

de Arango v Wolf Family, LLC
2019 NY Slip Op 34737(U)
June 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-610295
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 16-610295
CAL. No. 18-005750T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 8-21-18
ADJ. DATE 12-4-18
Mot. Seq. # 002 - MG; CASEDISP

-----X
LILLIAN CASTILLO DE ARANGO,

Plaintiff,

- against -

WOLF FAMILY, LLC,

Defendant.
-----X

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, uploaded July 20, 2018 ; Notice of Motion/ Order to Show Cause and supporting papers, _____ ; Answering Affidavits and supporting papers by plaintiff, uploaded November 14, 2018 ; Replying Affidavits and supporting papers by defendant, uploaded December 3, 2018 ; Other _____ ; it is,

ORDERED that the motion by defendant Wolf Family, LLC, for summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Lillian Castillo de Arango on September 11, 2014, when she was hit by a garage door during the course of her employment at non-party Contract Pharmacal Corp. ("CPC"), located in a building owned by defendant Wolf Family, LLC ("Wolf"). Plaintiff alleges that defendant was negligent in, among other things, permitting the garage door to become and remain "broken, disconnected, altered, unsupervised, dangerous, defective, unsafe, [and] hazardous."

Plaintiff testified that she arrived to work at approximately 7:23 a.m. for her 7:30 a.m. shift. Plaintiff stated that she put her bag in the cafeteria, punched in, and picked up gloves, a paper hat, and a work order.

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Plaintiff testified that the garage door of the warehouse was open when she first saw it from approximately six feet away. She further testified that while she was walking through the doorway, the garage door suddenly fell on the back part of her head, shoulders, and neck. Plaintiff explained that the door “had problems,” because it would sometimes come down suddenly on its own within seconds, as sensors had been removed. Plaintiff stated that Evelyn from human resources told the police following her accident that CPC removed the sensors so that the door would come down by itself, because it did not want the door to stay open when workers failed to close it.

Robyn Wolf-Eagle, chief team and resource officer of Contract Pharnacal Corp., testified that she is a member of Wolf and a shareholder of CPC. Ms. Wolf-Eagle’s brothers, Mark and Matt, are also shareholders of CPC. Ms. Wolf-Eagle explained that Wolf has owned the premises since its purchase in approximately 1998 and that CPC is the sole occupant of the premises.

Defendant now moves for summary judgment dismissing the complaint, arguing that it did not have a duty to plaintiff, as it was an out-of-possession landlord with no contractual obligation to repair or maintain the premises. Defendant submits, in support of the motion, among other things, copies of the pleadings, the bill of particulars, the transcripts of the deposition testimony of plaintiff and Robyn Wolf-Eagle, and a copy of a lease agreement between Wolf and CPC. In opposition, plaintiff argues that a triable issue of fact remains as to whether Wolf was an out-of-possession landlord, as its member worked on the premises and was a shareholder of CPC, and that Wolf had constructive notice of the defective garage door. Plaintiff submits, in opposition, a copy of Wolf’s limited liability company biennial statements.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (see *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). However, 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” (*Crosby v Southport, LLC*, 169 AD3d 637, 639, 94 NYS3d 109 [2d Dept 2019] [internal quotation marks omitted], quoting *Casson v McConnell*, 148 AD3d 863, 864, 49 NYS3d 711 [2d Dept 2017]; *Behluli v 228 Hotel Corp.*, ___ AD3d ___, 2019 NY Slip Op 03944 [2d Dept 2019]; *Fox v Patriot Saloon*, 166 AD3d 950, 88 NYS3d 483 [2d Dept 2018]). “Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition,” but only if a specific statutory violation exists

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and there is a significant structural or design defect (*Denemark v 2857 W. 8th St. Assoc.*, 111 AD3d 660, 661, 974 NYS2d 533 [2d Dept 2013]; see *Bouima v Dacomi, Inc.*, 36 AD3d 739, 829 NYS2d 572 [2d Dept 2007]; *Lowe-Barrett v City of New York*, 28 AD3d 721, 815 NYS2d 630 [2d Dept 2006]). However, the “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 Assoc., LLC.*, 166 AD3d 692, 693, 88 NYS3d 190 [2d Dept 2018]; see *Fuzaylova v 63-28 99th St. Farm Ltd.*, 161 AD3d 946, 78 NYS3d 159 [2d Dept 2018]).

Wolf established a prima facie case of entitlement to summary judgment by demonstrating that it did not possess or maintain control over the premises at the time of plaintiff’s accident, and that it was not contractually obligated to maintain or repair the alleged hazardous condition at the subject premises (see *Behluli v 228 Hotel Corp.*, supra; *Fox v Patriot Saloon*, supra; *Byrd v Brooklyn 46 Realty, LLC*, 129 AD3d 882, 10 NYS3d 642 [2d Dept 2015]; *Moltisanti v Virgin Entertainment Group, Inc.*, 91 AD3d 838, 937 NYS2d 285 [2d Dept 2012]). Ms. Wolf-Eagle testified that CPC “maintains the premises in its entirety,” including the overhead garage doors. She also stated that Wolf never performed maintenance, hired outside maintenance contractors, signed any service agreements, or performed periodic inspections of the premises. Ms. Wolf-Eagle stated that the parcel indicated in the lease agreement refers to the subject premises. Section 16 of the lease agreement provides, in pertinent part, that “Tenant shall take good care of the [subject premises] and make all repairs, structural and non structural, necessary for the [subject premises].” The terms of the lease agreement, which are clear and unambiguous, establish that Wolf was an out-of-possession landlord that had relinquished all control over the subject premises and had no duty to maintain the premises (see *Moltisanti v Virgin Entertainment Group, Inc.*, supra; *Stein v Harriet Mgt., LLC*, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether Wolf retained control over the premises or had a contractual or statutory duty to maintain and repair the area of the premises where the accident occurred (see *Byrd v Brooklyn 46 Realty, LLC*, supra; *Villarreal v CJAM Assoc., LLC*, 125 AD3d 644, 2 NYS3d 584 [2d Dept 2015]; *Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546, 990 NYS2d 849 [2d Dept 2014]; *Espada v City of New York*, 74 AD3d 1276, 903 NYS2d 237 [2d Dept 2010]). Plaintiff contends that Wolf was not an out-of-possession landlord, because Ms. Wolf-Eagle, who testified to being on premises four days per week, was a member of the landlord limited liability company and a shareholder of tenant corporation. However, such argument is self-defeating, as plaintiff would be barred from recovery by the exclusivity provisions of the Workers’ Compensation Law if Wolf were the alter ego of CPC (see *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]; see also Workers’ Compensation Law §§ 11, 29 [6]; see generally *Capella v Suresky at Hatfield Lane, LLC*, 55 AD3d 522, 864 NYS2d 316 [2d Dept 2008]). Although Wolf retained a right to re-enter the premises, plaintiff failed to provide any evidence demonstrating that the alleged dangerous condition of the overhead garage door constituted a significant structural or design defect (see *Yadegar v International Food Mkt.*, 37 AD3d 595, 830 NYS2d 244 [2d Dept 2007]; cf. *Bartels v Eack*, 164 AD3d 1202, 83 NYS3d 657 [2d Dept 2018]). Plaintiff also failed to raise a triable issue of fact as to whether her injuries were proximately caused by a defect which constituted a specific statutory violation sufficient to impose liability upon defendant (see *Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698, 874 NYS2d 528 [2d Dept 2009]; *Valenti v 400 Carlts Path Realty Corp.*, 52 AD3d 696, 861 NYS2d 357 [2d Dept 2008]). As Wolf did not owe a duty to plaintiff, the Court need not address the issue of whether Wolf had notice of the alleged

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dangerous condition (see *Garcia v Town of Babylon Indus. Dev. Agency, supra*; *Alnashmi v Certified Analytical Group, Inc., supra*).

Accordingly, the motion by defendant Wolf Family, LLC, for summary judgment dismissing the complaint is granted.

Dated: June 5, 2019

Martha L. C...
A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION