Syrko v Jertom Inc.

2015 NY Slip Op 30572(U)

March 16, 2015

Sup Ct, Bronx County

Docket Number: 302168/2012

Judge: Julia I. Rodriguez

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[* 1] FILED Mar 18 2015 Bronx County Clerk

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

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JERRY MICHAEL SYRKO,

Plaintiff,

-against-

JERTOM INCORPORATED d/b/a TOM & JERRY'S BAR AND GRILL, SILVER LAKE REALTY, LLC, BREWSTER PLAZA, LLC, VATAJ & ASSOCIATES REALTY, INC., VUKSAN VATIC and SONNY VATAJ,

Defendants.

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Index No. 302168/2012

DECISION and ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of motion for summary judgment pursuant to CPLR 3212 dismissing the complaint by Defendants Brewster, Vatic & Vataj:

Papers	Numbered
Notice of Motion by Defendants Brewster, Vatic & Vataj, Affirmation & Exhibits	1
Opposition by Defendant Jertom & Plaintiff & Exhibits	2, 3
Reply Affirmations dated 6/10/14 & 5/20/14	4, 5

Plaintiff commenced this action alleging injuries sustained when he slipped and fell on April 16, 2011 at a restaurant and pool establishment; specifically, Plaintiff alleges he slipped and fell due to accumulation of water on the floor emanating from a leaky window.

The Complaint states that Defendants **Jertom Incorporated d/b/a Tom & Jerry's Bar and Grill, Silver Lake Realty, LLC** and **Brewster Plaza, LLC** were all owners of the Premises; Defendants **Vataj & Associates Realty, Inc., Vuksan Vatic** and **Sonny Vataj** are alleged to maintain, manage and/or control the premises.

The answering Defendants interposed their respective affirmative defenses and cross-claims, and all denied liability in their Answers.

After discovery Defendants **Brewster Plaza, LLC, Vuksan Vatic s/h/a Vuksan Vatic** and **Sonny Vataj** moved for summary judgment pursuant to CPLR 3212 dismissing the complaint in their favor. By Decision and Order dated July 21, 2014 Defendants **Vuksan Vatic s/h/a Vuksan Vatic** and **Sonny Vataj** were dismissed from this action as they are individual members of the limited liability company, to wit:

FILED Mar 18 2015 Bronx County Clerk

Brewster Plaza, LLC, and therefore cannot be held personally liable absent piercing of the corporate veil. The remaining branch of Brewster's motion seeking summary judgment is decided as follows:

Brewster Plaza moves for summary judgment dismissing the complaint and all cross-claims against it on the ground that it is an out-of-possession landlord that was not in control of the subject property, that it did not create the allegedly dangerous condition and that it had no actual or constructive notice of the alleged condition. Brewster Plaza contends that to the extent there may be an issue of fact whether a defective condition existed regarding a leaking window and/or inadequate lighting, the obligation to maintain those items would befall upon the tenant at the premises: co-defendants Jertom/Tom & Jerry's. Brewster Plaza further contends that it is entitled to contractual indemnification by Tom & Jerry's.

In opposition to summary judgment, Plaintiff and co-defendant Jertom contend that Brewster Plaza is liable for Plaintiff's injuries because: (1) Brewster had actual and/or constructive notice that the windows in the pool room would leak rain water into the premises; and (2) Brewster had a contractual right to re-enter the premises to inspect and make repairs.

In support of its motion, Brewster points to Article 4 of the Lease which states that the "Tenant shall . . . take good care of the demised premises and the fixtures and appurtenances therein . . make all non-structural repairs thereto as and when needed." Brewster also submitted, *inter alia,* (1) a photograph of the premises, (2) the deposition testimony of Plaintiff, **Sean Scott**, who is the 100% shareholder/owner of **Jertom Incorporated d/b/a Tom & Jerry's Bar and Grill**; (3) deposition testimony of **Kevin Wall**, a bartender/employee of **Tom & Jerry's Bar and Grill**; and (4) the deposition testimony and affidavit of **Sonny Vataj**.

