to leave the party. In the approximately two hours she was at the party, Remes had consumed two glasses of champagne. The small lobby was crowded with guests because a downpour of rain kept them from leaving.

The lobby is eight by seven feet, and is used as the main entrance to the building from 26th Street. As one enters the lobby, an elevator is situated on the right, and straight ahead is a separate room with mailboxes that is below the lobby grade level, and is accessed by descending two steps. There is no handrail by these steps. Photographs submitted as part of the motion show that the top surfaces of the steps are the same color stone as the lobby, with darker, contrasting stone facing the mail room and on the walls on either side of the steps. Also straight ahead from the entrance is a door that leads to the basement, which is separated from the mail room by a wall.

Remes was standing in the lobby facing toward the door, with her back to the mail room steps. As another guest passed in front of her, she took a step back to avoid contact, and stumbled down the mail room steps. As she fell, Remes reached to grab

onto something, without success. Remes testified that she was not aware that there were steps behind her, and had believed that the mail room was on the same level as the lobby.

Two years before the accident, the lobby had been renovated. Owner hired the Architect, Designer and Contractor for this job. Architect planned the lobby and mail room layout, including the steps; Designer suggested a color scheme for the floor tiles and paint in the lobby and mail room; and Contractor carried out the plans.

DISCUSSION

As a preliminary matter, Atelier's motion was filed on February 20, 2009. The court's computer shows that plaintiff filed her note of issue on December 17, 2008, sixty-five days earlier. The preliminary conference order stated that dispositive motions were to be filed within sixty days after the note of issue is filed. Atelier's motion is untimely, and no explanation or excuse is offered, so the motion must be denied (see *Brill v City of New York*, 2 NY3d 648 [2004]). However, if it appears that Atelier is entitled to summary judgment under the facts presented in the other motions, the court may grant summary judgment in its favor (CPLR 3212 [b]).

Movants contend that the sole proximate cause of plaintiff's injury was her own inattentiveness and, by implication, her inebriation, which resulted in her not noticing

that there were steps behind her. At best, this raises a question of fact on her comparative negligence, so it is necessary to determine if there is a basis for finding negligence on part of the movants.

If plaintiff can establish that her injury was the result of a violation of Title 27, Chapter 1 of the New York City Administrative Code (the Building Code), the violation can serve as evidence of negligence on the Owner's part (see, *Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311 [1st Dept 2008]). Since Architect was charged with designing the lobby in accordance with the Building Code, the violation would permit Owner's third-party claim against it to go forward.

Plaintiff served CPLR 3101(d) disclosure stating that her architectural expert opines that the subject stairs are required to have a handrail under 12 New York City Administrative Code (Building Code) § 27-354 and § 27-375, and the lack of a handrail presented a hazardous condition (Owner's Notice of Motion, Ex. W, and see Affidavit of Thomas N. Fox, Plaintiff's Opposition to Motions, Ex. K). The expert states that the stairs to the mail room is the only means of egress from the mail room to the street, via the lobby, so the stair is a required exit within the meaning of the Building Code. Finally, the expert opines that good and accepted architectural practice and the Building Code require that two steps should not exceed 25 ½

inches in elevation from top to bottom, and the subject stairs rise 28 inches (Building Code § 27-375 [e][1]).

With respect to the latter contention, there is no evidence that the elevation from the mail room to the lobby was a factor in causing Remes's accident, or in the severity of her injury. Accordingly, the motions for summary judgment regarding this aspect of her claim are granted.

Building Code § 27-375 states that "interior stairs" shall comply with certain requirements, and that stairs less than forty-four inches wide, such as the stairs to the mail room, must have a handrail on one side (§ 27-375[f]). "Interior Stair" is defined in Building Code § 27-232 as "A stair within a building, that serves as a required exit (see Access Stair and Exterior Stair)". An Access Stair is defined in Building Code § 27-232 as a stair between two floors in a building that does not serve as a required exit, and an Exterior Stair is a stair open to the outdoor air that does serve as a required exit. "Exit" is defined as "[a] means of egress from the interior of a building to an open exterior space which is provided by the use of the following, either singly or in combination: exterior door openings, vertical exits, exit passageways, horizontal exits, interior stairs, exterior stairs, fire towers or fire escapes; but not including access stairs, aisles, corridor doors or corridors"; and "required is defined as "required by the

provisions of this code". Code § 27-354 states that Subchapter 6 (which includes § 27-375) shall control design and construction "to provide a safe means of egress" from buildings.

The intersection of these definitions has been the subject of court decisions before. For example, in *Maksuti v Best Italian Pizza*, the court held that a stair located under a trap door that led from the basement to the first floor of a restaurant did not serve as a required exit within the meaning of the above definitions (27 AD3d 300 [1st Dept 2006], appeal denied, 7 NY3d 715). An exterior staircase leading from a path to a platform, which in turn led to a building entrance, also is not an interior staircase as defined in the Building Code (*Gaston v NYCHA*, 258 AD2d 220 [1st Dept 1999]).

