

Caruso v Rudin Mgt. Co., Inc.

2011 NY Slip Op 31425(U)

May 25, 2011

Sup Ct, NY County

Docket Number: 114825/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROSANNE CARUSO,
Plaintiff,

Index No.: 114825/06

Motion Date: 09/29/10

- v -

Motion Seq. No.: 04

RUDIN MANAGEMENT CO., INC. and
215 East 68th Street, L.P.,

Motion Cal. No.: _____

Defendants.

RUDIN MANAGEMENT CO., INC. and
215 East 68th Street, L.P.,
Third-party Plaintiffs,

FILED

- v -

JUN 01 2011

DUETO OF SECOND AVENUE INC.,
Third-party Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
	1
	2, 3
	4, 5

Cross-Motion: Yes No

Upon the foregoing papers,

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, defendants/third-party plaintiffs Rudin Management Co., Inc. (Rudin) and 215 East 68th Street, L.P. (215) (together, defendants) move, pursuant to CPLR

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SETTLE/SUBMIT ORDER/JUDG.

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

3212, for summary judgment dismissing plaintiff's claim in its entirety, or, in the alternative, for summary judgment requiring third-party defendant Dueto of Second Avenue Inc. (Dueto) to defend and indemnify them.

In motion sequence number 005, Dueto moves, pursuant to CPLR 3211 and/or 3212, to dismiss the third-party complaint asserted against it in its entirety.

This action arose out of an alleged trip and fall down an interior staircase leading from the main floor to the basement area of Dueto, a hair salon, on August 19, 2005. Dueto is located at 1303 Second Avenue, New York, New York. Dueto is a commercial tenant in the building that is owned by 215 and managed by Rudin.

Plaintiff testified at her examination before trial (EBT) that she began working as a hairdresser at Dueto approximately five months prior to the date of the accident. According to plaintiff, the Dueto salon is comprised of a main floor, with a reception desk and hair dressing stations on each side of that floor, followed by four hair washing sinks. Behind the sinks, towards the rear of the main floor of the salon, there is a short hallway that leads to a set of steps going down to the basement area. The steps descend to a landing, make a left turn, followed by a few more steps to the basement level. The basement

consists of a break room, where workers eat lunch, a bathroom, and a storage area.

On the day of the accident, plaintiff headed down the stairs to eat her lunch at approximately 2:30 P.M. Plaintiff testified that, as she was going down the stairs, carrying her lunch in one hand, she tripped on a "black plastic piece" on the steps. Plaintiff stated that the black plastic piece, or edging, was on the fourth step from the top landing, and was raised approximately two inches, causing her foot to slip. Plaintiff said that she landed on the third step from the landing.

Prior to the accident, plaintiff used the same steps at least twice each day every time that she was at work. Plaintiff averred that she noticed the condition of the raised black edging since the inception of her employment at Dueto, but that she never told anyone at Dueto about the allegedly dangerous condition of the step.

Jimmy Cira (Cira), the superintendent for Rudin, was also deposed in this matter. According to Cira, as part of his responsibilities, he responds to requests for maintenance from Dueto, as well as to all of the retail commercial tenants at 215.

Cira claims that he never received any complaints regarding the condition of the steps in Dueto's salon, or any complaints about a raised black edging on those steps. Cira stated that any complaint about the edging on the stair would have been referred

to him. Further, according to an affidavit submitted by Cira, he was never asked by anyone from Dueto, or anyone else, to inspect, repair, alter, change or work on the steps in question prior to the date of the accident.

Julio Sosa (Sosa), the owner of Dueto, was also deposed in this matter. Sosa testified that, when he initially rented the space in 1987, the steps leading to the basement area were in good condition, and that he did not perform any work on the steps, nor did he contract with anyone to perform work on the steps. Further, according to Sosa, the black edging existed on the steps since his occupation of the premises, and he never received any complaints regarding the condition of the stairs. Sosa testified that he was not aware of any of the black edging being raised prior to the date of the accident.

Sosa stated that he was present at Dueto on the day of the accident, but that he did not witness the fall. After plaintiff fell, Sosa went down the stairs to check on plaintiff, but he did not notice any raised black edging, or any other allegedly dangerous condition on the subject stairs. Moreover, Sosa stated that no repairs have been made to the steps since the accident.

Ermelinda Bravo (Bravo), a Dueto employee, was also deposed in this matter. Bravo testified that she is employed by Dueto to clean the hair cutting area, launder towels, and perform related maintenance tasks. Bravo stated that, as part of her regular

duties, she uses the subject stairs numerous times each day. On the day of the accident, Bravo said that she went down the stairs after plaintiff fell, and that she did not notice any dangerous condition or raised black edging. Bravo also said that during the 20 years that she has worked at the salon, she has never noticed any dangerous or defective condition on the stairs.