At his deposition Sean Scott testified he never experienced "problems with water

leaking into those windows" [pg. 31] since he purchased the premises in 2010. According to Mr. Scott, he first discussed the water leaking with Kevin Wall after Plaintiff's accident [pg. 32], whereupon Kevin told him that there needed "to be a torrential downpour with the wind blowing directly in that direction. . towards the window" [pg. 33] for the leak to occur. When Mr. Scott bought the premises from the prior owner, **Thomas Snee**, Snee did not "indicate" that a problem existed to Mr. Scott.

At his deposition Kevin Wall testified he first noticed "some issues with water seeping in through the window...next to the pool table" ...""five or six years ago" when the "outside of the building" was remodeled [pg. 9], which did not include replacement of the "side windows" [pg.13]. From the time Mr. Wall first noticed "water seeping through the window in the bar next to the pool table" [pg. 13], it happened "rarely. . . say half a dozen to a dozen . . . it's ...got to be perfect conditions...like the wind, it's got to be raining sheets and the wind has to be blowing at those windows and then it comes down... if it's just light rain ...or the wind is blowing the right [sic] it doesn't leak...it's not a consistent leak" [pgs. 13&14].

On the date of Plaintiff's accident Mr. Wall described the lighting condition as "sufficient" [pg. 25] "because the dartboard lights are on...the pool table lights are on...that's the brightest part of the bar" [pg. 26]. After Plaintiff's fall Mr. Wall put a mat down in the wet area, which he would do "if it's raining like it is and it's coming through the window, then I put the mat down" [pg. 38]. In the four years before the accident, Mr. Wall had put the mat down "a couple of times, maximum. Like I said, it was, you know, 2008 or 2009 that they did the remodeling. So, I don't know, maybe three or four times total that I put the mat there. Before the accident" [pg. 38].

Mr. Vataj testified he acquired the premises after forming Brewster Plaza LLC in August 2006, consisting of "a retail strip about 20,000 square feet, single story" [pg. 8]; when he bought the premises from Tommy Snee they never discussed the "side windows" [pgs. 24]. Tommy Snee did not inform Vataj that "water was leaking into the bar when it

would rain" [pg. 27], and they never discussed that windows might leak in a bad rainstorm [pg. 58]. According to Vataj, if water leaked into the bar when it rained it would be the bar's responsibility [pgs. 27]; after the accident Vataj did not receive notification from Tom & Jerry to repair a leak "in the window" or "on a side window" [pg. 39]. Before Plaintiff's accident (4/16/2011) Vataj was not aware of "any kind of leaking problem with the windows on the side of Tom & Jerry's bar which were not changed" [pg. 66], and he never received any violations regarding those windows [pg. 66].

<u>The Law</u>:

It is well settled that absent evidence that an owner or possessor of a premises created a dangerous condition or that said owner had prior notice of a defective condition, actual or constructive, said owner cannot be held liable for an accident resulting from said dangerous condition. *See Acevedo v. York Intern. Corp.*, 31 A.D.3d 255, 818 N.Y.S.2d 83 (1st Dept. 2006); *Thomas v. Our Lady of Mercy Med. Ctr.*, 289 A.D.2d 37, 734 N.Y.S.2d 33 (1st Dept. 2001). Constructive notice will be imputed only if the defect is visible and apparent and has existed for a sufficient period of time to allow for discovery and correction. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 8356, 501 N.Y.S.2d 646 (1986). Further, a landlord is generally not 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 <u>and</u> liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. *See Quing Sui Li v. 37-65 LLC*, 114 A.D.3d 538, 539; 981 N.Y.S.2d 14, 15 (1st Dept. 2014); *Gomez v. Brodsky Organization, Inc.*, 38 Misc.3d 1223(A), 969 N.Y.S.2d 803, 808 (Sup. Ct. N.Y. Co 2013); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326; 642 N.Y.S.2d 897, 898 (1st Dept. 1996); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326; 642 N.Y.S.2d 897, 898 (1st Dept.

FILED Mar 18 2015 Bronx County Clerk

1996).

After consideration of Brewster Plaza's submission, the Court finds that it established its *prima facie* entitlement to summary judgment as to its liability for the accident by demonstrating that it did not control the property, it did not create the allegedly dangerous condition and it had no actual or constructive notice of the alleged condition. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 (1986); and see *Winegrad v. New York Univ. Med. Ctr.*, 64 N..Y.2d 851, 853, 487 N.Y.S.2d 316 (1985) (proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact). The Court further finds that Plaintiff failed to meet his burden of rebuttal to defeat summary judgment in Brewster's favor for his failure to raise a triable issue of fact that Brewster had constructive or actual notice of the window leak, and/or that the remodeling of the building's facade was "structural". *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228, 812 N.Y.S.2d 12 (1st Dept. 2006) (once the proponent has made a prima facie showing, the burden shifts to the opposing party to present evidentiary facts to raise a genuine triable issue of fact).

In its submission in opposition, Jertom argues that Brewster had actual and/or constructive notice of the leaking window because the prior owner informed Vataj of the condition; in this regard Jertom presents the affidavit of the prior owner, **Thomas J. Snee**, sworn to in Charleston, South Carolina, who alleges that he advised Sonny Vataj "on a number of occasions before I sold the business" of the windows which leaked "during an extreme rain storm." As an initial matter, the affidavit is not in admissible form for failure to comply with the out-of-state conformity requirement set forth in 2309(c) of the CPLR. In any event, it is not probative for purposes of summary judgment because it is vague and lacking sufficient facts. Consider: while not identifying one date whatsoever, Mr. Snee states that "after commencement" of the "work on the outside facade of the premises" he "observed that during an extreme rain storm" the windows in

the pool room started to leak after which he advised Sonny Vataj"on a number of occasions" of this observance.

Mr. Wall's testimony failed to raise an issue of fact precluding summary judgment because he never informed the Brewster principals of any condition regarding the pool room and/or the windows in the pool room.

The argument that the work on the facade was structural in nature, *as defined in the lease*, is not supported by an individual with personal knowledge of the actual work done, or by expert opinion. Section 53 of the Lease Rider sets forth that the "Owner is responsible for structurally bearing repairs" and that "for purposes of this Article [i.e., repairs] "structural repairs shall mean repairs to the building foundation, vertical and horizontal supporting beams of the floor and roof." Here, no evidence was submitted to rebut Mr. Vataj's claim that the renovation/repair of the windows, or lack thereof, was not structural in nature. Under these circumstances, the Brewster movants established prima facie entitlement to summary judgment by showing that the leaking window "that allegedly caused Plaintiff to slip and fall did not constitute such a defect or violate a specific statutory provision." *Gomez v. Brodsky Organization, Inc.*, 38 Misc.3d 1223(A), 969 N.Y.S.2d 803, 808 (Sup. Ct. N.Y. Co. 2013); *Oviedo v. Summer Management Co., LLC*, 34 Misc.3d 130(A), 946 N.Y.S.2d 67 (App. Term, 1st Dep't 2011); *Dallas v. ZCWK Associates, L.P.,* 287 A.D.2d 304, 731 N.Y.S.2d 428 (1st Dep't 2001) (no cognizable claim that the accident was caused by a structural defect).

For the foregoing reasons, Brewster Plaza's motion for summary judgment is **granted**, and therefore it is ORDERED that the complaint and all cross-claims are dismissed solely as against Defendants **Brewster Plaza, LLC, Vuksan Vatic s/h/a Vuksan Vatic** and **Sonny Vataj**.

That branch of Brewster's motion seeking legal fees is **denied** and that branch of motion seeking indemnification from co-defendants is **denied** as moot.

Dated: Bronx, New York
March 16, 2015

Hon. Julia I. Rodriguez