Owner and Architect contend that, as a matter of law, the cited Building Code provisions are inapplicable because the steps from the mail room to the lobby are not "interior stairs" because they are not a "required exit" leading from the interior of the building to an open space. This reading of the code is too narrow, however, because the definition of "exit" encompasses not only the exterior door, but "either singly or in combination", the stairs, passages and door openings leading outside. The interpretation of this provision urged by plaintiff's architectural expert, that the stair should be viewed in combination with the lobby and exterior door, is more correct.

It is undisputed that the stairs where Remes fell is the only way out of the tenant's mail room, so to succeed in their argument, Owner and Architect would need to show that no exit is required from that room. Alternatively, they could demonstrate that if a handrail was required, the lack of one was not a proximate cause of Remes's injury. In *Gaston*, the site of the accident clearly was not an interior stair, and in *Maksuti*, the layout of the restaurant is not fully described, but the decision implies that the "trap door" servicing the stairs where plaintiff fell was not the only way in and out of the basement, so the subject stair was not a "required exit". Here, there is evidence that the stair is an "interior stair" requiring a handrail within the meaning of the Building Code, since it is the only means of egress from the tenants' mail room. And Remes testified that she reached out to grab onto something while falling, and a jury could conclude that had a handrail been present, it would have prevented her injury (see, *Viscuse v Fenner*, 10 AD3d 361 [2d Dept 2004], citing *Orlick v Granit Hotel & Country Club*, 30 NY2d 246 [1972]). Accordingly, Remes's claim based on a violation of the Building Code is not dismissed.

Owner and Atelier sued the Architect for contribution and common law indemnification to recover any damages resulting from the Architect's professional negligence in designing the lobby and mail room. That branch of Owner's claim based on

Architect's failure to maintain the premises is dismissed because there was no such duty. Plaintiff contends that her accident was caused in part by Owner's failure to renovate the lobby and mail room in compliance with the New York City Building Code, and Owner and Atelier seek to place responsibility for this failure on the Architect. In light of the foregoing discussion, the claims against the Architect survive.

Designer alleges that it is entitled to summary judgment because its participation in the lobby renovation was to help choose decorative finishes subject to Owner's approval; it had no role in deciding whether to install a handrail. The third-party complaints allege that Remes's injuries stem from Designer's negligence; Owner also alleges that it is entitled to contractual indemnification, but that claim is dismissed because no such contractual clause is identified. Remes's only claim attributable in any way to Designer is one for "color confusion", i.e., the similarity in the colors of the lobby, mail room and step floor tiles caused her to think that the mail room was on the same level as the lobby. Her testimony, however, indicates that she was not looking toward the mail room when she fell, and to attribute her mis-apprehension regarding the level of the mail room to Designer's color suggestions two years earlier is too remote a basis to impose liability. Also, her verified bill of particulars makes no claim for liability based on "color

confusion" (Architect's Notice of Motion, Ex. A). Therefore, Designer's motion is granted because there is no basis upon which the direct defendants could be liable for its negligence.

Contractor's cross motion for summary judgment also is granted. It performed the lobby renovation pursuant to plans drafted by the Architect. There is no evidence showing that Contractor was responsible for Building Code compliance (see *Weiss v City of New York*, 16 AD3d 680 [2d Dept 2005]), or tying Remes's injury to a defect in Contractor's workmanship.

Finally, the papers submitted include all the pleadings and voluminous deposition transcripts. Plaintiff's theory on why Atelier is liable to her is that it negligently permitted a crowd to exit the gallery, and failed to better direct the flow of traffic out the lobby door (Aff. in Opposition, Steven J. Horowitz, Esq., paragraphs 49-50). Remes testified that guests remained in the lobby to avoid a downpour, and she fell when she stepped away from a passing guest as a matter of politeness. Under these circumstances, Atelier had no duty to prevent people from walking near Remes. Upon searching the record, the complaint and cross-claim against Atelier are dismissed, as are its third-party actions. Accordingly, it hereby is

ORDERED that the motion by defendant 513 West 26th Realty, LLC for summary judgment (motion sequence 07) is denied; and it further is

ORDERED that the cross-motions by Andrew Ong, LLC s/h/a Andrew On Design and Integrity Contracting, Inc., are granted, and the third-party complaints are severed and dismissed as against these parties, and the Clerk of the Court shall enter judgment accordingly, with costs and disbursements as taxed; and it further is

ORDERED that the motion by third-party defendant Murdoch Young Architects, PLLC for summary judgment (motion sequence 08) dismissing Owner's third-party complaints as against it is denied; and it further is

ORDERED that upon searching the record, summary judgment severing and dismissing the complaint and cross-claims by and against defendant Atelier 14 Corp. is granted, and the third-party claims by Atelier 14 Corp. against Integrity Contracting, Inc., Andrew Ong, LLC and Murdoch Young Architects, PLLC likewise are dismissed; and it further is

ORDERED that counsel for the remaining parties shall appear in Part 55 for a pre-trial conference on January 11, 2010 at 2 PM.

Dated: December 4, 2009

Enter:

J.S.

J.S.C.
JANE S. SOLOMON

FILED
DEC 10 2009
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