Weeks v Green 485 TIC LLC
2019 NY Slip Op 32434(U)
August 14, 2019
Supreme Court, New York County
Docket Number: 156047/2015
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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RUTH WEEKS,

Plaintiff,

- v -

GREEN 485 TIC LLC and SL GREEN REALTY CORP.,

Defendants.

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INDEX NO. 156047/2015

MOTION DATE 09/14/2018

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, 80, 81, 82, 91

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgement accordingly.

DECISION

In this personal injury action, plaintiff alleges that she was struck on her face and body by an improperly secured metal plate mounted on a magnetically locked door that controlled entry to her office space on the 16th floor of 485 Lexington Avenue, New York, New York (the building or the premises).

In motion sequence number 003, defendant Green 485 TIC LLC moves for summary judgment, pursuant to CPLR 3212, to dismiss the complaint and all cross-claims with prejudice.

On July 23, 2018, plaintiff entered into a stipulation with defendant SL Green Realty Corp. to discontinue the action against it.

I. Background

Defendant is the owner of the building where the accident took place.

Plaintiff contends that defendant failed to properly install, maintain or inspect the aforementioned metal plate; failed to warn plaintiff and others of the unsafe or dangerous condition, and failed to comply with existing federal, state and local statutes, codes and ordinances relative to the maintenance of the metal plate.

Defendant, in its capacity as landlord, leased the premises to Citibank, N. A., which in turn sublet the space where the alleged incident took place to Xerox Corporation, plaintiff's place of employment.

According to her bill of particulars, on March 2, 2015, plaintiff was at work at the premises. Upon returning from the restroom, she proceeded along a route which led her through a secured door that required her to press a door release button in order to advance through the secured door to return to her work

area. Plaintiff avers that when she pressed the door release button, the metal plate with its nut and bolt as well as debris and waste fell from the secured doorway and struck her. Plaintiff asserts that she sustained traumatic injuries to her head, eye, and cervical and lumbar spine and experienced limitations of some activities of daily living.

II. Contentions

In its motion papers, defendant claims that it was not contractually obligated to maintain or repair the premises and that it is an out-of-possession landlord by virtue of its lease with Citibank, N.A. and therefore it is not generally liable for any condition on the leased-out premises.

Defendant contends that, pursuant to Section 1.01 of the lease, it ceded possession, control and any obligation to maintain and repair the entirety of the 16th floor of the building to Citibank, N.A.

Section 10.01 of the lease further makes clear that Citibank, N.A. has the duty and obligation to maintain, repair, inspect and take care of the premises.

Defendant further argues that Recital A of the sublease between Citibank, N.A. and Xerox Corporation, plaintiff's employer, vests the latter with the right of possession and control as well as the obligation to maintain the entirety of the 16th floor of the building. Any obligation to perform work

on the premises was hence transferred from Citibank, N.A. to Xerox Corporation, pursuant to covenant 7.4 of the sublease.

In addition, defendant argues that plaintiff did not allege any significant structural or design defect or code violation as a predicate for its claim and that the subject metal plate at issue is not a significant structural or design defect. Furthermore, defendant argues that it is not statutorily obligated to maintain the premises; nor does it have a contractual right to reenter, inspect and make needed repairs.

Next, defendant argues that it did not create or have notice of the allegedly dangerous condition. Defendant contends that it lacked actual notice, it received no complaint. It asserts that did not observe the dangerous condition.

At his deposition, the building manager stated that his employer's system shows no request for a door repair in the months prior to the accident and there were no complaints about the integrity of doors or locks.

During his deposition, defendant's employee on location testified that the management company did not install the magnetic lock at issue. In addition, a Siemens work form states that service of the magnetic lock after the incident was coordinated with and scheduled by a technician's call to the Xerox Corporation and paid for by a Xerox Corporation agent.

With respect to constructive notice, defendant contends that plaintiff admitted that the defect was latent and could not be observed. Indeed, the complaint alleges that the metal plate was a hazard that was not "apparent or open and obvious to plaintiff" and that plaintiff "could not appreciate and recognize the said hazard of the improperly secured metal plate."

In opposition, plaintiff disputes defendant's status as an "out-of-possession" owner and "out- of-control" landlord. Plaintiff argues that defendant maintained control and had free access to the premises.

