

<b>Ratner v 34th St. Penn Assn., LLC</b>
2019 NY Slip Op 31703(U)
June 10, 2019
Supreme Court, New York County
Docket Number: 154561/2018
Judge: Francis A. Kahn, III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14

Acting Justice

INDEX NO. 154561/2018

TERRY RATNER, MOTION DATE 03/19/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

34TH STREET PENN ASSOCIATION, LLC, 34TH HOTEL VENTURES LLC, STONEBRIDGE REALTY ADVISORS, INC., STONEBRIDGE COMPANIES, LLC, L.E.S. INTERNATIONAL INC., LETS INTERNATIONAL INC., L.E.S. INTERNATIONAL DESIGN INC., RENAISSANCE NEW YORK MIDTOWN HOTEL,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 4, 5, 7, 31- 44, 46-59, 61, 62

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, the motion by Defendants Stonebridge Realty Advisors, Inc., d/b/a Stonebridge Companies s/h/a Stonebridge Realty Advisors, LLC, and 34th Street Penn Association, LLC, for summary judgment pursuant to CPLR §3212 is decided as follows:

According to Plaintiff's complaint, this action arises out of a trip and fall accident that allegedly occurred on October 29, 2016. Plaintiff claims that while in his hotel room at the Renaissance New York Midtown Hotel ("Renaissance"), located at 218 West 35th Street in Manhattan, he was caused to trip and fall and sustain injuries due to alleged defective flooring. Plaintiff further alleges that all of the Defendants were under a duty to maintain the floors within the hotel rooms "in a safe, proper and secure manner, in good repair and free from obstruction, hazard and defect" (see NYSCEF Document ##1, 33; Defendants' motion, Exhibit A). In his bill of particulars, Plaintiff identifies the defective condition to be a raised, uneven and/or dangerous area of carpet/flooring within Guest Room 3308 (see NYSCEF Document #37; Defendants' motion, Exhibit E).

In its answer, Defendant 34th Street Penn Association, LLC ("Penn"), admits owning the subject premises by not denying the allegation in paragraph 3 of Plaintiff's complaint (see CPLR 3018[a]; NYSCEF Document ##7, 36; Defendants' motion, Exhibit D). However, Penn expressly denies maintaining, controlling, managing or repairing said premises (id).

In the answer filed by Defendants 34th Hotel Ventures LLC ("Ventures") and Stonebridge Realty Advisors, Inc., d/b/a Stonebridge Companies s/h/a Stonebridge Realty Advisors, LLC ("Stonebridge"), Ventures, a non-movant, expressly admitted ownership of the subject premises, but explicitly denied maintaining, controlling, managing or repairing said premises (see NYSCEF Document ##4, 34; Defendant's motion, Exhibit B). Stonebridge expressly denied ownership, maintenance, control, management or repair of the subject premises.

Defendants LETS International Design Inc., i/s/h L.E.S. International Inc., LETS International Inc., and L.E.S. International Design Inc. (“LETS”), also a non-movant, appears to have not denied Plaintiff’s allegation in paragraph 32 of the complaint that Defendant Stonebridge Companies, LLC (“Stonebridge”), its agents, contractors and/or employees made repairs to the subject premises (*see* NYSCEF Document #5)<sup>1</sup>.

The proponent of a summary judgment motion must show *prima facie* entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). CPLR §3212[b] requires the court to determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit" (*id.*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

In support of the motion, Defendant Penn argues it can not be held liable for Plaintiff’s accident since it is an “out-of-possession ground lessor,” without obligation to maintain or repair the premises at issue (*see generally Putnam v Stout*, 38 NY2d 607 [1976]). In support of this contention, movants proffered the affidavit of David Dushey (“Dushey”), Chief Executive Officer of Jenel Management Corp. (“Jenel”). Dushey avers in his affidavit Jenel is a property management company that, pursuant to a written contract that was not annexed to the motion, manages the retail properties located near 218 West 35<sup>th</sup> Street in Manhattan which are leased to DSW, Party City, Payless, Joe Fresh and Planet Fitness on behalf of Defendant Penn. Dushey stated Jenel has never managed and was not under any contractual obligation to manage the Renaissance, the accident location (*see* NYSCEF Document #39; Defendants’ motion, Exhibit G).

As to the issue of management and control of the premises, Dushey avers that Ventures leases the hotel property from Penn pursuant a lease agreement between the entities, but that agreement was not annexed to the motion. According to Dushey, Penn was not involved in the contract to build the subject hotel nor had any “contractual obligation to maintain, inspect or repair the premises.” Dushey further states, “The only thing that 34th Street Penn Association, LLC, receives related to [the hotel] is the rent paid by 34th Hotel Ventures, LLC, which is collected by Jenel Management Corp” (*see* NYSCEF Document #39; Defendants’ motion, Exhibit G).

CPLR §3212 (b) requires a motion for summary judgment to include an affidavit “by a person having knowledge of the facts.” In this case, movants failed to attach an affidavit from anyone affiliated with Defendant Penn, but instead rely on one from Dushey, an officer of Jenel. Other than to state that his company manages the unrelated ground floor tenants and collects rent for the subject hotel on movant’s behalf, Mr. Dushey does not explain his basis of knowledge as to Penn’s business, making his affidavit devoid of probative value (*see Castro v New York University*, 5 AD3d 135 [1<sup>st</sup> Dept 2004]). Dushey’s knowledge of the lease between Penn and Ventures is similarly unexplained (*see Barraillier v*

<sup>1</sup> The e-filed copy of this answer is missing page 2 (*see* NYSCEF Document #5).

*City of New York*, 12 AD3d 168 [1<sup>st</sup> Dept 2004]; *Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477 [1<sup>st</sup> Dept 1987]). At most, Dushey demonstrates that Jenel does not manage the subject hotel which is not dispositive on whether or not Penn was an “out-of-possession” landlord.

As to the branch of the motion on behalf of Stonebridge, it is asserted it had “no nexus to the premises where plaintiff’s accident is alleged to have occurred.” In support of this claim, an affidavit from Chris Manley (“Manley”), the Chief Operating Officer of Stonebridge, is annexed to the moving papers. Manley avers that Stonebridge never owned the Renaissance nor managed it. He claims 365 Management Company, LLC (“365 Management”) managed the Renaissance at the time of the accident. Although he refers to a management agreement for the hotel and claims it is an exhibit to his affidavit, it was not attached (*see* NYSCEF Document # 38; Defendants’ motion, Exhibit F).

Manley’s entire affidavit is comprised of five sentences and is patently conclusory. Without explaining his knowledge or substantiating his claim with documentary proof, he identifies 365 Management as the manager of the hotel which is plainly insufficient (*see Residential Credit Solutions, Inc., v Gould*, 171 AD3d 638 [1<sup>st</sup> Dept 2019]; *Barraillier v City of New York, supra*). This bare bones affidavit is all the more insufficient in light of Defendants LETS’ claim in its answer that Defendant Stonebridge, its agents, contractors and/or employees made repairs to the subject premises coupled with the fact that Ventures shares an address with Stonebridge (as per the lease agreement proffered by movants). As such, Stonebridge has failed to sufficiently demonstrate *prima facie* it does not have “a nexus to the premises where plaintiff’s accident is alleged to have occurred.” Based on the foregoing, the better course is to allow discovery to be conducted (*see Healy v Arp Cable, Inc.*, 259 AD2d 380 [1<sup>st</sup> Dept 1999]; *Reohr v Golub Corp.*, 242 AD2d 850, 851 [3d Dept 1997]).

Finally, any reliance on the purported contract to build the Renaissance which identifies Ventures as the owner (*see* NYSCEF Document #40; Defendants’ motion, Exhibit H) is insufficient since it is dated three years prior to the accident and does not indicate that Ventures continued to own, control, possess and/or manage the premises on the day of the accident.

Even if this Court were to find the movants met their initial burden, Plaintiff’s opposition raised triable issues as to whether the moving Defendants can be held liable for the subject accident. Pursuant to Plaintiff’s affidavit, photographs and expert’s affidavit, he identifies the alleged defective condition that caused his fall and supports a claim that it violated the New York State Building Code. When this evidence is considered with the provision in the lease agreement that reserves Penn’s right to renter, inspect and repair the hotel, it creates a triable issue as to whether Penn is responsible for the alleged defective condition (*see McDonald’s v River Bay Corp.*, 308 AD2d 345 [1<sup>st</sup> Dept 2003]; *Fountain v Ferrara*, 118 AD3d 416 [1<sup>st</sup> Dept 2014]).

In addition, an issue as to Stonebridge’s liability for the existence for the alleged defective condition exists in a letter submitted by Plaintiff issued by Hanover Insurance Company, the purported insurers for Defendant LETS, which was apparently made in response to a tender of insurance coverage by the insurers for Stonebridge (also Hanover). In that letter, it reads [in pertinent part],

“It has been reported that L.E.S. International Inc., and/or LETS International Inc., L.E.S. International Design Inc., was hired by Stonebridge Realty Advisors and 34th Hotel Ventures LLC to lay wood laminate flooring in all rooms during the construction project in March of 2016...” (*see* NYSCEF Document #47; Plaintiff’s opposition, Exhibit A).

The movants' attempt in their reply affirmation to cure their failure to provide relevant documents, to wit the management agreement between Ventures and 365 Management as well as the lease agreement between Penn and Ventures, fails as "it sought to remedy . . . basic deficiencies in [movant's] prima facie showing rather than respond to arguments in plaintiff's opposition papers" (*Migdol v City of New York*, 291 AD2d 201 [1<sup>st</sup> Dept 2002]; see also *BP 399 Park Ave. LLC v Pret 399 Park, Inc.*, 150 A.D.3d 507 [1<sup>st</sup> Dept 2017]; *Poole v MCPJF, Inc.*, 127 AD3d 949 [2d Dept 2015]).

Parenthetically, the court notes that the lease between Penn and Ventures identifies Penn as sharing an address with Jenel and it also identifies Ventures as having a common address with Stonebridge. The lease also reserves the right to Penn, as owner, to enter and inspect the premises as well as to make certain repairs (see NYSCEF Document #53, reply affirmation, Exhibit B).<sup>2</sup>

Accordingly, the motion for summary judgment brought by Defendants Stonebridge Realty Advisors, Inc., d/b/a Stonebridge Companies s/h/a Stonebridge Realty Advisors, LLC, and 34th Street Penn Association, LLC, is denied.

All parties are reminded that a compliance conference has been scheduled in this matter for **September 24, 2019 at 9:30 am**, in Courtroom 1045, located in 111 Centre Street.

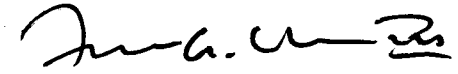
6/10/2019  
DATE

CHECK ONE:  CASE DISPOSED  DENIED

APPLICATION:  GRANTED  SUBMIT ORDER

CHECK IF APPROPRIATE:  SETTLE ORDER  FIDUCIARY APPOINTMENT

INCLUDES TRANSFER/REASSIGN  REFERENCE

  
 FRANCIS A. KAHN, III, A.J.S.C.  
**HON. FRANCIS A. KAHN III**  
 J.S.C.

<sup>2</sup> Exhibit C of the reply affirmation is an assignment of the management agreement between 34<sup>th</sup> Street Penn Association LLC, and Cantor Commercial Real Estate Lending, L.P., which is wholly irrelevant to the motion (see NYSCEF Document #54; reply affirmation Exhibit C).