Turegalieva v Orenstein
2020 NY Slip Op 31397(U)
April 27, 2020
Supreme Court, Kings County
Docket Number: 521804/2017
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 27th day of April, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

ASEL TUREGALIEVA,

Plaintiff,

-against-

HAL ORENSTEIN and CARMELA ORENSTEIN,

Defendants.

HAL ORENSTEIN and CARMELA ORENSTEIN,

Third Party Plaintiffs,

-against-

LIVING ROOM RESTAURANT AND LOUNGE, INC.

Third Party Defendants.

Index No.: 521804/2017

DECISION AND ORDER

Motion Sequence #1

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2, 3
Opposing Affidavits (Affirmations)	4,
Reply Affidavits (Affirmations)	5

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of an alleged accident that occurred on July 9, 2017. On that day, the Plaintiff, Asel Turegalieva (hereinafter "the Plaintiff") alleges in her Complaint that she suffered personal injuries after she slipped and fell down stairs while working in a restaurant located in a property owned by Defendants Hal

Orenstein and Carmela Orenstein (hereinafter the "Defendants") at 178 Avenue U, Brooklyn, NY (hereinafter the "Premises"). At the time of the alleged accident, the Plaintiff was purportedly employed by Third Party Defendant Living Room Restaurant and Lounge, Inc. (hereinafter "Third Party Defendants").

The Defendants now move for an order pursuant to CPLR 3212, granting summary judgment and dismissing the Complaint of the Plaintiff. The Defendants contend that summary judgment should be granted as they did not create the condition at issue and did not have actual or constructive knowledge of the alleged condition at issue. The Defendants contend that while they are owners of the Premises, the Third-Party Defendants were responsible for maintaining the Premises in the area where the alleged incident occurred and that they are out of possession landlords. Specifically, the Defendants contend that the Plaintiff testified in her deposition that she slipped on the stairs as a result of the presence of an oil like substance. As such the Defendants argue that they are not responsible for cleaning such a condition, which they contend constitutes a transient condition.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the Defendants have failed to meet their *prima facie* burden which includes that they establish that they were not responsible for the alleged condition at issue. The Plaintiff further contends that the Plaintiff's injuries are a product of the condition of the stairs. The Plaintiff contends that the stairway did not have a hand-rail and that the stairway was uneven.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

In general, "[t]o demonstrate prima facie entitlement to judgment as a matter of law in a premises liability case, a defendant must establish that it did not create the condition that allegedly caused the fall or have

actual or constructive notice of that condition." *Gauzza v. GBR Two Crosfield Ave. Liab. Co.*, 133 A.D.3d 710, 710–11, 20 N.Y.S.3d 147, 148 [2nd Dept 2015]. "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Rubin v. Cryder House*, 39 A.D.3d 840, 840, 834 N.Y.S.2d 316, 317 [2nd Dept 2007]; *see also Penn v. Fleet Bank*, 12 A.D.3d 584, 785 N.Y.S.2d 107 [2nd Dept 2004]. However, "[a]n out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct." *Duggan v. Cronos Enterprises, Inc.*, 133 A.D.3d 564, 564, 18 N.Y.S.3d 555 [2nd Dept 2015]; *see also Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 18, 929 N.Y.S.2d 620, 627 [2nd Dept 2011].

In support of its application, the Defendants rely primarily on the Depositions of the Plaintiff and Defendant Hal Orenstein and the lease agreement between the Defendants and the Third Party Defendant. When the Plaintiff was asked how she fell, she testified that "I slipped on the upper part of the stairs and I went down - - I fell down." (See Defendants Motion, Exhibit "F", Page 27) When asked if there was anything on the steps the Plaintiff testified that "[t]here was spilled. Something, something like oil." (See Defendants Motion, Exhibit "F", Page 28) When asked how she fell the Plaintiff testified that "I was just sliding along the stairs." (See Defendants Motion, Exhibit "F", Page 29) Defendant Hal Orenstein testified that he owned the building and had entered into a lease agreement with the Third Party Defendant. When asked who was responsible for repairs in the restaurant, Defendant Orenstein testified "[t]he tenant." See Defendants Motion, Exhibit "H", Page 27) Paragraph 3 of the Lease between the Defendants and the Third Party Defendant specifies that the tenant is to keep the premises in good condition. (Defendants' Motion, Exhibit G, Paragraph 3).

Moreover, the Defendants contend that subject stairs are not "interior stairs", as such term is defined by the Administrative Code of the City of New York. The Defendants argue and that the subject stairway "did not serve as a means of egress to an open exterior space on either end" and point to the fact that there is no issue as to which stairway was the scene of the incident. *Mansfield v. Dolcemascolo,* 34 A.D.3d 763, 826 N.Y.S.2d 115 [2nd Dept 2006] See also *Fox v. Saloon,* 166 A.D.3d 950, 88 N.Y.S.3d 483 [2nd Dept 2018] and *Fishelson v. Kramer Props.*, 133 A.D.3d 706, 19 N.Y.S.3d 580 [2nd Dept 2015]. As such, the Court finds that the Defendants

have established a *prima facie* showing of entitlement to summary judgment and dismissal of the complaint. *Goggins v. Nidoj Realty Corp.*, 93 A.D.3d 757, 758, 940 N.Y.S.2d 674, 675 [2nd Dept 2012]; *Chery v. Exotic Realty, Inc.*, 34 A.D.3d 412, 413, 824 N.Y.S.2d 364, 365 [2nd Dept 2006].

In opposition, the Plaintiff has failed to raise a material issue of fact that serves to prevent this Court from granting summary judgment to the Defendants. The Plaintiff responds in conclusory fashion and makes general and unsupported allegations in opposition. Accordingly, the Defendants' motion is granted.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #1) is granted. The complaint against the Defendants is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.