Pursuant to the lease between 215 and Dueto, all maintenance of the demised premises, including all structural repairs, are solely the responsibility of Dueto. The lease also provides that Dueto agrees to defend and indemnify 215 and Rudin from any liability related to Dueto's failure to maintain or repair the property in accordance with the provisions of the lease.

The pertinent sections of the lease state:

Section 5.01. Tenant shall take good care of the Demised Premises and, at Tenant's sole cost and expense, shall make all repairs and replacements, structural and otherwise, as and when needed to preserve the Demised Premises in good working order and condition, except that Tenant shall not be required to make any such structural repairs or structural replacements to the Demised Premises unless necessitated or occasioned by the acts, omissions or negligence of Tenant or any person claiming through or under Tenant, or any or their servants, employees, contractors, agents, visitors or licensees, or by the use or occupancy or manner of use or occupancy of the Demised Premises by Tenant or any such person . .

* * *

Section 13.01. Landlord and its agents shall have the following rights in and about the Demised Premises: (1) to enter the Demised Premises at all times to examine the Demised Premises or for any of the purposes set forth in this Article for the purpose of performing any

obligation of Landlord under this Lease or exercising any right or remedy reserved to Landlord in this lease Section 13.02. All parts (except surfaces facing the interior of the Demised Premises) of all walls, windows and doors bounding the Demised Premises (including exterior Building walls, core corridor walls, doors and entrances), all balconies, terraces and roofs adjacent to the Demised Premises, all space in or adjacent to the Demised Premises used for shafts, stacks, stairways . . . service closets and other Building facilities, and the use thereof, as well as access thereto, through the Demised Premises for the purposes of operation, maintenance, alteration and repair, are hereby reserved to Landlord. . . . Nothing contained in this Article shall impose any obligation upon Landlord with respect to the operation, maintenance, alteration or repair of the Demised Premises or the Building.

* * *

Section 19.02. Tenant agrees to indemnify and save Landlord harmless of and from all loss, cost, liability, damage and expense including, but not limited to, reasonable counsel fees, penalties and fines, incurred in connection with or arising from (i) any default by Tenant in the observance or performance of any of the terms, covenants or conditions of this Lease on Tenant's part to be observed or performed, or, (ii) the use or occupancy or manner of use or occupancy of the Demised Premises by Tenant or any person claiming through or under Tenant, or (iii) any acts, omissions or negligence of Tenant or any such person, or the contractors, agents, servants, employees, visitors or licensees of Tenant or any other such person, in or about the Demised Premises or the Building Tenant further agrees to indemnify and save harmless Landlord, Landlord's agents, and the lessor or lessors under all ground or underlying leases, of and from all loss, cost, liability, damage and expense including, but not limited to, reasonable counsel fees, incurred in connection with or arising from any claims by persons by reason of injury to persons or damage to property occasioned by the use, occupancy, act, omission or negligence referred to in the preceding sentence. If any action or proceeding shall be brought against Landlord or Landlord's agents, or the lessor or lessors under any ground lease, based upon such claim and if Tenant, upon notice from Landlord, shall cause such action or proceeding to be defended at Tenant's expense

by counsel acting for Tenant's insurance carriers in connection with such defense or by any other counsel reasonably satisfactory to Landlord, without any disclaimer of liability by Tenant in connection with such claim, Tenant shall not be required to indemnify Landlord, Landlord's agents, or any such lessor for counsel fees in connection with such action or proceeding. Tenant shall maintain comprehensive public liability insurance against any claims by reason of personal injury, death and property damage occurring in or about the Demised Premises covering, without limitation, the operation of any private air conditioning equipment and any private elevators, escalators or conveyors in or serving the Demised Premises or any part thereof, whether installed by Landlord, Tenant or others, and shall furnish to Landlord duplicate original policies of such insurance at least ten (10) days prior to the expiration of the term of any such policy previously furnished by Tenant, in which policies Landlord, its agents and any lessor under any ground or underlying lease shall be named as parties insured, which such policies shall be issued by companies, and shall be in form and amounts, satisfactory to Landlord.

* * *

Section 29.01 A. Tenant, at Tenant's expense, shall keep the Demised Premises in order, shall cause the Demised Premises to be cleaned at regular intervals

* * *

Section 36.02. Landlord has made no representations to Tenant as to the condition of the Demised Premises and Tenant agrees to accept possession of the Demised Premises in the condition which shall exist on the Commencement Date 'as is' and further agrees that Landlord shall have no obligation to perform any work or make any installations in order to prepare the Demised Premises for Tenant's occupancy.

* * *

Section 40.01. Tenant shall obtain and maintain throughout the Demised Term, general comprehensive public liability insurance including products liability, against claims by reason of personal injury, death or property damage, occurring in, on or about the Demised Premises,

in form, amount and written by companies reasonably satisfactory to Landlord. . . .

Defendants maintain that they are entitled to summary judgment dismissing the complaint because there is no evidence that they had either actual or constructive knowledge or notice of any defective or dangerous condition on the steps that are the subject of this litigation.

In opposition to the instant motion (motion sequence number 004) plaintiff asserts that the photographs of the stairs that she was shown at her deposition did not fairly and accurately depict the stairs on the date of the accident. Plaintiff claims that the stairs had been repaired, in contradiction to the testimony of Sosa. However, although plaintiff maintains that she noticed the condition of the black edging when she first started working for Dueto, she confirms that she never complained about it to anyone.

Plaintiff also argues that, at his deposition, Cira said that he did not know whether any of his assistants, or anyone employed by Rudin, had made repairs to the steps in question, but that in his affidavit Cira states that no one from his staff worked on the stairs. This, claims plaintiff, is in direct contradiction to his deposition and, therefore, should be disregarded.

Lastly, plaintiff contends that in section 13.02 of the lease, Landlord reserved to itself the right to repair and

maintain the stairs, as well as the right to access those stairs for the purpose of maintaining, altering or repairing. Hence, according to plaintiff, 215 and Rudin are liable to her for her injuries caused by the allegedly defective condition of the staircase.

In reply to plaintiff's opposition, defendants state that plaintiff has not argued that defendants had actual notice of a dangerous condition on the staircase, but only contends that they had constructive notice of the condition of the stairs based on plaintiff's testimony that she noticed the allegedly dangerous condition for the five months preceding her accident. However, defendants assert, no one else who worked at the salon and used the stairs noticed any problem with the stair's edging.

Defendants also maintain that plaintiff is misreading section 13.02 of the lease, which refers to the use and occupancy of the premises, and does not outline each party's responsibilities with respect to maintenance of the Demised Premises, which are specifically detailed in Article 5 of the lease (quoted above).

Defendants also seek summary judgment against Dueto, pursuant to the above-quoted lease provisions, declaring that Dueto has a duty to defend and indemnify them with respect to plaintiff's action.

In motion sequence number 005, Dueto moves for summary judgment dismissing the third-party complaint asserted against it, arguing that the demised premises does not include the internal staircase, stating that the diagrams affixed to the lease only indicate the main floor and the basement as being its rented portion of the building. Further, Dueto contends that, even if the staircase is considered to be part of the demised premises, Dueto, as Tenant, is not responsible for structural repairs, pursuant to section 5.01 of the lease, and Landlord is responsible for maintaining and repairing the stairs, pursuant to section 13.02 of the lease.

In opposition to Dueto's motion, defendants first assert that Dueto's motion is unsupported by an affidavit of an individual with personal knowledge, basing the entire argument on the terms of a lease which, claim defendants, is an inaccurate copy of the agreement. Notably, defendants state that portions of the lease attached to Dueto's motion are missing, and that that copy was never identified as the correct lease. Furthermore, defendants state that the staircase is part of the demised premises.

In addition, defendants maintain that Dueto is misrepresenting the terms of the lease, since Dueto admits, in its motion, that the demised premises consists of three floors which were for the exclusive use of Dueto. Moreover, the

diagrams of the demised premises affixed to defendants' motion and opposition to Dueto's motion indicate that the staircase is part of Dueto's rented portion of the building, and, in her deposition, plaintiff states that the stairs are located inside the salon.

Also, as stated with respect to plaintiff's opposition to their motion, defendants aver that section 13.02 of the lease specifically states that that section of the lease does not impose on Landlord the obligation to maintain or repair the demised premises, not otherwise appearing in the lease.

In reply to defendants' opposition, Dueto asserts that the lease attached to its motion is the same lease attached to defendants' motion, and is a correct copy of the agreement between the parties. Otherwise, Dueto merely reiterates its earlier arguments.

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v

City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

That portion of defendants' motion seeking to dismiss the complaint is granted.

In order to hold a party liable for a dangerous condition within a premises, it must be established that the party so charged either created the dangerous condition or had prior actual or constructive notice of the condition. Early v Hilton Hotels Corp., 73 AD3d 559 (1st Dept 2010).

In order to hold a landowner liable for a dangerous condition on its premises, a plaintiff must demonstrate that the defendant either created, or had actual or constructive notice of the hazardous condition which precipitated the injury. However, notice alone is not enough; the plaintiff must also show that defendant had 'a sufficient opportunity, within the exercise of reasonable care, to remedy the situation' after receiving such notice.

Aquino v Kuczinski, Vila & Associates, P.C., 39 AD3d 216, 219 (1st Dept 2007) (internal citations omitted).

A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected.

Larsen v Congregation B'Nai Jeshurun of Staten Island, 29 AD3d 643, 643 (2d Dept 2006); Gordon v American Museum of Natural History, 67 NY2d 836 (1986); Viera v Riverbay Corp., 44 AD3d 577 (1st Dept 2007).

In the case at bar, the court agrees with plaintiff that there is conflicting testimony as to whether the edge of the step had been raised for a sufficient period of time so as to give defendants constructive notice of a dangerous or defective condition. Although Sosa and Bravo say that they did not notice anything wrong with the stairs, plaintiff's testimony that she had observed the condition for a period of five months prior to the date of her accident raises an issue of fact as to constructive notice. Gutierrez v Riverbay Corp., 262 AD2d 64 (1st Dept 1999).

The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.

Roth v Barreto, 289 AD2d 557, 558 (2d Dept 2001). Moreover, [a]lthough reservation of a right to enter may constitute sufficient retention of control to permit a finding that the landlord had constructive notice of a dangerous condition which constitutes a violation of a statutory duty, this exception applies where there is a significant structural or design defect. Angwin v SRF Partnership, L.P., 285 AD2d 570, 571 (2d Dept 2001).

In the absence of a duty imposed by statute, an out-of-possession landlord's reservation of a right to enter a leased premises to make repairs is insufficient to give rise to liability for a subsequently arising dangerous condition. Although reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception

applies only where a specific statutory violation exists and there is a significant structural or design defect.

Nunez v Alfred Bleyer & Co., Inc., 304 AD2d 734 (2d Dept 2003) (internal quotation marks and citations omitted)..

In the case at bar, there has been no allegation that the allegedly defective plastic stair edging constituted a structural or design defect.

Of course, if an out-of-possession landlord has contractually agreed to be obligated to repair the premises, the landlord may be liable for injuries that occur on the premises after the transfer of control and possession to the tenant. Valenti v 400 Carlls Path Realty Corp., 52 AD3d 696 (2d Dept 2008); Reichberg v Lemel, 29 AD3d 664 (2d Dept 2006). In the case at bar, both Dueto and plaintiff argue that the lease between Dueto and defendants imposes the obligation to maintain and repair the subject staircase on defendants. The court disagrees.

The interpretation of the provisions of a contract is a question of law to be decided by the courts (Ruttenberg v Davidge Data Systems Corp., 215 AD2d 191 [1st Dept 1995]), and the "mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact." New York Off-Track Betting Corp. v Safe Factory Outlet, Inc., 28 AD3d 175, 177-178 (1st Dept 2006).

In the instant matter, a complete reading of the lease does not obligate defendants to maintain and/or repair the subject staircase. Despite arguments to the contrary, it is clear, from the lease and the deposition testimony, that the staircase in question was an internal staircase located within the demised premises of the salon. There is no evidence that anyone other than Dueto, its employees, agents and customers, had access to that staircase. In reading the lease provisions quoted above, Dueto assumed total control over the staircase, and defendants only retained a right to enter to maintain and make repairs that affect the entire building, not those that just affect Dueto's rented space.

Since the court does not find that defendants' lease obligations required them to maintain or repair the internal staircase located in the salon, and there is no allegation of a violation of a statutory provision or a structural or design defect, plaintiff cannot maintain an action for her injuries against out-of-possession defendants.

Based on the foregoing, that portion of defendants' motion seeking to dismiss the complaint shall be granted.

The court notes that, even though the argument regarding the obligations of an out-of-possession landlord was addressed to Dueto as part of defendants' request for alternative relief, plaintiff, in her opposition, addressed this argument and is not,

therefore, prejudiced by this finding. Further, having dismissed the complaint, defendants' alternative requested relief for defense and indemnification from Dueto is rendered moot.

This finding also renders moot Dueto's motion for summary judgment dismissing the third-party complaint, since dismissing plaintiff's action has the effect of dismissing the third-party complaint which is based on that action. See Avala v. Lockheed Martin Corp., 22 AD3d 394 (1st Dept 2005) ("Since the complaint in the main action had been dismissed, there was no surviving issue as to whether [defendants] were entitled to prevail on their third-party claim").

Based on the foregoing, it is hereby

ORDERED that defendants' motion (motion sequence number 004) seeking to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Dueto of Second Avenue, Inc.'s motion for summary judgment (motion sequence number 005) is rendered moot, and the third-party complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: May 25, 2011

ENTER:

~~Debra A. James~~
J.S.C.

DEBRA A. JAMES

FILED

JUN 01 2011

**NEW YORK
COUNTY CLERK'S OFFICE**