

Beeker v Islip U-Slip LLC
2014 NY Slip Op 31934(U)
July 10, 2014
Supreme Court, Suffolk County
Docket Number: 09-20630
Judge: Denise F. Molia
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SHORT FORM ORDER

INDEX No. 09-20630
CAL No. 13-01439OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 10-15-13
ADJ. DATE 3-14-14
Mot. Seq. # 005 - MD

-----X

JEFFREY BEEKER,

Plaintiff,

- against -

ISLIP U-SLIP LLC and RAYMOUR &
FLANIGAN PROPERTIES, LLC,

Defendants.

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Upon the following papers numbered 1 to 35 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29 - 33; Replying Affidavits and supporting papers 34 - 35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Islip U-Slip, LLC, and Raymour & Flanigan Properties, LLC, for summary judgment dismissing the complaint is denied.

Plaintiff Jeffrey Beeker commenced this action to recover damages for personal injuries he allegedly sustained on October 14, 2008, when he fell from an exterior staircase at a commercial warehouse owned by defendant Islip U-Slip, LLC. Known as 111 Windsor Place, Central Islip, the subject property was purchased by Islip U-Slip from JDI Islip, LLC, in 2004. At the time of the accident, plaintiff was employed as a "driver's helper" by Raymours Furniture Company, Inc., which stored furniture for delivery at the warehouse, and defendant Raymour & Flanigan Properties, LLC, had a contract to purchase the property. The amended complaint alleges, in part, that a dangerous condition existed on the subject premises, and that defendants were negligent in failing to maintain and repair the premises.

Defendants now move for summary judgment dismissing the complaint, arguing that Islip U-Slip cannot be held liable for plaintiff's injuries, as it was an out-of-possession landlord and had no obligation to maintain or repair the premises. They also allege the Worker's Compensation Law bars plaintiff's claim against Raymour & Flanigan Properties, as it is an alter ego of or in a joint venture with Raymours Furniture Company. Defendants' submissions in support of the motion include copies of the pleadings and transcripts of the parties' deposition testimony. Also submitted with the moving papers is a copy of a lease agreement

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for the subject property executed in March 2001 by JDI Islip and Seaman Furniture Company, and written amendments to the lease agreement executed by Islip U-Slip and Raymour & Flanigan Properties.

Plaintiff opposes the motion, arguing that defendants' submissions were insufficient to establish a prima facie case that Raymour & Flanigan Properties was an alter ego of or a joint venturer with Raymour's Furniture Company. Plaintiff further contends that, pursuant to the terms of the purchase agreement entered into by Islip U-Slip and Raymour & Flanigan Properties in November 2005, Islip U-Slip was contractually obligated to maintain and repair the subject property. In opposition, plaintiff submits a copy of the purchase agreement between Islip U-Slip and Raymour & Flanigan Properties and amendments to such agreement executed in January 2006 and April 2008.

The branch of the motion seeking summary judgment in favor of Islip U-Slip is denied. It is fundamental that to recover for negligence, a plaintiff must establish the defendant owed him or her a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 964 NYS2d 599 [2d Dept 2013]; *Fox v Marshall*, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]). A landowner or possessor has a duty to maintain its property in a reasonably safe condition (*see Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). To impose liability based on a failure to keep premises in a reasonably safe condition, a plaintiff must show the existence of a dangerous or defective condition on the property, that such condition caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Sama v Sama*, 92 AD3d 862, 939 NYS2d 113 [2d Dept 2012]; *Winder v Executive Cleaning Serv., LLC*, 91 AD3d 865, 936 NYS2d 687 [2d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; *Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; *Barland v Cryder House*, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 AD3d 947, 621 NYS2d 511 [1994]).

A landlord's duty of care may arise under common law, statutory law or regulation, or it may be assumed by contract or by course of conduct (*see Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541 [2001]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). An out-of-possession landlord may be held liable for injuries occurring on leased premises due to a dangerous or defective condition if it retained control over the premises, or if it is contractually or statutorily obligated to repair and maintain the premises (*see Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541; *Milham v Port Auth. of N.Y. & N.J.*, 117 AD3d 694, 985 NYS2d 595 [2d Dept 2014]; *Goggins v Nidoj Realty Corp.*, 93 AD3d 757, 940 NYS2d 674 [2d Dept 2012]; *Sciammarella v Manorville Postal Assocs.*, 87 AD3d 530, 927 NYS2d 798 [2d Dept 2011]; *Lindquist v C & C Landscape Contrs., Inc.*, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]). Control of the property refers to an out-of-possession landlord's ability to remedy a dangerous or defective condition (*Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 17, 929 NYS2d 620), and may be evidenced with proof of a past course of conduct demonstrating the landlord assumed the responsibility to maintain and repair the property (*see Euvino v Loconti*, 67 AD3d 629, 888 NYS2d 571 [2d Dept 2009]; *Taylor v Lastres*, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; *Ever Win v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]). Further, if a landlord is contractually obligated to maintain or repair the premises, to establish its entitlement to judgment as a matter

of law on the issue of liability, the landlord must show that it did not cause the alleged dangerous or defective condition and that it had no actual or constructive notice of such condition (*see Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 827 NYS2d 63).

Although it is undisputed that Islip U-Slip was an out-of-possession landlord, defendants failed to establish a prima facie case that it was not contractually obligated to maintain or repair the staircase at the subject premises (*see Lee v Second Ave. Vil. Partners, LLC*, 100 AD3d 601, 953 NYS2d 259 [2d Dept 2012]; *cf. Goggins v Nidoj Realty Corp.*, 93 AD3d 757, 940 NYS2d 674). The lease agreement between JDI Islip and Seaman Furniture Company states that the landlord “shall have no obligation to alter, remodel, improve, repair . . . the premises,” and that the tenant “shall at its own cost and expense keep and maintain all parts of the premises in good condition, promptly making all necessary repairs and replacements, whether structural or nonstructural . . . including, but not limited to, repair and replacement of . . . exterior stairs.” The First Amendment to Lease Agreement, dated June 1, 2006, identifies Raymours Furniture Company and Raymour & Flanigan Properties collectively as “tenant” and states, in part, that tenant agreed to assume Seaman Furniture Company’s obligations under the 2001 lease agreement “by operation of the terms of the Purchase Agreement.” Similarly, the Second Amendment to Lease, dated April 2008, identifies Raymours Furniture Company and Raymour & Flanigan Properties as “tenant,” and states “pursuant to the terms of the Agreement for the Purchase and Sale dated as of November 1, 2005, between Landlord, as seller, and [Raymour & Flanigan Properties], as purchaser . . . Tenant agreed to perform and be liable for Seaman’s obligations as tenant under the 2001 lease agreement.”

Defendants allege in their moving papers that Raymours Furniture Company was in exclusive possession of the warehouse and was obligated under the amendment to the lease agreement to maintain and repair the premises. Jeffrey Rosmarin, the owner of Islip U-Slip, testified at a deposition that Islip U-Slip assumed the 2001 lease agreement when it purchased the property from JDI Islip, that “Raymour & Flanigan” was the tenant at the warehouse at the time of plaintiff’s fall, and that Raymours Furniture Company assumed the lease obligations of Seaman Furniture Company as part of the agreement to purchase the property. He testified that the property was subject to a triple net lease, and that the amendment executed in 2006 modified the 2001 lease by requiring Raymours Furniture Company to pay the real estate taxes for the property. Rosmarin also testified that he visited the property only four or five times, and that Islip U-Slip did not renovate or inspect the property, or repair the staircase at issue, during its ownership. Defendants, however, failed to submit a copy of the purchase agreement with the moving papers or documentary proof of such an assignment (*see Azumally v 16 W. 19th, LLC*, 79 AD3d 922, 913 NYS2d 730 [2d Dept 2010], *lv denied* 16 NY3d 707, 920 NYS2d 780 [2011]; *Lalicata v 39-15 Skillman Realty Co., LLC*, 63 AD3d 889, 882 NYS2d 185 [2d Dept 2009]).

Furthermore, absent from defendants’ submissions is evidence that the 2001 lease was still in existence when the purchase agreement and the purported amendments to the lease were executed. Neil Rube, Senior Vice President and General Counsel of Raymour & Flanigan Properties, testified on behalf of such corporation that Seaman Furniture Company had been acquired by Levitz Furniture and no longer existed at the time the purchase agreement was executed. He testified that as Levitz Furniture had filed for bankruptcy protection, Raymour & Flanigan Properties agreed, as part of the deal to purchase the property from Islip U-Slip, that it would take the warehouse as a tenant, “on the same terms as those set forth in [the 2001] lease,” if such lease was rejected by the bankruptcy court. Rube further testified that, despite the

language in the lease amendments naming two tenants, Raymours Furniture Company was responsible for maintaining the property. In addition, he testified that both parties to the purchase agreement were involved in the drafting of such agreement. Although Rube testified that the unexpired lease was rejected in the bankruptcy proceeding, and that Raymours Furniture Company was the tenant at the property at the time of the accident, there is no evidence in the record regarding the apparent termination of Levitz Furniture's leasehold of the subject property. The rejection of an executory commercial lease by a bankruptcy trustee for the lessee's estate does not terminate such lease (*see In re Lavigne*, 114 F3d 379, 386-387 [2d Cir 1997]; *In re Austin Dev. Co.*, 19 F3d 1077, 1082 [5th Cir], *cert denied* 513 US 874, 115 S Ct 201 [1994]).

In any event, plaintiff's submission of the purchase agreement raised a triable issue of fact as to whether Islip U-Slip had a duty to maintain the premises at 111 Windsor Place in a reasonably safe condition (*see Lawrence v Celtic Holdings, LLC*, 85 AD3d 874, 925 NYS2d 172 [2d Dept 2011]). The purchase agreement between Islip U-Slip and Raymour & Flanigan Properties states that, "between the Effective Date and the Closing Date . . . Seller shall maintain, repair and keep up, or cause to be maintained, repaired and kept up, the Property consistent with Seller's customary practices." The term "effective date" is defined in the purchase agreement as the date of its execution, November 1, 2005. The purchase agreement, however, also refers to the lease agreement, and states that Islip U-Slip shall provide Raymour & Flanigan Properties with copies of any notices in the bankruptcy proceeding entitled *In re Levitz Home Furnishings*, case number 05-45189, which relate in a material way to the subject property, including the acceptance or rejection of the lease by the tenant, and that, if the lease is rejected in bankruptcy, "Purchaser and Raymour's [Furniture Company] shall, jointly and severally, have all of the same rights and obligations as the tenant under the Lease."

The fundamental principle of contract interpretation is that an agreement is to be construed in accord with the parties intent (*Greenfield v Phillis Records*, 98 NY2d 562, 569, 750 NYS2d 565 [2002]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Ambiguity is present in a contract if the language used renders it susceptible to more than one reasonable interpretation (*see Brad H. v City of New York*, 17 NY3d 180, 928 NYS2d 221 [2011]; *Evans v Famous Music Corp.*, 1 NY3d 452, 775 NYS2d 757 [2004]), or if there is contradictory or inconsistent language in different portions of the contract (*see Natt v White Sands Condominium*, 95 AD3d 848, 849, 943 NYS2d 231 [2d Dept 2012]). If an ambiguity is discerned with respect to the parties' intent, the court may consider extrinsic evidence (*see Laing v Laing*, 282 AD2d 655, 723 NYS2d 710 [2d Dept 2001]; *Tirella v Tirella*, 249 AD2d 294, 670 NYS2d 889 [2d Dept 1998]; *see also Morash v State of New York*, 268 AD2d 510, 703 NYS2d 55 [2d Dept], *lv denied* 95 NY2d 755, 712 NYS2d 447 [2000]; *Seaman Furniture Co. v Seaman*, 267 AD2d 297, 701 NYS2d 82 [2d Dept 1999]). However, "when a term or clause is ambiguous and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence," then the ambiguity must be resolved by a trial (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *see Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]). The ambiguous language of the purchase agreement regarding Islip U-Slip's obligation to maintain and repair the subject property until the closing date, together with the lack of evidence regarding the apparent termination of Levitz Furniture's tenancy, reveals a triable issue as to whether Islip U-Slip may be held liable for the alleged defective condition on the staircase.

The branch of the motion seeking summary judgment dismissing the claim against Raymour & Flanigan Properties also is denied. Sections 11 and 29 of the Worker's Compensation Law provide that receipt of worker's compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses due to an unintentional injury suffered during the course of employment (*see Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 676 NYS2d 110 [1998]; *Charles v Broad St. Dev., LLC*, 95 AD3d 814, 947 NYS2d 518 [2d Dept 2012]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]; *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 864 NYS2d 491 [2d Dept 2008]). The exclusivity provisions of the Workers' Compensation Law also extend to entities which are alter egos of, or engaged in a joint venture with, the injured worker's employer (*see Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 954 NYS2d 113 [2d Dept 2012]; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 906 NYS2d 67 [2d Dept 2010]; *Degale-Selier v Preferred Mgt. & Leasing Corp.*, 57 AD3d 825, 870 NYS2d 94 [2d Dept 2008]; *Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522, 864 NYS2d 316 [2d Dept 2008]).

"A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594-595, 906 NYS2d 67; *see Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 960 NYS2d 130 [2d Dept 2013]; *Cappella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522, 864 NYS2d 316; *Crespo v Pucciarelli*, 21 AD3d 1048, 803 NYS2d 586 [2d Dept 2005]; *Thompson v Bernard G. Janowitz Constr. Corp.*, 301 AD2d 588, 754 NYS2d 50 [2d Dept 2003]). "Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct" (*Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204 [3d Dept 2003]; *see Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 909 NYS2d 826 [3d Dept 2010]). A showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other (*see Batts v IBEX Constr., LLC*, 112 AD3d 765, 977 NYS2d 282 [2d Dept 2012]; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 906 NYS2d 67; *Mournet v Educational & Cultural Trust Fund of Elec. Indus.*, 303 AD2d 474, 756 NYS2d 433 [2d Dept 2003]; *Constantine v Premier Cab Corp.*, 295 AD2d 303, 743 NYS2d 516 [2d Dept 2002]).

Similarly, a defendant claiming to be in a joint venture with the plaintiff's employer must show more than just an agreement to act in concert to achieve an economic objective. "The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the co-venturers to the joint undertaking (*i.e.*, a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Tilden of N.J. v Regency Leasing Sys.*, 230 AD2d 784, 785-786, 646 NYS2d 700 [2d Dept 1996], *quoting Ackerman v Landes*, 112 AD2d 1081, 1082, 493 NYS2d 59 [2d Dept 1985]; *see Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 878 NYS2d 97 [2d Dept 2009]; *Kaufman v Torkan*, 51 AD3d 977, 859 NYS2d 253 [2d Dept 2008]).

Defendants' submissions were insufficient to establish that the Worker's Compensation Law bars plaintiff's claim against Raymour & Flanigan Properties, either because it was the alter ego of Raymour's Furniture Company or because the corporations were engaged in a joint venture (*see Zhiwei Mao v Krantz*

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& Levinson Realty Corp., 117 AD3d 944, 985 NYS2d 893 [2d Dept 2014]; *Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 909 NYS2d 826; *Degale-Selier v Preferred Mgt. & Leasing Corp.*, 57 AD3d 825, 870 NYS2d 94; *Masley v Herlew Realty Corp.*, 45 AD3d 653, 846 NYS2d 252 [2d Dept 2007]; *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 759 NYS2d 204). Significantly, Rube testified that Raymour & Flanigan Properties was formed in 2005 for the purpose of acting as a contract vendee for properties that later would be operated by Raymours Furniture Company. Rube explained it was never intended that Raymour & Flanigan Properties would actually acquire the subject property and that, in fact, it assigned its rights under the purchase agreement to a different entity, Islip CSC, Inc., which purchased the property from Islip U-Slip in 2010. He testified Raymour & Flanigan Properties had no office and no employees, that the members were not paid a salary, and that the company may not even have had its own checking account.

Accordingly, the motion for summary judgment dismissing the complaint is denied.

Dated: 7-10-14

Hon. Denise F. Molia

A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION