

Sheeran v Alexandria Real Estate Equities, Inc.

2016 NY Slip Op 30555(U)

April 1, 2016

Supreme Court, New York County

Docket Number: 452934/14

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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PAULETTE SHEERAN and JOHN V. SHEERAN,

Plaintiffs,

Index No. 452934/14

Motion seq. nos. 001, 002

-against-

DECISION AND ORDER

ALEXANDRIA REAL ESTATE EQUITIES, INC.,
CLUSTER AMENITIES NO. 1, LLC d/b/a
RIVERPARK RESTAURANT, WITCHCRAFT
OPERATING, LLC, CRAFT WORLDWIDE
HOLDINGS, LLC, ABM JANITORIAL SERVICES –
NORTHEAST, INC., ARE EASTRIVER SCIENCE
PARK, LLC, ABC CORPORATIONS 1-5, JOHN
DOES 1-5, and RICHARD ROES 1-5,

Defendants.

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This action arises from a slip and fall. The issue presented is which of the defendants, if any, is responsible for the hazardous condition which allegedly caused plaintiff to slip. By respective notices of motion, defendants Craft Worldwide Holdings, LLC, and Witchcraft

Operating, LLC move pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against them. (Mot. seq. nos. 001 and 002, respectively). Plaintiffs oppose, and defendants Alexandria Real Estate Equities, Inc., Cluster Amenities No. 1, LLC d/b/a Riverpark Restaurant (Cluster), ABM Janitorial Service – Northeast, Inc., and ARE – East River Science Park, LLC (ARE-East) (collectively, Alexandria defendants) oppose Witchcraft’s motion. The motions are consolidated for disposition.

I. PERTINENT FACTS

In January 2010, Cluster, the owner/tenant of a portion of the premises located at 450 East 29th Street in Manhattan, and defendant Witchcraft entered into a food and beverage services management agreement, whereby Witchcraft agreed to operate a restaurant, café, and catering space within the premises, and “to establish, supervise, manage and operate the Restaurant, the Café and Catering in accordance with the Approved Operating Plan and the terms and conditions [herein].” In the agreement, the premises is defined as “the Restaurant, the Café and the Catering Premises,” and the common areas, in pertinent part, as “public hallways [and] lobbies.” By an amendment dated June 25, 2010, the parties also agreed that the “Restaurant Trade Name under the Agreement shall be ‘riverpark.’” Defendant ARE-East is the landlord of the premises. (NYSCEF 57).

On June 10, 2011, plaintiff Paulette Sheeran allegedly slipped and fell on an unidentified liquid in the women’s restroom in the lobby of the premises. (NYSCEF 32). An incident report dated June 13, 2011, reflects that plaintiff arrived at Riverpark at approximately 10:00 p.m., that she left the restaurant and entered the lobby restroom at approximately 11:30 p.m., and that a Riverpark employee stated that a Riverpark attendant cleans and stocks the restroom from five

p.m. to ten p.m. (NYSCEF 82). It is also stated in the report that an ABM employee was in and around the restroom with his cleaning cart from approximately 15 minutes before plaintiff entered the restroom until 11:30 p.m., just before plaintiff left, and that he advised safety personnel at the premises that when he left the restroom, the floor was damp, not wet, and would have been “completely dry” before plaintiff arrived. (*Id.*).

On June 30, 2014, defendants Alexandria, Cluster, ABM, and ARE-East interposed a joint answer to plaintiff’s complaint and asserted affirmative defenses and cross claims of contribution against defendants Craft and Witchcraft. (NYSCEF 6-7). On July 31, 2014, Craft and Witchcraft, by the same counsel, interposed a joint answer. (NYSCEF 18). Thereafter, Craft, by separate counsel, interposed an answer and asserted cross claims against all other defendants sounding in indemnification, contribution, and failure to procure insurance. (NYSCEF 22).

Craft’s website, as of August 20, 2015, reflects that Craft’s and Witchcraft’s executive chef and member “opened” Riverpark in New York in 2010. (NYSCEF 65, 75).

II. APPLICABLE LAW

To prevail on a motion for summary judgment dismissing a cause of action, the defendant “bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action.” (*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the defendant meets this burden, the plaintiff must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Pursuant to CPLR 3212(f), the court may deny a motion for summary judgment as

premature if it “appear[s] from affidavits submitted in opposition to the motion . . . that facts essential to justify opposition may exist but cannot then be stated,” especially where the facts are in the exclusive knowledge and control of the moving party. (*Worley v Safemove Rental*, 120 AD3d 667, 668 [2d Dept 2014]).

To establish a *prima facie* cause of action for injuries resulting from a slip and fall, the plaintiff must prove that the defendant either created the condition which caused the accident or that it had actual or constructive notice of it and a reasonable time within which to correct it. (*Campanella v 1955 Corp.*, 300 AD2d 427 [2d Dept 2002]). “Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises.” (*Branch v County of Sullivan*, 25 NY3d 1079, 1082 [2015], citing *Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]; see also *Mitchell v Icolari*, 108 AD3d 600, 601 [2d Dept 2013]). Absent any of these conditions, the defendant may not be held liable for the dangerous or defective condition on the property. (*Hickman v Medina*, 114 AD3d 907, 907 [2d Dept 2014]).

One who contracts with an owner of real property may be liable in tort to third parties if “the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (*Church ex rel. Smith v Callanan Indus.*, 99 NY2d 104, 112 [2002], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002]; *Powell v HIS Contractors, Inc.*, 75 AD3d 463, 464 [1st Dept 2010]), and the contractual undertaking must be “comprehensive and exclusive” (*Megaro v Pfizer, Inc.*, 116 AD3d 427, 427 [1st Dept 2014]; *Cahn v Ward Trucking, Inc.*, 101 AD3d 458, 459 [1st Dept 2012]).

III. CRAFT'S MOTION

A. Contentions

In support of summary dismissal, Craft denies that it owned or managed the area of the premises where the accident occurred and argues that it thus owes no duty to plaintiff, relying on the affidavit of its executive director of finance who adds that Craft owned three restaurants at the time of the accident, none of which was Riverpark, and that Craft was “not a party to any lease or contract regarding ownership, possession, maintenance, control, cleaning or repair of any part of the premises.” (NYSCEF 37-38).

In opposition, plaintiffs contend that Craft's motion is premature absent discovery that may reveal its control over the subject premises, contractually or otherwise. Plaintiffs produce a website printout which they allege shows that Craft's owner/chef owned an interest in Riverpark as of 2010, and thus maintain that additional discovery will reveal the extent of Craft's ownership in Riverpark, if any, when and if and from whom it purchased Riverpark, and whether it assumed any of Riverpark's liabilities. (NYSCEF 59, 65-66).

In reply, Craft argues that the 2010 management agreement demonstrates that Cluster solely owned or leased the premises at the time of the accident, and thus only Cluster, Witchcraft, or ARE-East would possess relevant documents concerning ownership and control of the premises. It also contends that the 2015 website does not prove that it owned or controlled Riverpark, as the printout was obtained four years after the accident and evidences only the date on which Riverpark opened. (NYSCEF 75).

Moreover, in an affidavit dated August 26, 2015, Craft's executive director of finance attests that Craft “became involved in the ownership” of Riverpark on June 29, 2015, following

the expiration of the 2010 agreement between Witchcraft and Cluster, and claims that on the same day, a nonparty subsidiary of Craft entered into a lease with ARE-East. He contends that the chef was a member of both Witchcraft and Craft, that he “opened” Riverpark in 2010 in his capacity as a member of Witchcraft only, that Witchcraft alone managed the restaurant from 2010 to 2015, and that Craft thus was not a party to any agreement evidencing that it owned or operated Riverpark during that period and possesses no pertinent documents. (NYSCEF 76).

B. Analysis

The 2010 management agreement reflects that on the date of the accident, Witchcraft alone managed Riverpark, and that Cluster owned or leased the space occupied by the restaurant, which is consistent with the affidavits of Craft’s executive director of finance. Thus, Craft establishes, *prima facie*, that it did not own, occupy, control, or specially use any part of the premises at the time of plaintiff’s accident. (*Cf. Kreimer v Rockefeller Group, Inc.*, 2 AD3d 407, 408 [2d Dept 2003] [defendant did not meet *prima facie* burden with unsubstantiated and conclusory affidavit by principal stating that defendant lacked control over premises or accident site and failed to submit lease or other documentation evidencing lack of control]; *see also Kydd v Daarta Realty Corp.*, 60 AD3d 997, 998-999 [2d Dept 2009] [defendant established, *prima facie*, that he had no control over premises given testimony that he did not become managing agent thereof until after plaintiff’s injury]).

Nonetheless, as Craft concedes that the chef is a member of both Craft and Witchcraft and that he opened Riverpark, thereby connoting Craft’s proprietary interest in Riverpark that is not ruled out by the management agreement, a triable issue of fact is raised as to the extent of its ownership and/or control of Riverpark. Additionally, as Craft does not provide its subsidiary’s

2015 lease with ARE-East, which purportedly evidences that it only assumed ownership and/or control of Riverpark in 2015, there also exists a basis for further discovery.

IV. WITCHCRAFT'S MOTION

A. Contentions

Witchcraft argues that it neither owned nor possessed any portion of the premises identified in plaintiff's bill of particulars, and that pursuant to its management agreement with Cluster, it had no contractual duty to repair and/or maintain the lobby restrooms, nor were the restrooms established for its benefit. It relies on the affidavit of its principal, who also alleges, on information and belief, that Alexandria owned the subject premises and ambient common areas and hired ABM to clean and maintain the lobby restrooms. Absent factual issues, Witchcraft contends that further discovery is unnecessary. (NYSCEF 48).

In opposition, plaintiffs argue that Craft's website reflects possible common ownership between Craft and Witchcraft that they are entitled to explore in discovery, and that the 2010 agreement demonstrates that Witchcraft operated its business at the premises and that issues of fact remain as to the extent of its control over the premises. (NYSCEF 67).

In their opposition, the Alexandria defendants argue that Witchcraft may be held liable for hiring the restroom attendant who was on duty at the time of the accident and for plaintiff's intoxication. They rely on the incident report, wherein a Riverpark employee indicates that a Riverpark restroom attendant finished his or her shift 90 minutes before plaintiff's accident, raising a possibility that the attendant created the hazardous condition. They also offer the affidavit of a site supervisor/fire safety director at the premises, who attests that he witnessed members of plaintiff's party "giggling" after the incident and that "it was obvious that alcohol

was consumed by [plaintiff] and everyone who laughed with her.” They contend that the extent of plaintiff’s intoxication should be explored in discovery. (NYSCEF 81-83).

In reply, Witchcraft contends that it is beyond dispute that it neither owned nor possessed any portion of the premises, and relies on the incident report as evidence that ABM likely created the condition that caused plaintiff’s accident. And, absent any underlying allegation of how much alcohol it served plaintiff or the extent of her intoxication, the issue is immaterial and creates no issue of fact. Witchcraft reiterates its remaining contentions. (NYSCEF 77, 89).

B. Analysis

The 2010 management agreement establishes, *prima facie*, that Witchcraft’s maintenance obligations were not comprehensive and exclusive, were limited to those portions of the premises comprising the restaurant, café, and catering area, and did not extend to common areas, including the lobby (*see DeCoursey v Briarcliff Cong. Church*, 104 AD3d 799, 801 [2d Dept 2013] [defendant demonstrated *prima facie* no contractual obligation to maintain common area and no exclusive right to possession of exterior stairway, which it was permitted to use in common with other defendant]; *cf. Kozak v Broadway Joe’s*, 296 AD2d 683, 684 [3d Dept 2002] [lease agreement between owner and property manager established that latter was responsible for maintenance of common areas]), notwithstanding that the lobby restrooms were used by patrons of Riverpark (*see Kubicko v Westchester County Elec., Inc.*, 116 AD3d 737, 739 [2d Dept 2014] [“(Defendant) established, *prima facie*, that it had no exclusive right to use the loading dock, but was merely permitted to use that area in common with other tenants, . . .”). To the extent plaintiffs rely on Craft’s website to demonstrate Witchcraft’s interest in Riverpark, a point not disputed by Witchcraft, they fail to raise any factual issues regarding the extent of Witchcraft’s

control of the restrooms.

The incident report on which the Alexandria defendants rely, however, reflects that Riverpark engaged an attendant to clean the lobby restrooms each evening, thus raising a triable issue as to Witchcraft's control over this area of the premises. (*See Chestnut v Aramark Facility Servs., LLC*, 111 AD3d 510, 511 [1st Dept 2013] [triable issue of fact regarding whether defendant assumed control over premises by providing housecleaning staffing]; *Marrone v S. Shore Props.*, 29 AD3d 961, 962 [2d Dept 2006] [plaintiff raised triable issue as to defendant's ownership or control of premises "by showing that (it) had retained a service to clean the subject premises"]).

Given this result, I need not consider the Alexandria defendants' remaining contentions.

V. CROSS CLAIMS

As Craft and Witchcraft raise no arguments in support of dismissal of the cross claims asserted against them, those branches of their respective motions are denied. (*See Bd. of Mrgs. of Caton Ct. Condominium v Caton Dev. LP*, 41 Misc 3d 1231[A], 2013 NY Slip Op 51951[U], *10 [Sup Ct, Kings County 2013] [defendants made no arguments supporting dismissal of several causes of action, which thus survived defendants' motion]).

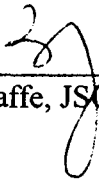
VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Craft Worldwide Holdings, LLC's motion for an order summarily dismissing the complaint and all cross claims against it is denied; it is further

ORDERED, that defendant Witchcraft Operating, LLC's motion for an order summarily dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED, that the parties shall appear for a preliminary conference in Room 279, 80
Centre Street on April 20, 2016, at 2:15 p.m.



Barbara Jaffe, JSC

DATED: April 1, 2016
New York, New York