

Cacciuottolo v Brown Harris Steven Mgt.
2019 NY Slip Op 31551(U)
May 28, 2019
Supreme Court, Kings County
Docket Number: 502849/2017
Judge: Peter P. Sweeney
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
COUNTY OF KINGS

Index No.:502849/2017
Motion Date: 3-11-19
Mot. Cal. No.: 11

-----x
VINCENZO CACCIUOTTOLO,
Plaintiff,

-against-

DECISION/ORDER

BROWN HARRIS STEVEN MANAGEMENT,
Defendant,
-----x

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

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, BROWN HARRIS STEVEN MANAGEMENT, moves pursuant to CPLR 3212 for an order awarding it summary judgment dismissing the complaint. Plaintiff, VINCENZO CACCIUOTTOLO, opposes the motion.

This action arises out of an accident that occurred on April 22, 2016, at a residential building located at 340 East 72nd Street, New York, New York. The building is owned by 342 East 72nd Street Corp., plaintiff's employer and managed by the defendant, BROWN HARRIS STEVEN MANAGEMENT. Plaintiff alleges that he was injured when he tripped and fell on a broken tile located just before an interior staircase leading downstairs to the employee locker room. Plaintiff was an employee of East 72nd Street Corp.

ms #02
xmd

Paragraph 2.2 of the management contract between the defendant and East 72nd Street Corp obligated the defendant to “maintain the Building in such condition as may be advisable including...ordinary repairs and alterations...” subject to the following limitations. “Ordinary repairs or alterations involving an expenditure of over Three Thousand (\$3,000) dollars for any one item shall be made only with the prior approval of the Principal (the owner).” All the maintenance and repair work under the contract was to be performed by the employees of 342 East 72nd Street Corp. or independent contractors.

The person who in charge of all the maintenance staff at the building at the time of the accident was Luis Litardo, the building superintendent. He was an employee of East 72nd Street Corp. and had been working at the building for approximately 11 years prior to the accident. The maintenance staff included doormen, porters and handyman that worked in the building all of whom were also employed by East 72nd Street Corp. Although Mr. Litardo reported to Bruce Lebow, the person who managed the building for the defendant, he also took direction from the Board of Directors of building, who would often tell him about issues in the building that had to be addressed. Mr. Litardo had no knowledge of the management agreement between the building owner and the defendant and never saw or reviewed it.

Based on these facts, defendant contends that it was not in exclusive control of the management of the building, and that for this reasons, it is not subject to liability. Plaintiff’s contends that since the management agreement creates triable issues of fact as to whether defendant was is exclusive control of the maintenance and repair the building, the motion must be denied.

In *Tushaj v. 322 Elm Mgmt. Assocs., Inc.*, 293 A.D.2d 44, 45, 740 N.Y.S.2d 40, 41 (1st Dep’t 2002), the question presented was whether a managing agent of a residential apartment building, whose authority to undertake repairs in the building was limited by its contract with the

building's owner, can be liable for injuries incurred by the owner's employee as a result of the agent's failure to undertake repairs that were within its limited contractual authority. The owner's employee was building superintendent, who apparently had some authority to make repairs to the building. While the managing agent had authority to make repairs up to \$500, the repair at issue would have cost only \$12. The Court answered this question in the affirmative.

In *Giarratani v. We're Assocs., Inc.*, 29 A.D.3d 946, 948, 817 N.Y.S.2d 301, 303 [2nd Dep't 2006], the plaintiff was injured when she fell on broken curb and brought personal injury actions against multiple defendants, including a property management company who managed the property for a commercial tenant. In addressing plaintiff's claim against the property management company, the Court held that the property management company failed to demonstrate that the property management services agreement that it had with the tenant occupying the premise "was not comprehensive and exclusive, and did not entirely displace the tenant's duty to maintain the premises in a reasonably safe condition (*Giarratani*, 29 A.D.3d at 948, 817 N.Y.S.2d at 303, *citing Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120, 773 N.E.2d 485 [2002]; *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817, 634 N.E.2d 189 [1994]; *Riley v. ISS Intl. Serv. Sys.*, 5 A.D.3d 754, 757, 774 N.Y.S.2d 182). The agreement provided, *inter alia*, that the property management company "shall cause such ordinary and necessary repairs to be made to the Properties ... as shall be necessary" but provided that the tenant had the right to approve all invoices exceeding \$10,000 (*id.*). The Court held that the agreement was sufficiently comprehensive and exclusive so as support a duty running to the plaintiff and the fact that the tenant had the right to approve all invoices exceeding \$10,000 "did not diminish the property management company's authority to repair the subject curb (*see Tushaj v. Elm Mgt. Assoc.*, 293 A.D.2d 44, 48, 740 N.Y.S.2d 40), particularly in the absence of any proof that the cost

of the repair would have exceeded \$10,000.” (*Giarratani*, 29 A.D.3d at 948, 817 N.Y.S.2d at 303). The Court notes that in *Giarratani*, *Tushaj* was cited with approval.

Here, as in *Tushaj* and *Giarratani*, the defendant was contractually obligated to make ordinary repairs. As in *Tushaj*, the plaintiff was an employee of the building. Certainly, there has been no showing that the cost of repairing the broken tile would be more than \$10,000. Based on *Tushaj* and *Giarratani*, the Court must reject defendant’s contention that the defendant did not owe a legal duty to the plaintiff, even though the repairs were effected by employees of East 72nd Street Corp.


With respect to defendant’s contention that it lacked notice of the alleged defective condition, since the defendant failed to submit evidence as to when it had last inspected the area where the alleged defective condition was located, it failed to establish, as a matter of law, that it lack of constructive notice of the allegedly defective condition (*see Hanney v. White Plains Galleria, LP*, 157 A.D.3d 660, 662, 68 N.Y.S.3d 522; *Przywaly v. New York City Tr. Auth.*, 69 A.D.3d 598, 892 N.Y.S.2d 181).

Accordingly, it is hereby

ORDERED that defendant’s motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 28, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P SWEENEY

2019 JUN -3 AM 8:32

KINGS COUNTY CLERK FILED

