Tsokolakyan v Tiffany Mgt. Ltd.
2019 NY Slip Op 33454(U)
November 14, 2019
Supreme Court, Kings County
Docket Number: 510830/2016
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 14th day of November 2019.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

----------X

NINA TSOKOLAKYAN,

Plaintiff,

-against-

TIFFANY MANAGEMENT LTD., AAAN FRATELLO CORP., MAMA MIA PIZZERIA RESTAURANT and BAR & GRILL PIZZERIA RESTAURANT, INC.

Defendant.

----------X

Index No.: 510830/2016

AMENDED[1] [2]
DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	90-108
Opposing Affidavits (Affirmations)	112-131, 144-150
Reply Affidavits (Affirmations)	132-142, 153-157

[1] This decision and order was amended on October 24, 2019 to correct the spelling of plaintiff's last name.

[2] This decision and order is amended herein to correct the motion sequence number.

Introduction

Defendant, Tiffany Management Ltd., moves by notice of motion, sequence number six, pursuant to CPLR § 3212 seeking summary judgment in and for such other and further relief as this Court may deem just and proper. Plaintiff, Nina Tsokolakyan, opposes this application.

Background

Plaintiff, a home attendant, allegedly sustained personal injuries June 26, 2014, when she tripped and fell while exiting a pizzeria, located at 230 65th Street, Brooklyn, New York (the premises). Plaintiff testified at an examination before trial on November 29, 2018 (*see* Notice of Motion, Exhibit K). At the request of plaintiff's client, she purchased pizza, and then exited the store. At that time, she was holding her purse, a bag of fruit and the pizza box (*see id.* at 48-49). Plaintiff stepped forward with her right "foot which dropped; it went all the way down. And so at that moment, I felt I was flying forward … Like I flew one or two meters forward" (*id.* at 50-51). Plaintiff testified that at the time of the accident, she stepped over a brown molding and dropped approximately four inches (*see id.* at 74).

Google Image photographs of the premises demonstrate that the front of the property was changed, including the door, when the pizzeria took over the unit. However, the photographs show that the entrance to the building remains the same (*see* Google Map Image (Opposition, Exhibit 12). The "step" which caused plaintiff's fall is not a stair. Rather, there a height difference between the sidewalk outside of the premises and the doorway into the premises (*see id.* at Exhibit 13). It is unclear what the exact

measurement of the height difference was at the time of the accident, but plaintiff testified that it was approximately four inches (*see* Plaintiff EBT at 75). After the pizzeria vacated the space, the doorway was changed by the subsequent tenant. The brown door saddle was replaced with a red granite door saddle (*see* Opposition, Exhibit 14). These photographs show that the doorway of the premises is approximately 4-5 inches higher than the sidewalk (*see id.*).

Tiffany Management has owned the subject premises since 1993. Tifa Radoncic is the owner of Tiffany Management, Ltd. Radoncic testified at an examination before trial on January 3, 2019 (*see* Notice of Motion, Exhibit L). The premises, build in 1926, is a four story walk up with twenty-two residential apartments and five commercial units. In 2011, the pizzeria was leased to Aaan Fratello Corp., which conducted business as Mama Mia Pizzeria Restaurant and Bar (*see* Notice of Motion, Exhibit N). Before the Pizzeria leased the space, the unit was occupied by a flower shop. Mama Mia completely renovated the space, including walls, floors, equipment and the front doors near the step in question. "It is undisputed that this work was performed without a permit" (Supplemental Affirmation in Opposition at ¶ 12). Radoncic testified that pursuant to the lease terms, it was the tenant's obligation to keep the premises in safe condition. Further, the tenant was obligated to obtain insurance. Radoncic stated that the molding on the floor that plaintiff identified is a saddle. She testified that she did not install the saddle, but she also had no recollection if that saddle was in that doorway when she purchased the property.

Radoncic testified that she managed the property for about 15 years. In approximately 2015, she hired a management company to manage the premises (*see* Notice of Motion, Exhibit L, 12)[3]. Tiffany Management employed a live-in superintendent who was the "eyes and ears" at the building (*see id.* at 26-27). The superintendent testified that to enter the pizzeria he had to raise his leg to get in (*see* Opposition, Exhibit 10, 42 and 45). The superintendent also stated that the pizzeria renovated the interior space prior to opening; he was not sure if the doors were changed or if the step into the doorway was changed (*see id.* at 33).

According to the lease between Tiffany Management LTD and AAAN Fratello, Corp., the "tenant shall maintain the Store in good condition", however "in the event that Tenant fails to make said repairs, Landlord may do so at Tenant's expense... Landlord shall maintain in proper order and repair the exterior of the Premises as well as the common areas and the utilities servicing the Premises" (*id.* at p 4-5). The lease further states that, "Landlord has the right to change the arrangement and/or location of entrances, hallways, passageways, doorways, doors elevators, stairs or any other part of the Premises used by the general public..." (*id.* at p 7).

Plaintiff commenced this action on June 26, 2016, issue was joined by Tiffany Management on September 26, 2016. On December 8, 2016, Justice Lawrence Knipel awarded plaintiff a default judgment against defendants Aaan Fratello Corp., Mama Mia

[3] Radoncic testified that she hired a management company "approximately four years" prior to her deposition in January 2019. By letter date February 1, 2019, Counsel for Tiffany Management stated that his client did not retain a property manager during the relevant time (see Opposition, Exhibit 17).

Pizzeria and Bar & Grill Pizzeria (*see* Notice of Motion, Exhibit D). The note of issue was filed on September 7, 2018.

Discussion

Summary Judgment

"[T]he 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 demonstrate absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

> Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions". To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form". Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts"... "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party". "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist". Accordingly, "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned". "[W]here credibility determinations are required, summary judgment must be denied" [internal citations omitted].

(*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]).

Failure to make such a showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.,* 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.,* 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). "A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Chimbo v. Bolivar*, 142 A.D.3d 944, 37 N.Y.S.3d 339 [2 Dept., 2016], quoting *Ruiz v. Griffin,* 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2 Dept., 2010]).

Although "[a]n owner of property has a duty to maintain his or her premises in a reasonably safe condition" (*Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 904 N.Y.S.2d 121 [2 Dept., 2010]), "[a] property owner is not liable in negligence unless he or she created the allegedly dangerous condition or had actual or constructive notice of its existence" (*Rosas v. 397 Broadway Corp.*, 19 A.D.3d 574, 797 N.Y.S.2d 546 [2 Dept., 2005]). "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct [internal quotation marks omitted]" (*Crosby v. Southport, LLC*, 169 A.D.3d 637, 94 N.Y.S.3d 109 [2 Dept.,

2019], quoting *Casson v. McConnell,* 148 A.D.3d 863, 49 N.Y.S.3d 711 [2 Dept., 2017]; *see also Gowen v. Gabrielle Realty Holdings, LLC*, 140 A.D.3d 929, 33 N.Y.S.3d 431 [2 Dept., 2016]).

In the instant case, defendant met its burden and established entitlement to summary judgment as a matter of law. Defendant provided the EBT testimony of owner Tifa Radoncic and the superintendent, which established that defendants had no constructive or actual notice of the defect. Although the superintendent, having inspected the premises in the course of his duties and having dined at the pizzeria, had knowledge that you had to "raise your leg" to step into the store, he had no reason to believe that this was "defective". Defendant contends that they are an out-of-possession landlord, and relinquished control of the premises. Defendants stated that the unit was fully renovated before the pizzeria opened and the owner did not do any work in the unit, nor were they required to under the lease. Defendant provided a copy of the store lease which clearly states that the landlord has the right to change the doors, doorways, stairs, or any part of the premises used by the general public. However, "[t]he mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises" (*Richer v. JQ II Assocs., LLC*, 166 A.D.3d 692, 88 N.Y.S.3d 190 [2 Dept., 2018], citing *Star v. Berridge,* 77 N.Y.2d 899, 568 N.Y.S.2d 904 [1991]). Further, defendants met their burden and provided the certificate of occupancy

of the building which establishes that it was constructed in 1928 and is subject the 1968 Building Code (*see Powers ex rel. Powers,* 24 N.Y.3d 84, 996 N.Y.S.2d 210 [2014]).[4]

In opposition, plaintiff failed to raise a triable issue of fact. "Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when a specific statutory violation exists and there is a significant structural or design defect [internal quotation marks omitted]" (*Yadegar v. Int'l Food Mkt.*, 37 A.D.3d 595, 830 N.Y.S.2d 244 [2 Dept., 2007], quoting *Lowe–Barrett v. City of New York,* 28 A.D.3d 721, 815 N.Y.S.2d 630 [2 Dept., 2006]; *see also Lindquist v. C & C Landscape Contractors, Inc.,* 38 A.D.3d 616, 831 N.Y.S.2d 523 [2 Dept., 2007]). In opposition, plaintiff provided the affidavit of Nicholas Bellizzi, P.E, who opines that the doorway to the premises violates §1008.1.4 of the 2008 Building Code, which requires a level or slightly sloped floor or landing on each side of an exterior landing. Defendant, in reply provided the affidavit of Frederic Zonsius, AIA, who opined that the 1968 Building Code applies, not the 2008 Building Code.

Here, there is no factual dispute regarding the doorway and "step" into the building. This Court takes judicial notice of the google map photographs, which demonstrate that the doorway was not renovated in 2011 when the pizzeria took over the lease. Although the doors were changed, the photographs show that the doorway to the

[4] In opposition plaintiff argued that the certificate of occupancy is inadmissible as it is not certified. In reply, defendant provided a certified copy of the certificate of occupancy. Inasmuch as this Court allowed the parties to submit supplemental opposition and sur-reply, and plaintiff had a fair opportunity to respond to defendant's reply, this Court is considering the certificate of occupancy.

building is several inches higher than the sidewalk. After the pizzeria vacated the premises, the doorway was renovated. The photographs annexed to Bellizzi's affidavit show that the wooden door saddle was replaced with a red granite door saddle, which was measured to be 4 inches higher than the sidewalk. However, plaintiff testified that at the time of her accident, the doorway was approximately four inches higher than the sidewalk. Since there is no factual dispute as to the configuration and location of the "step" and doorway, the question of which Building Code is applicable is a question of law, not fact (*see generally, Mansfield v. Dolcemascolo*, 34 A.D.3d 763, 826 N.Y.S.2d 115 [2 Dept., 2006]; *Gaston v. New York City Hous. Auth.*, 258 A.D.2d 220, 695 N.Y.S.2d 83 [1 Dept., 1999]).

The premises was built in 1928. The 1934 Building Code does not address a step as an egress or entrance. The 1968 Building Code applies retroactively to older buildings. However, § 27-371 entitled Doors, requires that floors on both side of exit doors "shall be essentially level… except that where doors lead out of a building the floor level inside may be seven and one-half inches higher than the level outside" (*see* Reply, Zonsius Affidavit, Exhibit 4). Here, even assuming, arguendo, that Bellizzi's measurements are inadmissible, plaintiff testified that the "step" is approximately four inches higher than the sidewalk outside. There is no evidence submitted herein that the "step" was over seven and one-half inches above the sidewalk.

Bellizzi failed to establish that the 2008 Building Code is applicable. Rather, he states in his affidavit that because the door does not conform to the 2008 code, it is an unsafe condition which could cause injuries and deviates from the generally accepted

customs and practices of engineering safety standards (*see* Opposition, Bellizzi Affidavit at p 9). Defendant's reservation of a right of entry to make repairs can impose liability where a specific statutory violation exists and there is a significant structural or design defect. Here, even assuming that the doorway is a structural defect, plaintiff failed to establish a statutory violation. Bellizzi further alleges that since the construction done in 2011 was not permitted, defendants are skirting the 2008 building code requirements. However, there is no evidence provided herein that the door entryway was renovated in 2011. To the contrary, the google photographs show that the "step" and doorway was the same prior to the pizzeria's construction.

Conclusion

Accordingly, the defendant's motion for summary judgment is granted. Defendant established entitlement to summary judgment as a matter of law. In opposition, plaintiff failed to raise a triable issue of fact.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
J.S.C.

KINGS COUNTY CLERK
FILED
2019 NOV 21 AM 8:11

To:

Souren A. Israelyan, Esq.
Law Office of Souren A. Israelyan, LLP
Attorney for Plaintiff
39 Broadway, Suite 950
New York, NY 10006

Susan Miller, Esq.
Milber Makris Plousadis & Seiden, LLP
Attorney for Defendant Tiffany Management Ltd.
1000Wodbury Road, Suite 402
Woodbury New York 11797