

Perez v Mac-Twenty Prods., Inc.

2015 NY Slip Op 30366(U)

February 5, 2015

Supreme Court, Bronx County

Docket Number: 23684/2013E

Judge: Lizbeth Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

-----X
Myriam E. Perez,

Plaintiff,

DECISION and ORDER
Index No 23684/2013E

-against-

Mac-Twenty Products, Inc., Triangle Plaza 1 LLC
and McDonald’s Corporation,

Defendants.

-----X

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion to dismiss:

Amended Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Plaintiff Perez claims that she sustained serious injuries as a result of the defendants’ negligence. Ms. Perez alleges that on 7/24/13 she slipped on water and fell in a McDonald’s restaurant located at 138-11 20th Street in Whitestone, New York, a property owned by defendants McDonald’s Corporation (“McDonald’s Corp.”) and Triangle Plaza 1 LLC (“Triangle Plaza”) and leased to defendant Mac-Twenty Products, Inc. (“Mac-Twenty”). Defendant McDonald’s Corp. moves to dismiss the action against it on the ground that the subject premises was owned and operated by a separate and independent corporation pursuant to a franchise agreement with its assignee, McDonald’s USA, LLC. McDonald’s Corp. maintains that it is an out-of-possession landlord and thus not liable for plaintiff’s alleged accident.

Plaintiff Perez opposes the motion.

DISCUSSION

It is well settled that summary judgment is a drastic remedy which can only be granted when it is clear that there are no triable issues of fact (*Middle Village Associates v Pergament Home Centers, Inc.*, 184 Misc 2d 552 [2000], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].)

It is also well settled that “a landlord is not generally liable for negligence with respect to the

condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." (*Quing Sui Li v 37-65 LLC*, 114 AD3d 538 [1st Dept 2014]; *Howard v Alexandra Restaurant*, 84 AD3d 498 [1st Dept 2011]; *Malloy v Friedland*, 77 AD3d 583 [1st Dept 2010].)

An out-of-possession landlord is not liable for a third party's injury on his or her premises unless the landlord has notice of the defect and has consented to be responsible for maintenance or repair. (*Lopez v Shakespeare Avenue Housing Development Fund Corporation*, 299 AD2d 230 [1st Dept 2002].)

In support of its motion, defendant McDonald's Corp. proffers the defendants' respective answers to the plaintiff's complaint, a 8/4/00 Franchise Agreement between McDonald's Corp. and John Bert as Franchisee, a 1/1/05 McDonald's USA LLC Master Assignment and Assumption of Franchises and an Operator's Land Lease described as "Exhibit A to Franchise Agreement."

Defendant McDonald's Corp. references the following provision in the Franchise Agreement:

16. **Franchisee Not An Agent of McDonald's.** Franchisee shall have no authority, express or implied, to act as agent of McDonald's or any of its affiliates for any purpose. Franchisee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business...and for all claims or demands based on damage or destruction of property or based on injury, illness, or death of any person or persons, directly or indirectly, resulting from the operation of the Restaurant. Further, Franchisee and McDonald's are not and do not intend to be partners, or joint employers in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of Franchisee under any circumstances.

The Master Assignment and Assumption of Franchises identifies McDonald's Corp. as "Assignor" and McDonald's USA, LLC as "Assignee."

The Operator's Land Lease defines the tenant's obligations and states the following in pertinent part:

ARTICLE 4. OBLIGATION OF TENANT

4.02 **Maintenance and Repair:** So long as the Franchise Agreement is in effect, Tenant will, at its expense, (a) keep the Land, all Improvements, utility lines and Tenant's fixtures and equipment at all times in good repair, order or condition...Tenant's obligation to make repairs to the Land and Improvements includes all repairs, whether ordinary or extraordinary, including structural repairs to the foundation, floors, walls and roof. Under no circumstances does Landlord assume any duty, whether expressed or implied, to make any repairs, make any additions or improvement to, or perform any maintenance to the Land, Improvements, personal property, fixtures or equipment.

In opposition to the defendant's motion, plaintiff Perez states that the defendant's motion is premature due to outstanding discovery. The plaintiff maintains that in order to establish the "business relationship" between defendants McDonald's Corp. and Mac-Twenty and determine whether McDonald's Corp controlled or influenced the day-to-day activities of the subject franchise, depositions of the defendants and a review of the corporate instructional and policy materials are necessary.

In support of her position, Ms. Perez references other portions of the Franchise Agreement:

Section One (c) - Nature and Scope of Franchise:

Moreover, the establishment and maintenance of a close personal working relationship with McDonald's in the conduct of Franchise's McDonald restaurant business, Franchisee's accountability for performance of the obligations contained in this Franchise and Franchisee's adherence to the tenets of the McDonald's System constitute the essence of this Franchise.

Section Three - General Services of McDonald's:

McDonald's shall advise and consult with Franchise periodically in connection with the operation of the Restaurant and also, upon Franchisee's request, at other reasonable times. McDonald's shall communicate to Franchisee its know-how, new developments, techniques, and improvements in the areas of restaurant management, preparation, and service which are pertinent to the operation of a restaurant using the McDonalds System. The communications shall be accomplished by visits by operations consultants...McDonalds shall also make available to Franchisee all additional service, facilities, rights and privileges relating to the operation of the

Restaurant which McDonald's makes generally available...to its franchisees operating McDonald's restaurants.

Section Four - Manuals:

The business manuals contain detailed information including: (a) required operations procedures...(d) business practices and policies; and (e) other management and advertising policies. Franchisee agrees to promptly adopt and use exclusively the formulas, methods and policies contained in the business manuals, now and as they may be modified by McDonald's from time to time.

Section Six - Training:

Franchisee acknowledges the importance of quality of business operation among all restaurants in the McDonald's System and agrees to enroll Franchisee and Franchisee's managers present and future, at Hamburger University or at such other training center as may be designated by McDonald's from time to time...McDonald's...agrees to provide to Franchisee both basic and advanced instruction for the operation of a McDonald's System restaurant.

Section Twelve - Compliance With Entire System:

McDonald's shall have the right to inspect the Restaurant at all reasonable times to ensure the Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System. Franchisee shall comply with the entire McDonald's System including...(a) Operate the Restaurant in a clean, wholesome manner in compliance with prescribed standards of Quality, Service and Cleanliness; comply with all business policies, practices and procedures imposed by McDonald's...and maintain...signage...and parking area in a good, clean, wholesome condition and repair...and in compliance with designated standards as may be prescribed from time to time by McDonald's.

Section Eighteen - Material Breach:

The parties agree that the...following events shall constitute a material breach...and violate the essence of Franchisee's obligations...(a) Franchisee shall fail to maintain and operate the Restaurant in a good, clean, wholesome manner and in compliance with the standards prescribed by the McDonald's System.

Plaintiff Perez asserts that the foregoing terms can be viewed as a "symbiotic relationship" between defendants McDonald's Corp. and Mac-Twenty.

CONCLUSION

Plaintiff Perez claims that she slipped on a wet floor inside a McDonald's franchise and fell. Generally, an out-of-possession landlord is responsible for a substantial structural defect but bears no responsibility for a wet floor, a general maintenance defect. (*Del Rosario v 114 Fifth Ave. Assoc.*, 266 AD2d 162 [1st Dept 1999]) citing *Raynor v 666 Fifth Ave. Ltd. Partnership*, 232 AD2d 226 [1st Dept 1996].) Here, the *tenant* is responsible for all maintenance and repairs *including structural defects*. (See Operator's Land Lease Article 4.02 above.)


After careful review and consideration of the documentary evidence, the Court finds that defendant McDonald's Corp. met its initial burden and establishes that it bears no responsibility for the general maintenance of the franchise restaurant; it reserved the right to enter the franchise for inspection but not to make repairs or control its day-to-day activities. Accordingly, the defendant cannot be held liable for the plaintiff's alleged accident. Plaintiff Perez fails to show that further evidence would establish the contrary. Similarly, the provisions of the Agreement that she references are insufficient to warrant the denial of the motion.

Defendant McDonald's Corporation's motion to dismiss is granted. The defendant shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: February 5, 2015

So ordered,



Hon. Lizbeth Gonzalez, JSC