

Bevilacqua v Dolp 655 Props. LLC
2013 NY Slip Op 30879(U)
April 11, 2013
Supreme Court, New York County
Docket Number: 100316/2010
Judge: Eileen A. Rakower
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

JOSEPH BEVILACQUA,

INDEX NO. 100316/2010

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

DOLP 655 PROPERTIES LLC, AND
NEW NAIL FOR VENUS CORP., D/B/A
NEW NAIL FOR VENUS,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

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

1, 2

Answer — Affidavits — Exhibits _____

FILED

Replying Affidavits _____

APR 26 2013 5, 6

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Joseph Bevilacqua ("Plaintiff") brings this action for personal injuries allegedly sustained when he fell down a staircase in his apartment building located at 202 East 42nd Street, New York, NY ("the Premises") on November 20, 2008. Plaintiff lives in the fifth floor apartment of the Premises, and has been a resident there for forty years.

Defendant Dolp 655 Properties LLC ("Dolp"), the owner and landlord of the premises, now moves for summary judgment pursuant to CPLR §3212. Defendants New Nail for Venus Corp d/b/a New Nail for Venus ("New Nail") oppose this motion. Plaintiff's opposition does not address Dolp's motion for summary judgment; rather, it opposes a prior motion for summary judgment brought by New Nail, which was denied.

On the date of the accident, plaintiff testifies that he was walking up the middle of the first flight of stairs, and when he was about two steps from the landing, he "lost [his] grip either on the handrail or... there was a misplacement of

[his] feet.” Plaintiff describes the handrail as “not... a normal conventional handrail” that is located on the left side of the stairway, rather than on both sides. Plaintiff also describes the top two steps as “peculiar”. There is no allegation that the stairs themselves were changed in the forty years plaintiff lived in the building, and plaintiff testifies that he never complained about the condition of the stairs.

The complaint alleges:

the premises was in a dangerous and defective condition, namely, the upper section of the stairway leading from the street level up to the second floor, was dangerously narrow, and in violation of the applicable building laws, the nosing on the treads was raised above the surface of the treads themselves creating a dangerous condition, the one railing was recessed, making it difficult to reach to prevent a fall, the winders created a dangerous configuration, which conditions were in violation of applicable building and zoning laws and which were or should have been known to the defendants.

The complaint further asserts that defendants negligently caused, created and permitted to exist and remain a dangerous and defective condition on said staircase in:

- a) Failing to erect a staircase that was and is safe for the average reasonably prudent person to traverse;
- b) Failing to provide a staircase that complies with the New York City building codes that applied at the time of the subject occurrence;
- c) Failing to provide a reasonably safe handrail to grasp;
- d) Failing to provide proper handrail support;
- e) Failing to provide proper lighting for the safe traversal of the staircase exitway;
- f) Erecting and maintaining a raised rubber nosing that created a danger of tripping to the average person ascending or descending the

subject staircase thereby creating and maintaining an inherently dangerous condition,

g) Failing to repair all defective and dangerous conditions on the premises,

h) Failing to provide proper, safe, and adequate access and egress for the public and the tenants.

In support of its motion for summary judgment, Dolp annexes: the Affirmation of its attorney Dawn Gilbert Esq., the pleadings, the verified bill of particulars, the Lease Agreement between Brick Management Corp and Venus Nail, Inc. dated January 6, 1993, the Second Amendment to the Lease between Royal Realty Corp. and Venus Nail, Inc. dated December 1, 2004, the Management Agreement between Dolp 655 Properties LLC, Dolp 655 Leasehold LLC and Royal Realty Corp., dated October 1, 2001, and the deposition of Plaintiff.

In opposition, New Nail provides: the Affirmation of its Attorney David L. Wong, Esq.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Here, Dolp contends it is an out of possession landlord and therefore, owes no duty to plaintiff for any alleged injuries on the premises.

An out of possession landlord is one who “has surrendered possession and control over premises leased to a tenant.” (*Mehl v. Fleisher*, 234 AD3d 274, 650

NYS2d 784 [2nd Dept 1996]). An out of possession 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 [1987]). However, there are two exceptions to this general rule: where the landlord “(1) is contractually obligated to make repairs or maintain the premises; or (2) has 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 provisions.” (*Vasquez v. The Rector*, 40 AD3d 265 [1st Dept 2007]); *see also*, *Lane v. Fisher Park Lane Co.*, 276 AD3d 136 [1st Dept 2000]).

In January 1993, Brick Management Corp., the managing agent for Dolp, leased the entire second floor of the premises to Venus Nails, Inc. (“Venus Nails”), the tenant, for a ten year term. The 1993 Lease provides in pertinent part:

Access to Premises: 13. Owner or Owner’s agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform in the premises after Tenant’s failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

On October 1, 2001, a Management Agreement was entered between Dolp, as owner and landlord, and Royal Realty Corp. (“Royal Realty”). The Agreement made Royal Realty the new managing agent of the premises.

A First Amendment to the 1993 Lease was made on February 28, 2003, between Royal Realty, as agent for Dolp, and Venus Nails, as tenant. The First Amendment to the Lease extends the covenants and conditions of the 1993 Lease. Section C gives Venus Nails the right to make non-structural alterations to the common staircase which shall include, but not be limited to:

- (i) the reinforcement and refinishing of the staircase steps with rubber flooring, (ii) the installation of mirrors on the west side of the

staircase, (iii) the installation of new 5/8" sheetrock on the east side of the staircase and the painting of the same, (iv) the installation of a new handrail in the staircase, the installation of new recessed lighting in the entrance and the staircase...

On December 1, 2004, a Second Amendment to the 1993 Lease was made between Royal Realty, as agent for Dolp, and Venus Nail. In the Second Amendment to the 1993 Lease, Royal Realty certifies that the Lease is in full force and effect and has not been further modified or amended. All the terms, covenants and conditions remained in full force and effect. On August 21, 2006, Royal Realty, as managing agent of Dolp, consented to the acquisition of Venus Nail by New Nail.


The retention in the lease of a right to reenter the demised premises and make repairs furnishes a basis for liability in the case of a structural or design defect in violation of statute (*Guzman v. Haven Plaza Hous. Dev. Co.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 [1987]). Here, Dolp has not established prima facie entitlement to summary judgment. In the relevant lease agreements and modifications, Dolp reserves the right to reenter the premises to inspect and repair it. To the extent the second floor tenant was granted the right to make alterations to the staircase, they were designated non-structural. Furthermore, the verified complaint alleges significant structural defects, and the bill of particulars asserts that there were violations of the New York City Building Code and New York City Administrative Code.

Wherefore, it is hereby,

ORDERED that defendant Dolp's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 11, 2013



HON. EILEEN S. RAKOWER

Check one: FINAL DISPOSITION

X NON-FINAL DISPOSITION

FILED

APR 26 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Check if appropriate: DO NOT POST REFERENCE