Newell v World Columbus, Inc.
2011 NY Slip Op 33954(U)
April 7, 2011
Supreme Court, Bronx County
Docket Number: 21717/06
Judge: Mark Friedlander
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 25

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

APR 12 2011

----------X

NEWELL,MICHAEL

Index No. **0021717/2006**

-against-

Hon. **MARK FRIEDLANDER** ,

WORLD ON COLUMBUS,INC.

Justice.

----------X

The following papers numbered 1 to 5 Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **July 23 2010** and duly submitted as No. ____ on the Motion Calendar of 11/12/2010

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3, 4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH
MEMORANDUM DECISION FILED HEREWITH.

Motion is respectfully referred to Justice:

Dated:

Dated: 4/7/11

Hon. _____
MARK FRIEDLANDER, J.S.C.

NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

MICHAEL NEWELL,

Plaintiff,

-against

WORLD ON COLUMBUS, INC. d/b/a WORLD CAFE AND COLUMBUS 69th, LLC.,

Defendants.

MEMORANDUM DECISION/ORDER
Index No. 21717/06

HON. MARK FRIEDLANDER

Defendant, Columbus 69th, LLC. ("Columbus"), moves for an order, pursuant to CPLR§3212, granting: (1) summary judgment dismissing plaintiff's action against Columbus; and (2) summary judgment to Columbus on its cross-claim against defendant, World on Columbus, Inc. d/b/a World Café ("World"), for indemnification and defense costs, pursuant to contract.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on October 27, 2003 as a result of the negligence of the defendants. More specifically, plaintiff alleges that he slipped and fell while descending an exterior wooden stairway adjacent to a restaurant known as World's Café, located at 201 Columbus Avenue, New York, New York .

The relevant facts are as follows: 201 Columbus Avenue is a five story building on the corner of 69th Street and Columbus Avenue, consisting of apartments and two retail spaces. Columbus owned the building. It rented one of two commercial spaces therein to World for use as a restaurant. At the time of the accident, plaintiff was working as a delivery man for Dairyland U.S.A. On average, he would make ten to twenty deliveries per week of milk, eggs,

potatoes and other foodstuffs to World. Deliveries to World were always made to the basement. In order to access the basement, plaintiff always used and descended an exterior staircase located on the side of the building.

Plaintiff's accident occurred at approximately 1:00 P.M. It was raining and had been raining intermittently all day. At the time of the accident, plaintiff was using a hand truck. It was loaded with three cartons of milk and other items on top, weighing approximately fifty pounds. Plaintiff needed both his hand to lower and control the hand truck. He was on a landing, maneuvering the hand truck, preparing to go down the steps. He tilted the hand truck to begin descending from the landing down the stairs, when his right foot slipped from under him. Prior to his slipping, no part of the wheels of the hand truck started to go over the edge of the stair to the stair below it.

Plaintiff testified, at his deposition, that it was cooking oil on the landing which caused him to slip and fall. Before lowering his hand truck to the landing, he observed a substance "beading." There was rain water and cooking oil on the landing where he slipped. While he did not know how long the cooking oil was on the landing, he testified that cooking oil was there every day, and, at times, he saw sawdust on the landing to soak up the oil. He further testified that, although he never had a prior accident when making deliveries at World, there were a couple of times he almost slipped; that, at times, the stairs were slippery; and that he complained numerous times that the wood stayed moist and slippery. However, these complaints were never made to Columbus.

Ruth-Anne Bender was deposed on behalf of World. On the day of the accident, she was the general manager of World. Although she did not witness the accident, Ms. Bender testified

that, on October 27, 2003, she had occasion to look at the staircase and did not notice any oily substance on the portion of the staircase where plaintiff was found. Other than plaintiff, she was unaware of anyone else falling on the stairs while making a delivery. World employed busboys. One of their duties was to sweep the stairs in the morning for debris. Ms. Bender further testified that a busboy swept the stairs that day, even though she did not witness it.

Steven Kaplan, a non-party witness, was produced by Columbus. At his deposition, he testified that he is a property manager for A. J. Clarke Real Estate Corporation ("Clarke"), Columbus's managing agent for their building from October 1999 through July 2008. Unless he received a specific request by a tenant or someone from Clarke, he would not inspect a commercial tenant's space. However, he did go by the building every couple of weeks to look at the exterior of the building and the sidewalks, to make sure they were kept clean. He never noticed anything wrong with the exterior staircase, or debris or spills on the stairs. Prior to this lawsuit Mr. Kaplan was never told of anyone slipping on the staircase and never received any complaints from anyone about the stairs being slippery.

An affidavit by Mr. Kaplan was also submitted by Columbus. In the affidavit, Mr. Kaplan states that the space leased to World included an exterior stairway, which led to the basement commercial space. The exterior staircase did not provide access to the residential spaces at the building or to the other commercial space. Mr. Kaplan states that Columbus had no duty to maintain or repair the exterior stairway on October 27, 2003. This duty rested solely with World. In support of this contention, Mr. Kaplan and Columbus' counsel cite a general and a specific paragraph in the operative leases between Columbus and World. The general paragraph ("4") provides, in relevant part, that:

> "Owner shall maintain and repair the public portions of the building, both exterior and interior, ... Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted."

The specific obligation (paragraph "55") provides, according to Columbus' counsel, that "the Tenant, at its own cost and expense, will maintain and make all necessary repairs to the stairway, doors and frames, etc which lead to and are part of the basement space." Notwithstanding counsel's contention, the portion of the lease containing paragraph "55" was not included as part of Columbus' motion papers; its absence was noted by plaintiff's counsel in opposition papers; and the missing portion of the lease was not furnished in movant's reply papers. Consequently, paragraph "55" cannot be considered by the Court.

Columbus further asserts that, pursuant to paragraph "8" of the operative lease, World was required to obtain a general liability insurance policy in favor of Columbus against all claims for bodily injury occurring in or upon the demised premises; and hold Columbus harmless against any claims arising out of World's use of the premises. Columbus asserts that demand was made upon World and its insurance carrier to defend and indemnify Columbus in this action, which was denied.

Based upon the above, Columbus asserts that it is an out-of-possession landlord that had no duty to maintain or perform non-structural repairs to the premises; that World maintained exclusive control over the exterior staircase where the accident took place; that Columbus neither caused, created nor had actual or constructive notice of the alleged condition; and that it is

entitled to summary judgement dismissing plaintiff's complaint against it. Columbus further asserts that it is entitled to contractual indemnification and defense costs, including attorneys' fees, from World, on its two cross-claims.

In opposition to the motion, plaintiff submits, *inter alia*, an affidavit of Stanley H. Fein, a New York State licensed professional engineer. In his affidavit, Mr. Fein states that the accident and injuries sustained by plaintiff on October 27, 2003, were caused by the negligence of the owner/management of the subject premises for providing and maintaining an exterior stairway that was dangerous and hazardous, inasmuch as the subject stairway violated good and accepted engineering safety practice safety practice, in that:

(1) the subject steps were improperly constructed, had varying riser heights and tread depth, in violation of Sections 27-376 and 27-375(e)(2) of the New York City Building Code;

(2) the subject handrail was below 30 inches for the majority of the stairway, in violation of Sections 27-376 and 27-375(f)(2) of the New York City Building Code (height of handrails above the nosing of the treads shall not be more than 34 inches nor less than 30 inches);

(3) the headroom on the subject stairway was only 59 inches, in violation of Sections 27-376 and 27-375(c) of the New York City Building Code (headroom on stairways shall be at least 7 feet);

(4) wood treads were applied to the stairway, the nails used did not fully penetrate the steel below the surface of the treads so that the nails protruded through the top of each tread, some in excess of 1/4 inch, creating an extreme tripping hazard on the stairway;

(5) the tread steps which were built of wood, were not slip resistant, especially when in wet and oily condition, in violation of Sections 27-376 and 27-375(h) of the New York City

Building Code (treads and landings of steps to be built of or surfaced with non-skid materials). In addition thereto, plaintiff contends that paragraph "13" of the applicable lease agreement grants Columbus the right to enter the demised premises and make repairs.

World's opposition papers, after noting that the applicable lease provisions provide that Columbus is responsible for structural repairs and World is responsible for non-structural repairs, assert that the exterior stairway is structural in nature, and thus the responsibility of Columbus.

Columbus, as an out of possession owner, notwithstanding a lease provision reserving the right to enter the premises and make repairs, can only be found liable for failing to do so if the nature of the defect that caused the injuries was a significant structural or design defect that was contrary to a specific statutory safety provision. *Devlin v. Blaggards III Restaurant Corp.*, 80 A.D.3d 497 (1st Dept. 2011); *Babich v. R.G.T. Restaurant Corp.*, 75 A.D.3d 439 (1st Dept. 2010); *Torres v. West Street Realty Co.*, 21 A.D.3d 718 (1st Dept. 2005). Here, there is no triable issue of fact as to whether the alleged cause of plaintiff's injury involved a significant structural or design defect which related to a specific statutory safety provision. No evidence has been submitted that the stairway, or more specifically the landing, affected the structural integrity of the premises. *See, e.g., Torres v. West Street Realty Co., supra.* Plaintiff's accident occurred while he and his hand truck were fully located on a landing. There are no facts adduced to show that plaintiff fell as a result of any cause other than the slippery oil. Thus, the violations alleged by Mr. Fein (items "1" through "4" above) are inapplicable. With regard to item "5" above, Section 27-375(h) of the New York City Building Code is inapplicable, as it applies to interior stairs. Section 27-376, except as modified, provides that exterior stairs may be used in lieu of

interior stairs provided they comply with all the requirements for interior stairs, but plaintiff failed to submit evidence sufficient to raise a triable issue of fact that the subject stairway served as a required exit from the building, pursuant to New York City Building Code §§27-366, 27-375, 27-376. *Schwartz v. Hersh,* 50 A.d.3d 1011 (2nd Dept. 2008); *Dooley v. Vornado Realty Trust,* 39 A.D.3d 460 (2nd Dept. 2007); *Taylor v. City of New York,* 150 Misc.2d 528 (App. Term, 2nd and 11th Jud. Dists. 1991).

Since there is no evidence that the condition which caused plaintiff to slip was caused by a significant structural or design defect that was contrary to a specific statutory provision, there is no basis to impose liability on Columbus for plaintiff's accident. Furthermore, this determination is not affected by whether or not Columbus had knowledge of the defective condition prior to the accident or retained a right to re-enter the premises to inspect and repair under the applicable lease provisions. *Devlin v. Blaggards III Restaurant Corp., supra.*

Columbus' counsel alleges that paragraph "53 B" provides that "Tenant will indemnify and save Landlord harmless from and against any and all liabilities, obligations, damages, penalties, claims, costs, charges and expenses including reasonable attorneys' fees, which may be imposed upon or incurred by or asserted against Landlord by reason of .... any accident, injury, or damage to any person." Again, notwithstanding counsel's contention, the portion of the lease containing paragraph "53B" was not included as part of Columbus' motion papers. Consequently, paragraph "53B" cannot be considered by the Court.

Pursuant to paragraph "8" of the applicable lease provisions, World was obligated to procure and maintain general public liability insurance in favor the landlord against claims for bodily injury or death occurring in or upon the demised premises. Paragraph "8" further

provided, *inter alia*, that:

> "Tenant (World) shall indemnify and save harmless Owner (Columbus) against and from all liabilities, obligations, damages, penalties, claims, cost *and* expenses for which Owner shall not be reimbursed by insurance, including *reasonable* attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees, or licensees, of any covenants on (*sic*) condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agent, contractors, employees, invitees, or licensees. Tenant's liability under this lease extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee or licensee of any subtenant. In case any action or proceeding is brought against Owner by reason of any such claim, Tenant, upon written notice *from* Owner, will, at Tenant's expense, resist or defend such action or proceeding by Counsel approved by Owner in writing, such approval not be unreasonable withheld."

World procured a general liability insurance policy. However, this insurance policy named the managing agent and the former landlord as additional insureds, not Columbus. It appears from the motion papers that Columbus maintained its own liability insurance and Columbus' carrier is providing the defense to this action on behalf of Columbus. Where, as here, Columbus has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to Columbus' out-of pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased premiums. *Inchaustegui v. 666 5th Ave. Ltd. Partnership,* 96 N.Y.2d 111, 114 (2001); *Netjets, Inc. v. Signature Flight Support, Inc.,* 43 A.D.3d 1016 (2nd Dept. 2007).

Accordingly, the branch of Columbus' motion seeking summary judgment against plaintiff, is granted, and plaintiff's complaint against Columbus is dismissed. The branch of Columbus' motion seeking summary judgment against World on its contractual indemnification

cross-claims, is granted, to the extent indicated above.

The foregoing constitutes the Decision and Order of the Court.

Dated: 4/7/11

MARK FRIEDLANDER, J.S.C.