Bowen v A&P Real Prop., LLC
2018 NY Slip Op 32713(U)
September 26, 2018
Supreme Court, Kings County
Docket Number: 504747/2016
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of September, 2018.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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MERISE BOWEN,

Plaintiff,

Index No.: 504747/2016

-against-

Decision and Order

A&P REAL PROPERTY, LLC and M & K REAL ESTATE ASSOCIATES, LLC,

Defendants.

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The following *papers* numbered 1 to 3 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendants, M & K REAL ESTATE ASSOCIATES, LLC move this court pursuant to CPLR 3212 for summary judgment against the plaintiff MERISE BOWEN dismissing plaintiff's complaint asserted against these defendants on the grounds that defendant M & K REAL ESTATE ASSOCIATES, LLC is an out of possession landlord and that there

M3
M2

is no admissible proof that defendant M & K REAL ESTATE ASSOCIATES, LLC has notice of the alleged condition prior to the accident. Plaintiff MERISE BOWEN opposes the same contending there are material issues of fact, the defendant has failed to show it relinquished control.

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986].) Issue finding rather than issue determination is its function (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957].) The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Here, the affidavit of the property manager, Erwin Holzli, indicate that the defendants M & K REAL ESTATE ASSOCIATES, LLC, were an out of possession landlord of the premises where the accident occurred; the tenant of the premises at the time of the accident was defendant A&P Real Property, LLC; pursuant to the lease agreement the tenant was responsible for the maintenance of the interior of the premises; no one on behalf of M & K REAL ESTATE ASSOCIATES, LLC was present on the date of the incident and never saw the alleged condition nor was anyone on behalf of M & K

REAL ESTATE ASSOCIATES, LLC aware that the alleged condition ever existed, nor were there any complaints of said condition made to M & K REAL ESTATE ASSOCIATES, LLC establishing their prima facie entitlement to judgment as a matter of law. "An out-of-possession landlord owes no duty to maintain and make repairs upon demised property unless he retains control over the property or is contractually obligated to perform such maintenance and repairs" (see, e.g., *Ritto v Goldberg*, 27 NY2d 887, 889; see also, *Putnam v Stout*, 38 NY2d 607, 617; *Dalzell v McDonald's Corp.*, 220 AD2d 638; *Dufficy v Wharf Bar & Grill*, 217 AD2d 646; *Schlesinger v Rockefeller Ctr.*, 119 AD2d 462); *D'Orlando v. Port Auth. of New York & New Jersey*, 250 A.D.2d 805, 674 N.Y.S.2d 382 (1998) (*see, Ortiz v. RVC Realty Co.*, 253 AD2d 802, 677 NYS2d 598; *Aprea v. Carol Mgt. Corp.*, 190 AD2d 838, 594 NYS2d 53; *Allan v. DHL Exp. (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275; *Comes v. New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168, 631 NE2d 110; *Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317, 445 NYS2d 127, 429 NE2d 805; *Pilato v. 866 U.N. Plaza Assoc., LLC*, 77 AD3d at 646, 909 NYS2d 80; *Jenkins v. Walter Realty, Inc.*, 71 AD3d 954, 898 NYS2d 56; *Enos v. Werlatone, Inc.*, 68 AD3d 712, 888 NYS2d 902; *Ortega v. Puccia*, 57 AD3d at 62–63, 866 NYS2d 323)..

In opposition, the plaintiff MERISE BOWEN failed to raise a triable issue of fact because they fail to submit an admissible affidavit by the plaintiff, MERISE BOWEN and instead only submit an attorney affirmation. (*see Sehgal v. www.nyairportsbus.com, Inc.*,100 AD3d 860, 955 NYS2d 604, 2012 NY Slip Op.; *Hanakis v. DeCarlo*, 98 AD3d at 1084, 951 NYS2d 206; *Perez v. Brux Cab Corp.*, 251 AD2d 157, 159, 674 NYS2d 343).

The attorney affirmations submitted by plaintiff MERISE BOWEN, which were not based on personal knowledge of the facts, have no probative value (*see, Skinner v. City of Glen Cove,* 216 AD2d 381, 628 NYS2d 719; *Thoma v. Ronai,* 189 AD2d 635, 592 NYS2d 333, *affd.* 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690). *Bendik v. Dybowski*, 227 AD2d 228, 229, 642 NYS2d 284, 286 (1996)

Accordingly, defendant's request to dismiss the plaintiff's complaint as against them is hereby Granted, pursuant to CPLR 3212 as the plaintiff MERISE BOWEN has failed to raise a triable issue of fact.

Accordingly, Plaintiff, MERISE BOWEN request to deny Defendants application is hereby Denied.

This constitutes the Decision/Order of the Court.

Date: September 26, 2018

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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