

**McDonald v Flatbush Delaware Holding LLC**

2016 NY Slip Op 30582(U)

April 8, 2016

Supreme Court, New York County

Docket Number: 451684/2015

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

<u>JEAN MCDONALD,</u>	INDEX NO.	<u>451684/2015</u>
Plaintiff,	MOTION DATE	<u>02-17-2016</u>
- against -	MOTION SEQ. NO.	<u>004</u>
	MOTION CAL. NO.	<u>                    </u>

**FLATBUSH DELAWARE HOLDING LLC and  
THE STOP & SHOP SUPERMARKET COMPANY, LLC**  
  
Defendants.

The following papers, numbered 1 to 9 were read on this motion for change of venue and summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-7</u>
Replying Affidavits _____	<u>8-9</u>

**Cross-Motion:     Yes     No**

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment dismissing the complaint as to Defendant Flatbush Delaware Holding, LLC is granted, and the motion for a change of venue from New York County to Westchester County is granted.

Plaintiff, a resident of the County of Westchester, brought this action in Kings County against defendant Flatbush Delaware Holding LLC (herein "Flatbush") to recover for personal injuries sustained for a fall in a supermarket located at 1007 Flatbush Avenue, Brooklyn, New York (herein "The Premises"). (see Summons and Complaint- Mot. Exh. A; see also Answer- Mot. Exh. B). Flatbush is a foreign limited liability company with its principal place of business located in New York County and is the out of possession owner/landlord of the premises. Flatbush made a motion to change venue to Westchester County based on Plaintiff's residence, and in an Order dated April 27, 2015, the Supreme Court in Kings County changed venue, sua sponte, to New York County based on Flatbush maintaining its principal place of business there. (see Mot. Exh. C).

After venue was transferred to New York County, Plaintiff moved for leave to serve an amended verified complaint and add Stop and Shop Supermarket Company, LLC (herein "Stop and Shop") as an additional defendant. This Court granted Plaintiff's motion, on default, in an Order dated August 10, 2015. (see Mot. Exh. D). Plaintiff served the amended complaint (Mot. Exh. E) and Stop and Shop answered (Mot. Exh. F).

Defendants now move for an Order granting summary judgment dismissing the complaint as to Flatbush, and for change of venue from New York County to Westchester County. Plaintiff opposes Flatbush's motion and cross-moves for a change of venue from New York County to Kings County.

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

Flatbush has maintained throughout the instant action that it is an out of possession landlord of the subject premises that is leased to Stop & Shop. (Aff. In Supp. P 3). Initially, the lease of the premises was between Forest City Tilden Associates, L.P. as landlord and Mayfair Supermarkets, Inc. as tenant. (Id.) By an assignment and assumption dated August 9, 2004, all rights, title and interest were granted to Flatbush as lessor. (Id.). Pursuant to the lease terms, Stop and Shop has "exclusive possession and control of the premises, including the area of plaintiff's incident." (Id; see also Lease attached as Exh. G). The lease terms further provide that the tenant of the subject premises is responsible for "the supervision, maintenance, and repair of said premises. (Mot. Exh. G P 17). Specifically, "Tenant shall maintain the interior of the Demised Premises in good order and condition and shall make all repairs to the Demised Premises.." (Aff. In Supp. P 4 and Mot. Exh. G P 17 ¶9.3).

Further, Milton Sonneberg, property manager of Flatbush, asserts that Flatbush is the "Owner of the structure located at 1007 Flatbush Ave..." and that "Flatbush never undertook any inspections, maintenance activities, or participated in any day to day operations regarding the operation of the supermarket." (see Aff. In Supp. P 3; see also Sonneberg Aff.).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

As an out-of-possession landlord a defendant is entitled to summary judgment dismissing the complaint as against them when the lease specifically places responsibility for everyday maintenance and repairs on the tenant. Thomas, et al., v. Fairfield Investors, et al., 273 A.D.2d 118, 709 N.Y.S.2d 180 (1<sup>st</sup> Dept. 2000). "Generally, an out-of-possession landlord is not responsible for correcting defective conditions unless they are significant structural failures or specific statutory violations." Id., citing Quinones v. 27 Third City King Rest., et al., 198 A.D.2d 23, 603 N.Y.S.2d 130 (1<sup>st</sup> Dept. 1993). "A landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs..." Babich v. R.G.T. Restaurant Corp., 75 A.D.3d 439, 906 N.Y.S.2d 528 (1<sup>st</sup> Dept. 2010), citing Johnson v. Urena Serv. Ctr., 227 A.D.2d 325, 326, 642 N.Y.S.2d 897 (1<sup>st</sup> Dept. 1996).

Here, Flatbush has made a prima facie showing that it was not in possession or control of the subject premises, nor the interior area of the demised premises where plaintiff is alleged to have slipped and fell. Flatbush did not retain any responsibility to maintain or repair the interior of the premises and therefore Flatbush owed no duty to

the plaintiff. Therefore, summary judgment dismissing the complaint as to defendant Flatbush is proper.

In dismissing Flatbush from the action, defendants contend that New York County is no longer a proper venue because there is no nexus between New York County and any party in this action. (see Aff. In Supp. PP 6-7 and the exhs. attached thereto). Proper venue, therefore, would be Westchester County based on Plaintiff's residence. (Id.) Stop and Shop is a Delaware limited liability company, with its sole member being a Maryland corporation and its sole shareholder being a Delaware corporation with an Amsterdam, The Netherlands, business address. (Id.).

Plaintiff in its opposition and cross-motion argues that the proper venue is Kings County based solely on the grounds that this is where the incident occurred. (see Plaintiff's Cross-Mot. and Aff. In Opp. and the exhibits attached thereto). Further, Plaintiff contends that CPLR 509 provides that the place of trial is the county designated by Plaintiff, and because Plaintiff originally brought this action in Kings County based on the cause of action arising there, Kings County is the proper venue. (Id.).

Plaintiff's argument, however, is misplaced. CPLR 503(a) provides that "...the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff." CPLR 509 does not give a plaintiff, who resides within the state, the ability to pick a venue other than one in which either of the parties resides. In the Court Order of April 27, 2015, transferring venue from Kings County to New York County, that Court based the venue change on the fact that CPLR 503(a) "requires the action to be brought in a county where one of the parties resides." (see Def. Reply Aff. and Exh. 1 attached thereto).

"In those cases where venue is placed on the basis of the principal place of business of an improper party, a motion to change venue should be granted after the action is dismissed against the improper party." Clase v. Sidoti, 20 A.D.3d 330, 799 N.Y.S.2d 194 (1<sup>st</sup> Dept. 2005), citing Chow, et al., v. Long Isl. RR., et al., 202 A.D.2d 154, 608 N.Y.S.2d 186 (1<sup>st</sup> Dept. 1994).

In finding that summary judgment to dismiss the complaint against Defendant Flatbush is proper, Flatbush is an improper party and basing venue on its principal place of business no longer stands. Since venue must be placed at a party's residence, and being that Plaintiff is a resident of Westchester County and is the only party that resides within the state, the proper venue therefore is Westchester County.

Plaintiff's remaining argument in its opposition as to defendant Flatbush is unavailing and does not raise triable issues of fact as to whether or not Flatbush owed Plaintiff a duty upon which the claims in the complaint may stand.

Accordingly, it is hereby ORDERED that the motion for summary judgment dismissing the action as to Defendant Flatbush is granted, and the motion for a change of venue from New York County to Westchester County is granted, and it is further,

**ORDERED**, that Defendant's cross-motion for change of venue from New York County to Kings County is denied, and it is further,

**ORDERED**, that the cause of action in the Second Amended Complaint asserted against Defendant Flatbush is hereby dismissed, and it is further,

**ORDERED**, that the venue of this action is changed from this court to the Supreme Court, County of Westchester, and it is further,


**ORDERED**, that the action shall continue to trial as to the remaining defendant Stop and Shop, and it is further,

**ORDERED**, that Defendants shall serve a copy of this Order with Notice of Entry within 30 days from the date of entry of this Order upon all parties, the County Clerk and the General Clerk's Office Trial Support Clerk, and it is further,

**ORDERED** that the clerk of this court is **DIRECTED** to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester upon service of a copy of this Order with Notice of Entry and payment of the appropriate fees, if any.

Dated: April 8, 2016

ENTER:

  
\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

**MANUEL J. MENDEZ**  
J.S.C.

Check one:     **FINAL DISPOSITION**     **NON-FINAL DISPOSITION**

Check if appropriate:     **DO NOT POST**                       **REFERENCE**