Plaintiff argues that the only logical and reasonable interpretation of the sublease is that defendant was responsible for maintaining all structural and non-structural repairs in compliance with applicable laws and the lease. According to plaintiff, defendant, in its capacity as landlord, was obligated to make all repairs and maintenance and/or supervise and/or inspect same.

In support of this argument, plaintiff refers to the sublease, which states that the subtenant shall not do anything that would constitute a default under the lease or anything for which the landlord's consent is required (¶ 5.1, Covenants with Respect to the Lease) and that the sublease is subject and

subordinate to the lease (id., ¶ 6.1, Subordination to and Incorporation of the Lease).

Plaintiff argues that the magnetic lock is an alteration and that paragraph 7.2 of the sublease provides that any alteration may not be made or allowed to be made without the prior written consent of the landlord and sublandlord (id., Landlord's Performance under the Lease; Services, Repairs and Alterations). Furthermore, plaintiff argues that the sublease specifies that the premises shall be accepted in its "as is" condition and sublandlord shall have no obligation to perform any work (id., ¶ 7.4) and any buildout may require the landlord's approval (id., ¶ 7.6). Plaintiff also points to paragraph 16 of the sublease, (Consent of Landlord to This Sublease), which specifies that the written consent of the landlord shall be executed in the form and substance set forth in Exhibit G of the sublease (id.)

Plaintiff then turns to article 8 of the lease [Alterations], which provides that the tenant is required to request the prior written consent of the landlord to make any alteration and that any such alteration shall be executed in the manner and time, and with such materials as approved by the landlord and according to plans and specifications previously reviewed by the landlord. Specifically, any work pertaining to life safety systems, including tie-ins to such systems shall be

performed by the landlord's designated contractor (id., ¶ 8.01).

Turning to the question of the maintenance and repairs, plaintiff argues that the landlord was obligated, pursuant to the lease, to make all repairs and maintenance, and/or supervise and/or inspect same. Plaintiff points out that the lease states that it is the landlord's responsibility to "operate, maintain and make all necessary repairs (both structural and non-structural) to the Building Systems and the public portions of the Building, both interior and exterior" (id., ¶ 10, Repairs). The lease also provides that the landlord and tenant "shall both have the right to use the areas above any hung ceiling in the Premises" and that the landlord "shall reasonably coordinate Landlord's work in such areas with Tenants' work and give Tenant's work priority" (id.).

According to article 15.04 of the lease (Requirements of the Law), it is also the landlord's responsibility to "comply with all other Applicable Laws applicable to the Premises and the Building." Furthermore, any known condition, "which condition could reasonably be expected to threaten the health or safety of any occupant of the Premises" shall be remedied by the landlord by using "commercially reasonable efforts to cause compliance with the same" (id.).

Finally, article 19 of the lease (Right of Entry; Security) sets forth that the landlord "shall have the right to enter or pass through the Premises at reasonable times and upon reasonable notice to Tenant . . . to make such repairs, alterations or additions" (id., art. 19.01[b]). The landlord "shall have the right at any time . . . to change the arrangement and/or location of entrances or passageways" (id., art. 19.01[c]).

Thus, plaintiff argues that defendant failed to make a prima facie case that it relinquished full control over the property. Rather, plaintiff contends, defendant retained control and the right to reenter the premises to make contractual and statutory mandated repairs and maintenance to the building. In summary, plaintiff urges that defendant's duty to maintain the premises in a reasonably safe condition was not extinguished as a matter of law.

In addition, plaintiff points out that defendant did not submit an affidavit from a professional engineer on the question of whether the magnetic door lock/plate conformed to the applicable governmental safety codes and regulations that plaintiff alleges were violated, which plaintiff insists is necessary to demonstrate that plaintiff's allegations are without merit under law.

As to constructive notice, plaintiff contends that defendant's failure to inspect is no excuse. Plaintiff argues that defendant had a duty to inspect as it had a non-delegable contractual duty to maintain and make all repairs, but that defendant, by its own admission, failed to inspect the magnetic door locks/plates before plaintiff's accident.

According to plaintiff, there are issues of fact as to whether defendant breached the contract by failing to do what the lease mandated and/or negligently performed. In particular, argues plaintiff, there remain questions of fact as to whether defendant's negligence was a proximate and/or contributing cause of the accident, whether it negligently maintained or inspected or failed to inspect the magnetic door locks/plates and whether it exercised reasonable care under the circumstances.

III. Legal Standard

The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of

the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], citing Winegrad, 64 NY2d at 853; People v Grasso, 50 AD 3d 535, 545 [1st Dept 2008]).

IV. Analysis

In New York, an owner has a duty to maintain his or her premises in a reasonably safe condition (Peralta v Henriquez, 100 NY2d 139, 144 [2003], quoting Basso v Miller, 40 NY2d 233, 241 [1976]). However, an out-of-possession owner can only be held liable for a third party's injuries on the premises if he or she had "notice of the defect and consented to be responsible for repairs or maintenance" (Gomez v 192 East 151st Street Associates, L.P., 26 AD3d 276, 277 [1st Dept 2006]).

Here, the record indicates that defendant did not have actual notice. In addition, there is no dispute that the alleged condition was not visible or apparent; nor is there any evidence refuting defendant's observation that it did not exist for a sufficient length of time prior to the accident to constitute constructive notice (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]).

However, a landlord's reservation of a right to reenter the premises, pursuant to the lease, to inspect and perform repairs or maintenance may serve as a basis for liability where the alleged dangerous condition results from the violation of a

specific statutory safety provision, which the defendant could have had the opportunity to discover and cure or involve significant structural and/or design defects (Heim v Trustees of Columbia University in City of New York, 81 AD3d 507, 507 [1st Dept 2011]) ["An out-of-possession landlord with a right of reentry may be held liable where it has constructive notice of a 'significant structural or design defect in violation of a specific statutory safety provision,'" quoting Quinones v. 27 Third City King Rest., 198 AD2d 23, 24 [1993]").

In other words, an out-of-possession owner may be charged with notice of a defective condition only where it "is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (Babich v R.G.T. Rest. Corp., 75 AD3d 439, 440 [1st Dept 2010]; see also Gomez, 16 AD3d at 277; Velazquez v Tyler Graphics, 214 AD2d 489, 489 [1st Dept 1995]).

Indeed, in the First Department, the liability of an out-of-possession owner for negligence stemming from injuries occurring as a result of a condition on the premises is a function of a contractual obligation to make repairs and/or maintain the premises or the contractual right to reenter,

inspect and make repairs (Quing Sui Li v 37-65 LLC, 114 AD3d 538, 539 [1st Dept 2014]; see also Ross v Betty G. Reader Revocable Trust, 86 AD3d 419, 420 [1st Dept 2011]; Babich, 75 AD3d at 440) rather than control (see Helena v 300 Park Ave., 306 AD2d 170, 171-172 [1st Dept 2003]).

Here, although plaintiff cites various provisions of the lease, including but not limited to articles 10 and 19, which support its contentions that defendant was contractually obligated to make repairs and had preserved its right to reenter to maintain or repair the premises, the pleadings refer to unspecified statutory safety provisions or violations only.

Furthermore, contrary to plaintiff's assertions, once defendant pointed that nowhere in its pleadings, deposition testimony of affidavit did plaintiff allege any significant structural or design defects in violation of a statutory provision, the burden shifted to plaintiff to raise an issue of fact, based upon an inspection of the magnetic lock, that such magnetic lock had a significant structural or design defect in violation of a statutory safety provision (see Qing Sui Li, 114 AD3d at 539 [commercial tenant failed to demonstrate that spiral staircase in restaurant premises was a significant structural or design defect contrary to any specific statutory safety provisions, or demonstrate any specific statutory safety

violations]; Garcia-Rosales v 370 Seventh Ave. Assoc., LLC, 88 AD3d 464, 465 [1st Dept 2011]).

The record is devoid of any evidence that an improperly secured metal plate part of a magnetically locked door constitutes a significant structural or design defect (see Angwin v SRF Partnership, 285 AD2d 570, 571 [2d Dept 2001] [holding that an improperly secured magnetic lock mounted above a door frame for an alarm system was not a significant structural defect]; Morrone v Chelnik Parking Corp., 268 AD2d 268, 270 [1st Dept 2000] [holding that a "tilted and wobbly drain cover would not have been considered a structural defect"]; Pavon v Rudin, 254 AD2d 143, 147 [1st Dept 1998] [finding that the door's broken or torn top pivot hinge, which dislodged and caused the door to fall and strike plaintiff, was not a significant structural defect]). The deposition testimony that plaintiff excerpts fails to raise an issue of fact.

8/14/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE