Santiago v City of New York
2019 NY Slip Op 32831(U)
September 24, 2019
Supreme Court, Kings County
Docket Number: 504622/2016
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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MARIA SANTIAGO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

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DECISION / ORDER

Index No. 504622/2016
Motion Seq. No. 2
Date Submitted: 9/12/19
Cal No. 46

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	32-44
Affirmation in Opposition and Exhibits Annexed.....	45-51
Reply Affirmation.....	54

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a negligence action, for damages following plaintiff's slip and fall on May 26, 2015, in the hallway at the Bedford-Stuyvesant Multi-Service Center, located at 1958 Fulton Street, Brooklyn, New York. The location is a large office building owned by defendant The City of New York. Part of the building is used as a school, run by defendant New York City Department of Education ("DOE"). The school has its own entrances and exits and is exclusively on one side of the building. The rest of the building, where plaintiff's accident occurred, houses a number of not for profit organizations. Pursuant to

an agreement with New York City HRA, an agency of the City, referred to as a "Sponsorship Agreement," the non-school part of the building was managed by CAMBA, Inc. ("CAMBA"), a not-for-profit corporation, which subsequently entered into occupancy agreements with the various organizations and service providers which occupy the offices in the building. At the time of plaintiff's accident, CAMBA had offices in the building for programs of its own. Plaintiff was a program manager for the New Beginnings Program, which was operated by CAMBA. Plaintiff claims she slipped and fell at about 8:30 A.M., shortly after the hallway floor on the second floor had been mopped. She claims a "wet floor" sign was put down, but was placed where she could not see it. As she was an employee of CAMBA, she is prohibited from suing her employer by the New York State Worker's Compensation Law. She has thus sued the City of New York, the property owner, and two of its departments.

Defendant DOE claims it is entitled to summary judgment dismissing the complaint as the premises where plaintiff had her accident was not owned, occupied, leased or controlled by it. Defendants The City of New York and the New York City HRA claim they are entitled to summary judgment dismissing the complaint as they were an out-of-possession landlord. For the reasons which follow, the motion is granted and the complaint is dismissed.

Defendants note that at the time of the accident, the Bedford-Stuyvesant Multi-Service Center was owned by New York City and assigned to HRA, but HRA has never in any way occupied the premises, nor have they ever assigned any of their employees to work there. The non-school part of the building was managed by CAMBA as "contractor" or "sponsor," under the aforesaid Sponsorship Agreement with New York City HRA.

Defendants contend that, pursuant to the agreement, CAMBA managed and controlled the entire (non-school) premises, and was responsible for all cleaning, housekeeping, repairs and maintenance, including the second floor hallway where plaintiff claims she slipped and fell.

The defendants refer to ¶ ¶ 1 and 6 of Article II(B) of the agreement, (Exhibit B to affidavit of Fabian Feliciano, e-file doc. # 42, page 18) which requires the Sponsor (CAMBA) to "provide operational and maintenance services within the Multi-Service Center" and "all custodial services, building maintenance and security for the Center" and to "at all times keep the Center in good and safe condition and repair," as well as Appendix A, Article 4, Section 4.02, which provides that "[n]othing in the Agreement shall impose any liability or duty on the City for the acts, omissions, liabilities or obligations of the Contractor (CAMBA), or any officer, employees, or agent of the Contractor" (e-file doc. # 42, page 41).

Plaintiff opposes the motion, contending that while HRA entered into an agreement with CAMBA to operate and maintain the subject premises, HRA retained supervision and monitoring of CAMBA's building management functions, as well as the coordination of the services being provided at the center, so that it was not a true out-of-possession landlord. Plaintiff relies in part upon a clause in the Sponsorship Agreement that provides, among other things, that the Department (HRA) will "monitor and coordinate the services being provided at the center" and "monitor building management functions" (e-file doc. # 42, page 24). Further, plaintiff points out that the Agreement could be terminated on 15 days' notice, as further support for her claim that New York City HRA was in control of the premises.

DISCUSSION

"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" (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendants have made a prima facie showing of their entitlement to summary judgment. Plaintiff has failed to raise an issue of fact to the contrary. New York City HRA, which had no presence in the building, gave CAMBA full management and control of the day-to-day operations of the building, including cleaning and maintenance, so that New York City HRA was, by its written agreement, an out-of-possession landlord without any responsibility for a transient wet condition or the placement of warning signs.

The law with regard to out-of-possession landlords, and whether they have a duty to a third party such as plaintiff, is clear. If the hazard which the plaintiff attributes her injury to is not a transitory condition, it must constitute a structural and/or design defect violative of a statute (*see, Levy v Daitz,* 196 AD2d 454 [1st Dept 1993]). Otherwise, a defendant who establishes that it is an out-of-possession landlord may not be held liable for a plaintiff's harm even if, pursuant to the lease, it retained the right to reenter the subject premises to make needed repairs, but did not undertake to do so (*see, Hill v Spitzer*, 267 AD2d 149, 149 [1st Dept 1999], citing *Manning v New York Tel. Co.,* 157 AD2d 264 [1st Dept 1990]). When the hazard is a transitory one, such as water, wax or carpet, the out-of-possession landlord has no duty to a third party in the absence of actual

or constructive notice. (See *Fischbein v 1498 Third Realty Corp.*, 225 AD2d 1104 [4th Dept 1996] [liquid]; *Levy v Daitz,* 196 AD2d 454 [1st Dept 1993] [wax]; *Ortiz v RVC Realty Co.*, 253 AD2d 802 [2d Dept 1998]; *Hill v Spitzer*, 267 AD2d 149, 149 [1st Dept 1999] [carpet]).

For example, where the property owner has actual notice of the defect and has consented to be responsible for maintenance or repair of the property, a duty has been found (*Manning v New York Tel. Co.,* 157 AD2d 264, 266-270; *Worth Distribs. v Latham,* 59 NY2d 231, 238 [1983]). Further, constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists (*Guzman v Haven Plaza Hous. Dev. Fund Co.,* 69 NY2d 559, 566 [1987]; *Santiago v Port Auth.,* 203 AD2d 217 [1st Dept 1994], lv denied 84 NY2d 807.

Thus, when the hazard is a transient condition, a property owner establishes its entitlement to summary judgment by demonstrating that it was an out-of-possession landlord, that the lease placed responsibility for the repair and maintenance of the leased premises on the tenant, and that it [the hazard] did not violate any relevant statute or regulation (See *Madry v Heritage Holding Corp.*, 96 AD3d 1022, 1023 [2d Dept 2012]; *Mercer v Hellas Glass Works Corp.*, 87 AD3d 987, 988 [2d Dept 2011]).

To maintain the benefit of "out-of-possession landlord" status, a defendant must show that there is "no evidence that the landlord retained a sufficient degree of dominion and control over the leased premises to provide a basis for the imposition of liability . . . and there is no evidence of any affirmative conduct on the part of the defendant which would show that it had assumed a duty of care toward the plaintiff" (*Dalzell v McDonald's*

Corp., 220 AD2d 638 [2nd Dept. 1995]). Therefore, an out-of-possession landlord is liable to persons injured while on his property if there is evidence to establish that the so-called "out-of-possession landlord" had undertaken a course of conduct which demonstrated that the landlord had assumed the responsibility to maintain the premises, or a particular portion thereof. Such conduct, which is not present in the instant case, creates a question of fact as to whether there is a duty on the part of the landlord to protect persons on the property from unreasonable hazards (See *Gelardo v ASMA Realty Corp.,* 137 AD2d 787 [2nd Dept 1998]).

Here, New York City HRA has demonstrated that it was an out-of-possession owner, with no role in the day-to-day maintenance of the premises. The court notes that plaintiff does not contest the branch of the motion seeking dismissal as against DOE, and at oral argument, plaintiff's counsel indicated that he did not oppose that branch of the motion.

The language in the Agreement which plaintiff relies on in her opposition papers is in a section related to CAMBA's obligations with regard to financial matters such as payment of utilities, and CAMBA's relationship with the other service providers at the building, and cannot be interpreted, as plaintiff urges, to alter the fact that HRA was, by the terms of the Agreement, an out-of-possession owner with no involvement in the cleaning and maintenance of the building. Defendants' witness, Fabian Feliciano, testified that the reference in the Agreement to HRA's "monitoring of services provided" referred to the services provided by the service-provider agencies in occupancy, not the maintenance services for the building (Feliciano EBT at 24, 32-33). The fact that HRA attended regular meetings with CAMBA at the building, where issues concerning the HVAC and boiler were

discussed (Feliciano EBT at 27, 29, 35, 49), that HRA conducted a biannual inspection that included checking for physical defects or maintenance and upkeep problems at the building (Feliciano EBT at 35-36, 39), and that HRA required that it be notified of any complaints about the management or maintenance of the building, (Feliciano EBT at 60) does not alter the fact that New York City HRA was an out-of-possession owner, with no role in the day-to-day cleaning and maintenance of the building.

While the court acknowledges that the Agreement gives New York City HRA considerable control with regard to the financial aspects of the building's management and the choice of the organizations in occupancy, including a requirement for the establishment of a "cabinet" of representatives from all of the organizations in occupancy, which "cabinet" was required to meet regularly with an HRA representative in attendance, and that these provisions are not in an ordinary commercial lease, the day-to-day cleaning and maintenance provisions are similar enough to those of an ordinary commercial lease to be interpreted for this purpose as if CAMBA was a lessee instead of a "sponsor."

Accordingly, it is

ORDERED that defendants' motion is granted in its entirety and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: September 24, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court