

McCullough v Trustees of Columbia Univ.

2014 NY Slip Op 31143(U)

April 28, 2014

Supreme Court, New York County

Docket Number: 115560/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 111560/2011
MCCULLOUGH, JEANIE
VS.
TRUSTEES OF COLUMBIA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1-3

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 01 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 28, 2014



HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
JEANIE McCULLOUGH,

Plaintiff,

- against -

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK,

Defendant.
-----X

Index No. 115560/11

**DECISION/
ORDER**

Mot. Seq.: 001

HON. EILEEN A. RAKOWER

Plaintiff Jeanie McCulloch (“Plaintiff”) brings this action for personal injuries allegedly sustained in a slip and fall accident that occurred on January 22, 2011 in the basement stockroom of the business known as Aerosoles Shoes (“Aerosoles”), located at 2913A Broadway, New York, New York (“Subject Premises”).

Defendant, The Trustees of Columbia University in the City of New York (“Defendant” or “Columbia”), moves for summary judgment pursuant to CPLR §3212 on the grounds that Columbia is an out of possession landlord pursuant to a net lease, which had no notice of any defect and has been sued as the result of an alleged non-structural defect.

Defendant submits the following: the affirmation of Vincent Brescia, the pleadings, the bill of particulars, a preliminary conference Order dated January 31, 2012, deposition transcript of Plaintiff which was conducted on February 18, 2013, deposition transcript of Annie Lubell, Director of University Leasing and Agencies which was conducted on September 9, 2013, the Lease, amendment, and riders between Defendant and Aerosoles, and the affidavit of Mark Kerman, Assistant Vice President for Residential and Commercial Operations at Columbia Operations.

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NEW YORK

3] Plaintiff does not oppose.

At the time of the accident, Plaintiff was a sales associate for Aerosoles, the net lessee of the Subject Premises, and was in the process of putting shoeboxes back in the stockroom when she allegedly slipped and fell on a step. Plaintiff had one foot on the ground and one foot on the step while reaching to place two boxes onto the shelves. Plaintiff testified that the top of the step was uneven and "bumpy."

Plaintiff testified that prior to the accident, she had used the stockroom about three times a day. Plaintiff further testified that she did not have difficulty walking down the staircase prior to her accident and never noticed any bumps or cracks and never complained about the condition of the ground to her supervisor.

Columbia leased the Subject Premises to Aerosoles from 1999-2011, a period of twelve years. Aerosoles was the net tenant from August 1999 up until and including the date of the incident which is January 22, 2011. Pursuant to the lease, Columbia did not operate, manage, maintain, control or inspect the subject basement.

The Lease states in Article 4, "Repairs," in relevant part:

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 expenses, 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 . . .

It further provides in Article 13, "Access to Premises," in relevant part:

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, following

Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under the lease, or for the purpose of complying with the laws, regulations and other directions of governmental authorities . . .

As averred to Kerman's affidavit, upon signing the subject lease, Aerosoles accepted the space "as is" and assumed responsibility for all alterations and maintenance of this space, including but not limited to any steps located in the basement. Since that time, Columbia never altered the shape, size, or structure of the basement of the space they occupied. The tenant constructed the space when they leased it for their use. When making repairs or doing cement work, it was the custom and the practice that the tenant did not notify Columbia if they were making repairs in the rented space. The maintenance of the flooring and stairs in place as of the incident date was the sole responsibility of Aerosoles.

Kerman further avers that after the commencement of Aerosoles' lease, Columbia did not operate, manage, supervise, repair, clean or otherwise control the Subject Premises and did not hire contractors or any other person to perform work or services on the Subject Premises. Kerman further states that Columbia did not in any way cause or contribute to the alleged condition in the spaced leased by Aerosoles, never received any complaints regarding the floor or steps in the basement of the space occupied by Aerosoles as being defective at the Subject Premises, and did not have any involvement in the Aerosoles' day to day operations of their premises.

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]).

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 a 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]).

“Absent statutory duties, a landlord’s reservation of the right to enter the leased premises to make repairs or correct improper conditions does not impose liability for a subsequently arising dangerous condition.” *Brooks v. DuPont Associates*, 164 A.D. 2d 847, 848 [1st Dept 1990]).

Columbia has made a prima facie showing of entitlement to summary judgment dismissing the Complaint. Through the governing lease and affidavit provided, Columbia has demonstrated that it was an out-of-possession landlord pursuant to the parties’ Lease, did not create or have notice of any alleged defective condition, and did not have a contractual obligation to make repairs or maintain the stairs or basement of the subject. Plaintiff, in failing to oppose, has failed to raise a triable issue of fact in opposition. Plaintiff has failed to establish any negligence or statutory violation by Columbia.

Wherefore, it is hereby,

ORDERED that Defendant The Trustees of Columbia University in the City of New York’s motion for summary judgment is granted without opposition; and it is further

ORDERED that Complaint asserted against Defendant, The Trustees of Columbia University in the City of New York, is dismissed, and the Clerk shall enter judgment accordingly.

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

DATED: 4/28/14


EILEEN A. RAKOWER, J.S.C.

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