

Shaheen v YYY Third Ave. LLC.
2019 NY Slip Op 31141(U)
April 17, 2019
Supreme Court, New York County
Docket Number: 159280/2018
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

INDEX NO. 159280/2018

ISSAM SHAHEEN and HIND SHAHEEN,

MOTION DATE 01/07/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

YYY THIRD AVENUE LLC., ZZZ THIRD AVENUE LLC., JOY
CONSTRUCTION CORPORATION, 74-84 THIRD AVENUE
CORPORATION, ROSE ASSOCIATES, INC., and WAFRA
INVESTMENT ADVISORY GROUP, INC.

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISS.

In this action to recover damages for personal injuries arising from a 2017 slip-and-fall accident in a mixed-use residential/commercial building (the building), the defendants YYY Third Avenue, LLC (YYY), and ZZZ Third Avenue, LLC (ZZZ) (together the movants), move pursuant to CPLR 3211(a)(1) to dismiss the complaint and all cross claims against them on the ground that documentary evidence conclusively establishes a defense to the action. The plaintiffs oppose the motion, but the cross claimants do not. The motion is granted.

In the first instance, the plaintiffs did not appear at the calendar call of the motion. Although the court has discretion to grant the motion on default insofar as it seeks relief against them as a sanction for their failure to appear (see 22 NYCRR 202.27), in light of New York's policy of determining cases on the merits, it will address the merits of the motion.

Pursuant to a memorandum of lease dated February 5, 2012, and recorded March 14, 2012, the defendant owner 74-84 Third Avenue Corporation (74-84) leased the entirety of the building to YYY, as ground lessee. On October 4, 2013, YYY sublet a portion of the ground-floor retail space in the building to 74-84 Westside Market, LLC, to operate a supermarket. The

defendant Joy Construction Corporation allegedly constructed the building, which opened in 2014. In 2014, YYY entered into an agreement with nonparty Wafra Invest Nathaniel, L.P. (Wafra), for the sale of its interest in the ground lease. On February 12, 2015, YYY assigned an undivided 73.72% interest in the ground lease to ZZZ. On February 17, 2015, the sale closed, and the movants together assigned all of their right, title, and interest in the ground lease and the building to Wafra; the written assignment expressly relieved the movants of any ongoing obligations with respect to the premises. Also in 2015, 74-84 released the movants from all liability arising from their tenancy.

On October 13, 2017, the plaintiff Issam Shaheen allegedly slipped and fell on a puddle of water in the first-floor lobby of the building. The movants seek dismissal of the complaint and all cross claims insofar as asserted against them.

The movants submitted documentary evidence, consisting of the 2014 purchase and sale agreement between YYY and Wafra, the 2015 assignments and assumptions of the ground lease, and the notice of recording of those documents, establishing that they relinquished all of their right, title, and interest in and to the ground lease and the building as of February 17, 2015.

"In the most generic terms, a 'ground lease' is any lease made for the rental of unimproved land" (7 Warren's Weed New York Real Property § 84.12), usually for an extended period of time. During its tenancy, a ground tenant has rights in and obligations with respect to the leased property that are akin to those of the fee owner (*see Little Cherry, LLC v Cherry St. Owner, LLC*, 2018 NY Slip Op 32488[U] [Sup Ct, N.Y. County, Oct. 1, 2018]). Liability for failing to maintain premises in a safe condition must be based on occupancy, ownership, control, special use, statutory obligation, or contractual obligation (*see Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57 [1st Dept 2006]). Former owners and, hence, former ground tenants, have no such duty (*see Bittrolff v Ho's Devel. Corp.*, 77 NY2d 896, 898 [1991]; *Scheffield v Vestal Parkway Plaza, LLC*, 139 AD3d 1161, 1163 [3d Dept 2016]), except "where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable

time to discover the condition, if it was unknown, and to remedy the condition once it is known” (*Bittrolff v Ho's Devel. Corp.*, 77 NY2d at 898; see *Privette v Precision El.*, 143 AD3d 639, 640 [1st Dept 2016]; *Armstrong v Ogden Allied Facility Mgmt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]) or the former owner or ground tenant “affirmatively created the dangerous condition” (*Marrero v Marsico*, 218 AD2d 226, 229 [3d Dept 1996]). The puddle of water complained of by the plaintiffs does not fall within this exception.

Under CPLR 3211(a)(1), a dismissal is warranted “if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; see *Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as “documentary,” it must be unambiguous, authentic, and “essentially undeniable” (*Dixon v 105 W. 75th St., LLC*, 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Documents such as deeds, which reflect out-of-court transactions and are essentially unassailable, qualify as “documentary evidence” (see *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 86). A release also qualifies as documentary evidence (see *Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197, 197 [1st Dept 1993]), as does a contract (see *Fontanetta v John Doe 1*, 73 AD3d at 84-85), including an assignment agreement (see *Vasilii v Miller*, 2018 NY Slip Op 32487[U] [Sup Ct, N.Y. County, Oct. 2, 2018]).

The documents submitted by the movants here conclusively establish that they were no longer ground tenants after February 17, 2015, and were thus relieved of any obligation or duty to maintain the land or the building erected thereon after that date. The documents further establish that any obligation that the movants owed to 74-84, or anyone in privity with it, had been released, and that there was no basis for the boilerplate cross claims asserted against them by WIAG, Rose Associates, Inc., and 74-84 for contribution, common-law indemnification, and contractual indemnification.

Contrary to the plaintiffs' contention, the provision in the 2012 memorandum of lease in which YYY agreed to "bind" itself to the terms of the lease does not create a continuing obligation on its part to keep the building in a safe condition even after it relinquished the leasehold, and the plaintiffs point to no language in that memorandum that can be construed to impose such an obligation. Moreover, the fact that the YYY sublet the retail space to 74-84 Westside Market, LLC, in 2013 did not create any continuing obligation on the part of YYY to maintain the premises after it divested itself of any interest in the leasehold in 2015.

The plaintiffs also seek to rely on the Detailed Document Information sheet of a condominium declaration filed with the New York City Register, in which YYY was erroneously designated as "Address 1" for a condominium identified as 84 Third Avenue Condominium. Since the court may take judicial notice of entries made in a web site maintained by a governmental agency (*see Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-20 [2d Dept 2009]), it takes judicial notice of the relevant entries in the Automated City Register Information System (ACRIS) maintained by the New York City Register (*see Herman v 36 Gramercy Park Realty Assocs.*, 2017 NY Slip Op 30385[U] [Sup Ct, N.Y. County, Apr. 21, 2017]; *see also U.S. Bank Natl. Assn. v Martinez*, 54 Misc 3d 1209[A], 2016 NY Slip Op 51584[U] [Sup Ct, Kings County, Oct. 31, 2016]; *141 Sunnyside, LLC v M. Zoarez, Inc.*, 41 Misc 3d 1224[A], 2013 NY Slip Op 51826[U] [Sup Ct, Kings County, Nov. 1, 2013]). The condominium declaration, recorded therein on March 10, 2015, and dated August 8, 2014, reflects that, in 2014, YYY was the proposed sponsor of a condominium entity known as 84 Third Avenue Condominium. There is nothing in the parties' submissions, however, reflecting whether a condominium was actually created, and there is nothing in ACRIS reflecting that any unit in the building was either sold as a condominium unit or owned by YYY or ZZZ. In any event, a sponsor of a condominium may not be held liable for injuries sustained as a result of negligent maintenance of the common areas of the condominium; the board of managers of the condominium, as the owner of the

common elements, is the proper party defendant in this regard, even where the sponsor continued to control the board by virtue of owning a majority of the units (see *Jerdonek v 41 W. 72, LLC*, 143 A.D.3d 43 [1st Dept 2016]; *Pekelnaya v Allyn*, 25 AD3d 111 [1st Dept 2005]; *Puchades v Taube Mgt. Realty, LLC*, 2017 NY Slip Op 30060[U] [Sup Ct, N.Y. County, Jan. 9, 2017]).

Where a defendant establishes with documentary evidence that it has no ownership or occupancy interest in real property, and has been released from any further obligations with respect to it, such as the obligation to maintain it in a safe condition or to secure insurance, further discovery on the issue of any purportedly continuing obligations would be fruitless, and provides no basis on which to deny a motion to dismiss (see *Smith v Andre*, 43 AD3d 770 [1st Dept 2007]).

Accordingly, the motion of the defendants YYY Third Avenue, LLC, and ZZZ Third Avenue, LLC, to dismiss the complaint and all cross claims insofar as asserted against it is granted, and the complaint and all cross claims asserted against the defendants YYY Third Avenue, LLC, and ZZZ Third Avenue, LLC, are dismissed.

This constitutes the Decision and Order of the court.

4/17/2019
DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE