

Watson v Taj II

2015 NY Slip Op 30119(U)

January 23, 2015

Supreme Court, New York County

Docket Number: 151069/2012

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

CAMERON WATSON,
Plaintiff,

Index No.: 151069/2012

Motion Date: 01/22/2015

Motion Seq. No.: 004

- v -

TAJ II and DEZER PROPERTIES 48 LLC,
Defendants.

The following papers, numbered 1 to 4 were read on this motion / petition for

Table with 2 columns: Document Type and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2, 3), and Replying Affidavits - Exhibits (4).

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that the motion shall be granted to the extent that it seeks summary judgment dismissing the complaint against defendant Dezer Properties 48 LLC, but to the extent that it seeks judgment on the cross claim against defendant Taj II the motion shall be denied.

First, the court finds that Dezer has demonstrated good cause for its very brief delay in making the instant dispositive motion. Defendant Dezer admittedly did not make its motion until April 17, 2014, which was six (6) days late under CPLR 3212(a). Defendant Taj II timely made its motion for summary judgment on

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

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

April 10, 2014 (a day before the deadline), but several months before such deadline by separate motion, Taj II moved to strike the note of issue. Apparently undertaking to conduct further discovery, all parties agreed to and sought several adjournments of the resolution of Taj II's motion to strike, during which the deadline for dispositive motions expired, and the parties ultimately agreed that Taj II withdraw its motion to strike. This court finds that the parties' efforts to conserve judicial resources by completing discovery and holding in abeyance resolution of Taj II's motion to strike the note of issue, (which if granted would have mooted the deadline for dispositive motions), constituted just cause for Dezer's brief delay of less than one week. Gonzalez v 98 Mag Leasing Corp, 945 NY2d 124, 129 (2000).

§ 8 of the lease between Dezer, the landlord, and Taj II, the tenant, states, in pertinent part:

Tenant shall indemnify and hold harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs 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...of this lease, or the carelessness, negligence or improper conduct of the Tenant.

Defendant Dezer has not come forward with any evidence that it has incurred damages that have not been reimbursed by insurance in this action. Nor has any negligence or breach of lease on the part of Taj II been established. Therefore, Dezer is not entitled to judgment for contractual or common law indemnification on its cross claim against defendant Taj II.

It is not disputed that under the lease § 13, Dezer, the out-of-possession landlord, retained a right of reentry to inspect and make repairs to the subject premises, as "the Owner may deem necessary and reasonably desirable", "or for the purpose of complying with the laws, regulations and other directions of government authorities".

However, under lease § 4 entitled "Repairs", except with respect to the public portions of the building, both exterior and interior, defendant landlord Dezer did not promise to maintain the subject premises. Such lease provision states that Taj II, the tenant, is responsible to "take good care of the demised premises". Further, under lease § 2, Taj II had permission to make "alterations, additions or improvements which are non-structural and do not affect utility services or plumbing lines, in or to the interior of the demised premises". Moreover, although lease § 13 provides that Taj II must permit Dezer to "use and maintain and replace pipes and conduits in and through

the demised premises and to erect new pipes and conduits therein", it contains no provisions with respect to any steam that passes through such pipes. The only provision concerning heat appears in lease § 30, which provides only that Dezer "shall furnish heat to the demised premises, as required by law, on business days from 8:00 a.m. to 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m."

There is no dispute that the men's restroom in question was not part of the public portion of the building. Therefore under the lease, defendant landlord Dezer made no promises to maintain or to make any repairs therein. Further, according to plaintiff's bill of particulars, he suffered injury on December 11, 2011, 11:00 PM, which the court sua sponte judicially notices was a Saturday. Under the lease, Dezer never promised even to provide heat on a Saturday night, let alone, moderate the temperature level of heat provided on that night of the week that plaintiff alleges he was burned by the steam pipe.

As a matter of law, Dezer has established its prima facie defense that the existence of a hot steam pipe, even assuming arguendo that it was excessively hot, in the restroom of the subject premises, did not constitute a violation of a specific statutory provision, and neither plaintiff nor Taj II point to any such statute or regulation. Moreover, under the

lease, Dezer never promised to do more than furnish heat to the subject premises at designated times. Since it had no responsibility to install any warning signs, or paint the pipe with warning lines or in contrasting colors to the wall or otherwise warn a third party about the exposed hot steam pipe, Dezer may not be cast in damages to plaintiff, Taj II's patron/third party to the lease. See Boateng v Four Plus Corp, 22 AD3d 323, 324 (1st Dept 2005); Pavon v Rudin, 254 AD2d 143, 147 (1st Dept 1998) ("since the broker hinge was not a significant structural defect, and plaintiff did not point to any specific statutory violations in support of her claim that [landlord] breached a duty of care, [landlord] cannot be charged with constructive notice solely based on its right of re-entry" [citations omitted]); DiRende v Cipollaro, 234 AD2d 78 (1st Dept 1996) ("The out-of-possession owners were not liable on the ground that they had a contractual right to reenter, inspect and make needed repairs, since the broken concrete slab upon which plaintiff fell was not a structural defect that contravened a specific statutory safety provision"). As Taj II had the right and duty under the lease with respect to non-structural improvements such as signage or painting, it is subject to liability to its patron, the plaintiff, which issues must be determined at trial.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Dezer Properties 48 LLC is granted to the extent that it seeks dismissal of the complaint and the complaint against it is dismissed with costs and disbursements to defendant Dezer Properties 48 LLC as taxed by the Clerk upon the submission of an appropriate bill of costs, and it is further

ORDERED that the motion for summary judgment of defendant Dezer Properties 48 LLC to the extent that it seeks judgment on the cross claim against defendant Taj II is denied.

This is the decision and order of the court.

Dated: January 23, 2015

ENTER:

~~Walter H. James~~
J.S.C.

DEBRA A. JAMES