

Severin v T Burger, LLC
2014 NY Slip Op 30219(U)
January 15, 2014
Sup Ct, Suffolk County
Docket Number: 10-13274
Judge: Hector D. LaSalle
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 5-23-13 (#002)
MOTION DATE 6-18-13 (#003)
ADJ. DATE 9-3-13
Mot. Seq. # 002 - MD
003 - MotD

-----X
GEORGE SEVERIN and LORRAINE SEVERIN,

Plaintiffs,

- against -

T BURGER, LLC, VITUS I, 67 LAFAYETTE
CORP., "JOHN DOE" CONSTRUCTION
COMPANY and "JOHN DOE" STAIR
MAINTENANCE COMPANY,

Defendants.
-----X

KEEGAN & KEEGAN, ROSS &
ROSNER, L.L.P.
Attorney for Plaintiffs
147 N. Ocean Avenue, P.O. Box 918
Patchogue, New York 11772

WHITE & MCSPEDON, P.C.
Attorney for Defendant T Burger, LLC
875 Avenue of the Americas, Suite 800
New York, New York 10001

JONES MORRISON, LLP
Attorney for Defendant, Vitus I, LLC
670 White Plains Road, Penthouse
Scarsdale, New York 10583

Upon the following papers numbered 1 to 62 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 16 - 31; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 32 - 48; 49 - 51; Replying Affidavits and supporting papers 52 - 62; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (# 002) by defendant T Burger, LLC and the motion (# 003) by defendant Vitus I, LLC are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 002) by defendant T Burger, LLC for summary judgment dismissing the complaint and cross claims asserted against it is denied; and it is further

ORDERED that the motion (# 003) by defendant Vitus I, LLC for summary judgment dismissing the complaint and cross claims asserted against it and on its cross claims against defendant T Burger, LLC for contractual and common-law indemnification is decided as follows.

RR

Severin v T. Burger LLC

Index No. 10-13274

Page No. 2

This is an action to recover damages for personal injuries allegedly sustained by plaintiff George Severin ("plaintiff"), with a derivative claim on behalf of Lorraine Severin, on April 15, 2008 at approximately 12:30 p.m. when he fell while descending the basement stairway of a restaurant located at 67 Lafayette Avenue in Brooklyn, New York, which was operated by defendant T Burger, LLC ("T Burger"), and was leased by defendant Vitus I, LLC ("Vitus") to T Burger. The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained an injury that aggravated, activated and/or precipitated an underlying hypertrophic, degenerative, arthritic, circulatory, arterial, venous, systemic or osseous condition of his left knee which was asymptomatic prior to the subject accident.

T Burger now moves (#002) for summary judgment dismissing the complaint and cross claims against it on the ground that there was no causal relationship between the alleged defective condition and the plaintiff's accident. In support, T Burger submits, *inter alia*, the pleadings, the bills of particulars, and the transcripts of the deposition testimony given by plaintiff George Severin and Edward Tretter, a representative of T Burger and Vitus.

At his examination before trial, plaintiff George Severin testified to the effect that at the time of the accident, he was a route driver employed by J. King Food Service Professionals. His job was to deliver food service items to restaurants. After he arrived in front of the building where the subject restaurant was located, he used a hand truck loaded with approximately 200 pounds of food supplies. There are cellar doors which provide access to the basement from the sidewalk outside the front of the restaurant. The doors open in the center, outward, one to the left and the other to the right. While descending the basement stairs through the cellar doors with the loaded hand truck, he had difficulty navigating the steps because of a protruding object which seemed to be a hinge on the side of the door. He had to put more pressure on his left knee because he was wearing a prescribed brace on his right leg inside his work boot. When he tried to duck his head to avoid hitting the hinge, his left knee buckled, causing him to fall on top of the product that he was delivering. Prior to the accident, he was diagnosed with arthritis in the left knee and was advised by his treating physician, Dr. Petraco, that it needed to be replaced. Plaintiff testified that after the accident, the condition in his left knee was "worse," and the pain was "unbearable."

At his deposition, Edward Tretter testified to the effect that he is the sole owner of T Burger, which operates the subject restaurant, and that his mother, Agnes Tretter, is a member of Vitus. In 2005, prior to the formation of both T Burger and Vitus, Mr. Tretter personally entered into a lease agreement with his mother for a restaurant space which is currently owned by Vitus. Before opening the restaurant, he hired a contractor to perform renovations. In 2007, he hired a subcontractor to replace a steel hatch with aluminum doors leading to the basement of the restaurant on the sidewalk, and he installed steel treads thereon himself. He testified that prior to the accident, he did not receive any complaints about access to the subject basement, and that he was able to walk down the basement stairs without ducking his head.

While, to prove a prima facie case of negligence in a case involving a fall, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or

constructive notice of the condition (*see Williams v SNS Realty of Long Is.*, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendants, as the movants in this case, are required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; *Dwoskin v Burger King Corp.*, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see Piacquadio v Recine Realty Corp.* 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, the issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 [4th Dept 1995]; *Watson v New York*, 184 AD2d 690, 585 NYS2d 100 [2d Dept 1992]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; *Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]). There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (*see Trincere v County of Suffolk*, 31 AD3d 506, 818 NYS2d 567 [2d Dept 2006]; *Grover v State of New York*, 294 AD2d 690, 742 NYS2d 413 [3d Dept 2002]).

Here, T Burger has failed to establish its entitlement to judgment as a matter of law. While Mr. Tretter testified that he was able to walk down the subject basement stairs without ducking his head, plaintiff testified that he had to duck his head to avoid hitting the hinge. There are questions of fact as to whether a dangerous condition existed on the subject basement so as to create liability on the part of T Burger; whether it had a duty to conduct reasonable inspections of the premises; whether reasonable inspections were made on the premises prior to the accident (*see McCummings v New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether the plaintiff was comparatively negligent (*see Bruker v Fischbein*, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]). Accordingly, the branch of the motion by T Burger for summary judgment on the issue of a causal relationship between the alleged defective condition and the plaintiff's accident is denied.

T Burger also seeks summary judgment dismissing the complaint and cross claims against it on the ground that plaintiff's alleged knee injuries were pre-existing and unrelated to the subject accident.

Plaintiff's treating doctor, Dr. Douglas Petraco, had treated the plaintiff from July 2005 to August 2008. On July 14, 2005, Dr. Petraco administered a physical examination and concluded that the plaintiff had advanced osteoarthritis of the left knee. Dr. Petraco recommended injection of Depo-Medrol and Lidocaine which was performed under sterile conditions. On February 11, 2008, approximately two months prior to the subject accident, Dr. Petraco administered a physical examination and diagnosed the plaintiff with a moderate genu varum deformity and advanced osteoarthritis of the left knee, which was "minimally symptomatic." Dr. Petraco found that plaintiff had a little bit of swelling without effusion; his motion was surprisingly good; and he had crepitation but was non-tender with knee motion. Dr. Petraco recommended "no treatment" at this time. On April 17, 2008, two days after the subject accident, Dr. Petraco found that the plaintiff had a "significant" genu varum deformity. On May 12, 2008, approximately one month after the subject accident, Dr. Petraco found that the plaintiff had a varus deformity of the left knee, and that he had tenderness along the medial joint line with a positive patellofemoral grind. This time, Dr. Petraco

recommended total knee arthroplasty.

On January 25, 2012, approximately three years and nine months after the subject accident, T Burger's examining orthopedist, Dr. William Healey, examined plaintiff using certain orthopedic tests, including Lachman test, McMurray test, and Apley grind test. Dr. Healey found that all the test results were normal or negative, and that there was no tenderness or crepitation in the plaintiff's left knee. Dr. Healey opined that the necessity for the total knee replacement was in place prior to the subject accident, and that the accident did not cause the total knee replacement to become necessary.

Here, T Burger has failed to meet its prima facie burden of showing that plaintiff's alleged knee injuries were unrelated to the subject accident. While Dr. Healey opined that the subject accident did not cause the need for a total knee arthroplasty, as the necessity existed prior to the accident, Dr. Petraco found that plaintiff's motion was surprisingly good and recommended "no treatment" on February 11, 2008, approximately two months prior to the accident. The conflicting medical opinions of the experts raise issues of credibility for the jury to determine (*see Manuel v New York City Tr. Auth.*, 82 AD3d 1059, 918 NYS2d 787 [2d Dept 2011]; *Kalpakis v County of Nassau*, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Accordingly, the branch of the motion by T Burger for summary judgment on the issue of causal relationship between the plaintiff's alleged left knee injury and the subject accident is denied.

Vitus moves (# 003) for summary judgment dismissing the complaint and cross claims asserted against it, *inter alia*, on the basis that it was an out-of-possession owner with no contractual obligation to repair or maintain the basement stairs where the accident occurred as there was a written lease agreement requiring the tenant to maintain the subject area. In support, Vitus submits, *inter alia*, the pleadings, the bills of particulars, a lease agreement between Edward Tretter and Agnes Tretter, the affidavit of Agnes Tretter, and the transcripts of the deposition testimony given by plaintiff George Severin and Edward Tretter, a representative of T Burger and Vitus.

In her affidavit, Agnes Tretter stated that she is a principal of Vitus which owns the subject property. In 2005, the subject property was personally leased to Edward Tretter under a lease agreement. Thereafter, there was an effective assignment of the lease, from Agnes Tretter to Vitus and from Edward Tretter to T Burger. Under the agreement, Edward Tretter and T Burger are obligated to repair, maintain and modify the subject premises including the subject cellar doors and the staircase leading to the basement of the premises.

Paragraph five of the subject lease agreement provides, in relevant part that "[t]he Tenant shall keep the demised premises in good condition, and shall redecorate, paint and renovate the said premises as may be necessary to keep them in repair and good appearance."

Once possession of a property has been transferred to a tenant, an out-of-possession landlord will not be held liable for injuries that occur or defective conditions in existence on leased premises unless the landlord retains control over the premises, or is contractually bound to repair unsafe conditions (*see McElroy v Bernstein*, 72 AD3d 757, 898 NYS2d 471 [2d Dept 2010]; *Euvino v Loconti*, 67 AD3d 629, 888 NYS2d 571 [2d Dept 2009]; *Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696, 861 NYS2d 357 [2d Dept 2008]). Control may be evidenced by a lease provision making the landlord responsible for repairs or by

Severin v T. Burger LLC

Index No. 10-13274

Page No. 5

a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*see Fernandez v Town of Babylon*, 72 AD3d 636, 897 NYS2d 510 [2d Dept 2010]; *Taylor v Lastres*, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; *Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]).

Here, Vitus has established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not maintain control over the premises at the time of the plaintiff's accident, and that it was not contractually obligated to maintain or repair the allegedly defective condition at the subject premises (*see Greco v Starbucks Coffee Co.*, 58 AD3d 681, 873 NYS2d 639 [2d Dept 2009]; *Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121, 858 NYS2d 207 [2d Dept 2008]; *Gavallas v Health Ins. Plan of Greater N.Y.*, 35 AD3d 657, 829 NYS2d 131 [2d Dept 2006]). Edward Tretter testified, at his deposition, that Vitus is the current owner of the subject premises. Agnes Tretter stated, in her affidavit, that Edward Tretter and T Burger are obligated to repair and maintain the subject premises. The terms of the lease agreement demonstrate that Vitus was an out-of-possession landlord, which had relinquished all control over the subject premises on the day of the plaintiff's accident (*see Stein v Harriet Mgt., LLC*, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]). In addition, Vitus has shown that it neither created nor had actual or constructive notice of the allegedly defective condition on the premises (*see Flores v Langsam Prop. Servs. Corp.*, 13 NY3d 811, 890 NYS2d 432 [2009]; *Mokszki v Pratt*, 13 AD3d 709, 786 NYS2d 222 [3d Dept 2004]).

In opposition, plaintiffs and T Burger failed to raise a triable issue of fact as to whether Vitus was under a contractual duty to repair or maintain the alleged defect on the subject premises or whether the plaintiff's injuries were proximately caused by a defect which constituted a specific statutory violation sufficient to impose liability upon Vitus (*see Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698, 874 NYS2d 528 [2d Dept 2009]). Plaintiffs also failed to raise a triable issue of fact as to whether Vitus affirmatively created or had actual or constructive notice of the alleged dangerous condition (*see Travers v Charles H. Greenthal Mgt. Corp.*, 66 AD3d 768, 885 NYS2d 916 [2d Dept 2009]).

In view of the determination herein granting the motion (# 003) by Vitus for summary judgment dismissing the complaint and cross claims asserted against it, its motion for conditional summary judgment on its cross claims against T Burger for contractual and common-law indemnification is denied as moot. Accordingly, plaintiffs' complaint and all cross claims against Vitus are severed as well as dismissed.

The foregoing constitutes the Order of this Court.

Dated: January 15, 2014
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION