Platho Deli Grocery, Inc. v 65th Place Realty Corp.
2016 NY Slip Op 32099(U)
September 29, 2016
Supreme Court, Queens County
Docket Number: 27979/11
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

PLATHO DELI GROCERY, INC.,

Plaintiffs,

-against-

65TH PLACE REALTY CORP., AND 65TH PLACE REST. INC.,

Defendants.

65TH PLACE REST. INC.,

Third-party Plaintiff,

-against-

KITCHEN SUPREME CO. AND CHIEF FIRE PREVENTION & MECHANICAL CORP.,

Third-party Defendants.

Index No: 27979/11

Motion Date: May 17, 2016

Motion Seq. No.: 5 & 6

The following papers numbered 1 to 50 read on this motion by defendant and third-party plaintiff 65th Place Rest. Inc. (Restaurant) for summary judgment dismissing the complaint and all cross claims against it; and on this motion by third-party defendant Chief Fire Prevention & Mechanical Corp. (Chief) for summary judgment dismissing the third-party complaint against it; and on this motion by defendant 65th Place Realty Corp. (Realty) for summary judgment dismissing the complaint and all cross claims against it; and on this cross motion by plaintiff for leave to amend the complaint pursuant to CPLR 3025.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits ..... 1 - 12
Notice of Cross Motion - Affidavits - Exhibits ..... 13 - 16
Answering Affidavits - Exhibits ..... 17 - 41
Reply Affidavits ..... 42 - 50

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action arising out of a fire which occurred on May 2, 2011 at 64-21 53rd Drive in Maspeth, New York. Realty is the owner of the subject property. It is alleged that, as a result of the fire which started in the kitchen located in the basement of the restaurant occupied by Restaurant, the restaurant as well as several buildings adjacent to it sustained damage. According to the fire incident report prepared by the Bureau of Fire Investigation, FDNY, dated June 8, 2012, the fire started in an upright broiler and spread in the duct work due to a buildup of grease in the ducts. Plaintiff, one of the adjacent buildings, subsequently commenced the within action against defendants, alleging causes of action for negligence, nuisance, and trespass. Thereafter, Restaurant instituted a third-party action against Chief and third-party defendant Kitchen Supreme Co. (Kitchen Supreme) for contractual indemnification and common-law indemnification. Pursuant to an order of this court dated April 29, 2013, the instant action along with six other actions related to the same incident were consolidated for purposes of joint trial.

Initially, the court will address plaintiff's cross motion to amend the complaint. Leave to amend a complaint should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit or where the delay in seeking the amendment would cause prejudice or surprise (CPLR 3025[b]). In this case, plaintiff seeks leave to amend the complaint to assert a cause of action for breach of contract against Realty. This court finds, however, that the extensive delay in seeking an amendment at this late stage of litigation would cause Realty substantial prejudice and surprise. Plaintiff permitted five years to elapse since the action was commenced, during which time discovery proceeded on its original claims of negligence, nuisance, and trespass. The note of issue was then filed in March 2013. Three years after discovery has been completed, plaintiff now seeks to amend the complaint to allege a new legal theory without providing a reasonable excuse for the delay. In view of the foregoing, plaintiff's cross motion to amend the complaint is denied.

Next, the court turns to Restaurant's motion for summary judgment dismissing the complaint against it. A tenant in possession of real property has a common-law duty to

maintain the demised premises in a reasonably safe condition, independent of any obligations that might be imposed by the terms of a lease with the landlord (*see Williams v Esor Realty Co.*, 117 AD3d 480 [2014]; *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 1009 [2011]). To prevail on a motion for summary judgment in a premises liability case, a defendant in possession or control of real property bears the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (*see Pampalone v FBE Van Dam, LLC*, 123 AD3d 988 [2014]; *Guilfoyle v Parkash*, 123 AD3d 1088 [2014]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant, in the exercise of reasonable care, to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Furthermore, the issue of actual or constructive notice is irrelevant where the defendant has a duty to conduct reasonable inspections of the premises and failed to do so (*see Weller v Colleges of the Senecas*, 217 AD2d 280 [1995]).

In support of its motion, Restaurant argues that it did not have actual or constructive notice of the alleged dangerous condition, that is, the buildup of grease in the kitchen exhaust system, which caused the subject fire because it hired an outside contractor, Kitchen Supreme, to clean the hoods and duct ventilation system in the basement kitchen of the restaurant. According to Danny Pyle's deposition testimony, Restaurant contacted Kitchen Supreme, with which Restaurant did not have a contract, to clean the hoods and duct work in the basement kitchen of the restaurant every three months. Danny Pyle testified that Kitchen Supreme last cleaned the hoods and duct work in the basement kitchen of the premises on April 29, 2011, three days before the subject fire. In his affidavit, Gerard Ledwith, a certified fire investigator, stated that his personal inspections of the fire scene revealed physical evidence of heavy accumulations of grease throughout the kitchen exhaust system, which could not have accumulated in such a short period of time, that, in his opinion, the hood and horizontal ducts above the cooking line were not cleaned properly by Kitchen Supreme and, that the fire extension to the structural components of the building, from the basement kitchen to the rooftop at the other end of the building, was caused by a rapid and intense grease fire within the duct work. Noticeably absent from Restaurant's moving papers is any evidence as to the lack of Restaurant's constructive notice of the buildup of grease in the kitchen exhaust system. The mere fact that Restaurant hired a third party to periodically clean the kitchen exhaust system does not exempt Restaurant from liability as a matter of law (*see Zuckerman v State*, 209 AD2d 510, 511-512 [1994]). Restaurant, as a possessor of property, had a common-law duty to make reasonable efforts to inspect the premises to determine the presence of dangerous conditions, such as a buildup of grease in the hoods and duct work in the basement kitchen of the restaurant (*id.* at 512). Indeed, Restaurant's own expert stated in his affidavit that the significant amount of grease present in the kitchen exhaust system had not accumulated in the three days between the date of the last cleaning

by Kitchen Supreme and the date of the fire. Likewise, Gene West, a certified fire investigator, and John Titus, a professional fire protection engineer, whose affidavits were offered in opposition to the motion, opined that the grease accumulations in the kitchen ducts and vents and the grease residue visible on the cooking appliance surfaces occurred over a protracted period of time. As such, triable issues are raised, at least, as to whether Restaurant had, or should have had, constructive notice of the dangerous condition of a buildup of grease in the duct work prior to the fire. Additionally, the affidavits of West and Titus disclose questions of fact as to whether Restaurant was negligent in operating the subject premises by undertaking inappropriate actions upon discovery of the fire in failing to manually activate the fire suppression system and using water in an attempt to control or suppress the grease fire, and by improperly constructing the kitchen ventilation system such that certain duct openings were inaccessible for cleaning. In light of the existence of numerous factual issues with respect to Restaurant's negligence, summary judgment is precluded.

Realty's motion for summary judgment dismissing the complaint against it is denied. In support of its motion, Realty primarily contends that, as an out-of-possession landlord, it cannot be held liable for the fire resulting from a dangerous condition on the subject premises. Generally, an out-of-possession owner is not liable for a dangerous condition which exists on the leased premises unless the owner has retained control over the premises or is contractually or statutorily obligated to repair unsafe conditions (*see Martin v I Bldg Co., Inc.*, 126 AD3d 861 [2015]; *Lindquist v C & C Landscape Contrs., Inc.*, 38 AD3d 616 [2007]). Control of the premises may be established by proof of the landlord's promise, either written or otherwise, to keep certain premises in good repair, a statute imposing liability, or a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*see Ritto v Goldberg*, 27 NY2d 887, 889 [1970]; *Lugo v Austin-Forest Assoc.*, 99 AD3d 865, 866 [2012]; *Repetto v Alblan Realty Corp.*, 97 AD3d 735, 737 [2012]; *Healy v Bartolomei*, 87 AD3d 1112 [2011]; *Taylor v Lastres*, 45 AD3d 835 [2007]; *Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845 [2006]). An out-of-possession owner may also be liable if it has a contractual "right to reenter, inspect and make repairs," and the dangerous condition "involve[s] a significant structural or design defect contrary to a specific statutory provision" (*Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [2011]; *Babich v R.G. T. Rest. Corp.*, 75 AD3d 439, 440 [2010]; *Rhian v PABR Assoc., LLC*, 38 AD3d 637 [2007]; *Bouima v Dacomi, Inc.*, 36 AD3d 739 [2007]; *Thompson v Port Auth. of N.Y. & N.J.*, 305 AD2d 581 [2003]).

The only proof Realty offered on the issue of whether it is an out-of-possession landlord is the affidavit and deposition testimony of George Pyle, Realty's president, and the deposition testimony of Danny Pyle, Restaurant's owner. At their depositions, both George Pyle and Danny Pyle testified that there was no written lease agreement between Realty and

Restaurant at the time of the fire. Additionally, George Pyle testified at his deposition that there was no other agreement, in writing or otherwise, between Realty and Restaurant on the date of the fire. However, in his affidavit submitted on Realty's motion, George Pyle averred that Realty and Restaurant had an oral lease agreement since 1991, that, pursuant to said oral lease agreement, Restaurant was responsible for the installation, maintenance, inspection, and servicing of the fire suppression system, ducts, ventilation system, and kitchen equipment located in the restaurant, that Realty retained no responsibility over the fire suppression system, ducts, ventilation system, and kitchen equipment located in the restaurant, and that Realty did not retain a right of re-entry onto the premises. This court finds that the self-serving affidavit of George Pyle is an attempt to raise feigned factual issues designed to avoid the consequences of his prior deposition testimony and, thus, will not be considered in deciding summary judgment (*see Lupinsky v Windham Constr. Corp.*, 293 AD2d 317 [2002]; *Joe v Orbit Indus.*, 269 AD2d 121 [2000]; *see e.g. Semple v Sterling Estates*, 300 AD2d 297 [2002]; *Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2002]). Absent proof of a written lease or any other written agreement between Realty and Restaurant, the court is unable to ascertain the rights and responsibilities of the parties with respect to maintenance of the subject premises and, in particular, the kitchen exhaust system and fire suppression system in the basement kitchen of the restaurant. In view of the foregoing, it cannot be determined as a matter of law whether Realty is an out-of-possession landlord lacking control over the subject premises (*see e.g. Woods v Daniella Realty Corp.*, 15 AD3d 231 [2005]; *Thompson v Corbett*, 13 AD3d 1060, 1061-1062 [2004]; *Kreimer v Rockefeller Group*, 2 AD3d 407 [2003]; *English v B.P.M. Realty Co.*, 15 Misc 3d 1126[A] [Sup Ct, Richmond County 2007]).

Turning to those branches of Restaurant and Realty's separate motions for summary judgment dismissing the causes of action for nuisance and trespass asserted against them, defendants established their entitlement to judgment as a matter of law. In opposition, plaintiff failed to raise a triable issue of fact. "Private nuisance is established by proof of intentional action or inaction that substantially and unreasonably interferes with other people's use and enjoyment of their property" (*Nemeth v K-Tooling*, 100 AD3d 1271, 1272 [2012]). As a private nuisance claim involves the right to use and enjoy the land in question, no actual intrusion onto the plaintiff's property is required (*see Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 856 [2012]) and no actual damage to the property itself need be shown (*see Ivory v International Bus. Machines Corp.*, 116 AD3d 121, 131 [2014]). Trespass, on the other hand, involves an intentional entry onto the land of another without justification or permission (*see Marone v Kally*, 109 AD3d 880, 882-883 [2013]). Here, there are no facts in the record tending to show that Restaurant and/or Realty had the requisite willful intent to establish claims for nuisance and trespass against them. As such, those branches of Restaurant and Realty's separate motions for summary judgment

dismissing plaintiff's causes of action for nuisance and trespass asserted against them are granted.

That branch of Chief's motion for summary judgment dismissing the third-party cause of action for common-law indemnification asserted against it is denied. Summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved (*see Tzic v Kasampas*, 93 AD3d 438 [2012]; *Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027 [2009]; *Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 [2006]). As previously discussed, there are issues of fact as to the alleged negligence of Restaurant and Realty in the happening of the subject fire. Moreover, based on a careful review of the evidence in the record, the conflicting opinions of the various experts regarding their respective inspections of the fire suppression system at the restaurant, reveal issues of fact as to whether the fire suppression system was negligently installed and/or maintained by Chief. In their affidavits, Thomas W. Ryan, a certified fire and explosion investigator, and Bruce L. Rottner, a certified safety professional and certified fire and explosion investigator, opined that, based on their examinations of the subject fire scene, the fire suppression system installed by Chief at Restaurant properly discharged as designed at the time of the fire. Rottner further stated that, following the March 2011 inspection, Chief had no obligation to report the condition of heavy grease accumulations in the basement kitchen of the restaurant. Conversely, Kenneth M. Garside, a professional engineer and licensed fire protection inspector, opined in his affidavit that, based on his fire scene inspections, Chief failed to properly service the fire suppression system as the system did not activate in a timely manner since the fire had already spread throughout the ducts and into the other areas of the ventilation system by the time the fire suppression system discharged. Garside stated that Chief failed to install the correct fusible links for the subject fire suppression system because it installed a 450° F fusible link, whereas the design specifications required that a 360° F fusible link be installed, thereby causing a delay in the activation of the fire suppression system at the time of the fire. Similarly, in their affidavits, West and Titus concluded that the subject fire suppression system failed to extinguish the fire expeditiously or effectively before it extended beyond the broiler compartment. In addition, West opined that the grease accumulations on the appliances, at the base of the grease ducts, in the void between the grease ducts and ventilation ducts, and on the fire suppression system piping, nozzles and other components were present and easily visible at the time of Chief's March 2011 inspection at the restaurant, and the fire protection technicians had an obligation to report those conditions to the restaurant staff/owner, particularly in light of the fact that the grease deposits are an obvious fire hazard and had the potential to adversely affect the operation of the fire suppression system. Under these circumstances, a determination of the third-party claim for common-law indemnification asserted against Chief would be premature at this juncture.

Furthermore, that branch of Chief's motion for summary judgment dismissing the third-party claim for contractual indemnification against it is denied. Chief failed to address that issue in its moving papers and failed to submit any evidence to demonstrate its entitlement to judgment as a matter of law.

Accordingly, those branches of Restaurant and Realty's separate motions for summary judgment dismissing the causes of action for nuisance and trespass asserted against them are granted. In all other respects, the motions are denied. Plaintiff's cross motion for leave to amend the complaint is denied.

Dated: September 29, 2016

J.S.C.