

Gelman v Eve Pharm., Inc.
2020 NY Slip Op 34087(U)
December 2, 2020
Supreme Court, Kings County
Docket Number: 503991/2012
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

x**IRINA GELMAN, as Administrator of the Estate of
YEFIM SEMENSKIY, Deceased,****DECISION / ORDER****Plaintiff,****Index No. 503991/2012****-against-****Motion Seq. No. 10****Date Submitted: 10/21/20****EVE PHARMACY, INC. and
FORD COYLE PROPERTIES, INC.,****Defendants.**

x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Ford Coyle Properties, Inc.'s motion for summary judgment and other relief

Papers**NYSCEF Doc.**

Notice of Motion, Affirmation and Exhibits Annexed.....	<u>135-150</u>
Answering Affirmation	<u>152-153, 154-155</u>
Reply Affirmation and Exhibits Annexed.....	<u>159-160, 161</u>

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

This action arises from an accident which took place on July 25, 2012. On that date plaintiff's decedent was a customer at defendant Eve Pharmacy, located at 2836 Coney Island Avenue, Brooklyn, NY. The storefront was leased from defendant (and movant) Ford Coyle Properties, Inc. (hereafter "Ford Coyle"), the property owner. Plaintiff's decedent apparently asked an employee for assistance and was told to "look around," so he was looking for an item that he wanted to purchase. While walking around the store he claims to have fallen through what he described as an "open cellar door" and he fell down the stairs to the basement. He broke his arm and sustained other injuries. He claimed there was no warning sign, rope or barrier, and he did not see the opening in the floor as he

was looking at the items on the shelves. He also testified that the area was poorly lit.

This action was commenced a few months after the accident. Plaintiff asserted a claim of negligence as against both defendants. The complaint avers that the premises were not reasonably safe, and there was a dangerous and defective condition, which caused him to fall, and which demonstrates that defendants were negligent, described in ¶ 30 of the complaint as “unsafe floors, uneven, unlevelled, cracked worn down, damaged floors, defected [sic] lighting, railings and safety equipment at the aforementioned premises.”¹ Both defendants answered the complaint and asserted cross claims against each other. Discovery commenced, but when plaintiff passed away of unrelated causes on February 24, 2016, the case was stayed. In 2017, plaintiff Irina Gelman, decedent’s daughter, was appointed Administrator of his estate and substituted as plaintiff in this action, allowing the stay to be lifted. A stipulation to that effect was “so-ordered” on June 1, 2017. The stipulation also agreed that plaintiff could amend the complaint. The amended complaint is E-File Doc. 52. Defendant Eve Pharmacy served and filed an answer (Doc. 54) to the amended complaint, with cross claims against Ford Coyle for contribution, contractual indemnification, and breach of contract for failure to maintain insurance. Defendant Ford Coyle did not amend its answer until May 2019. Its amended answer (Doc. 103) asserts cross claims for contribution, defense and indemnification, and breach of contract to maintain insurance.

¹ In plaintiff’s bill of particulars, he adds “poor lighting conditions, no barrier, gate, door, rope between the first floor and stair case leading down to the basement, no light; no illumination of the stair case leading from the first floor to basement, no warning signs posted, no illumination of the basement.”

Plaintiff filed a note of issue in January of 2019, which was followed by motions from both defendants to strike it because discovery was not complete (MS 06 & 07). The motions were granted, and the note of issue was stricken. It has not as yet been restored. Thus, this motion is timely.

Defendant Ford Coyle filed and served this motion on June 26, 2020. It was argued virtually on October 21, 2020 and decision was reserved. There are four branches to the motion, which the court will address one at a time.

Defendant Ford Coyle first seeks an order granting it summary judgment and dismissing the complaint as against it. It argues that it is "an out-of-possession owner, and (1) Defendant did not have a duty to repair or maintain the stairs which allegedly caused the plaintiff's injury and (2) Defendant did not create or have actual or constructive notice of a dangerous or defective condition inside Eve Pharmacy." Defendant supports the motion with the pleadings, the plaintiff's EBT transcript (taken in 2015, before he passed away), the defendants' EBT transcripts, and the lease agreement (Doc 150). Both plaintiff and co-defendant Eve Pharmacy oppose the motion, although Eve Pharmacy's opposition is solely addressed to the branch of the motion seeking summary judgment on its cross claims against Eve Pharmacy, not the branch seeking dismissal.

This property is a one-story property with a basement, which is two hundred feet wide, running along Coney Island Avenue, and the Certificate of Occupancy, according to the NYC Department of Buildings' public database, is for eight stores. Eve Pharmacy is located on the corner of Coney Island Avenue and Avenue Z. The lease in effect at the time of the accident is provided as E-File Doc. 150. The first document is titled "modific-

ation and extension of lease.” It does not contain anything relevant to this motion, as it only modifies the amount of rent, and incorporates the prior lease extension (2002) and the initial lease before that, which was entered into by another lessee and assigned to the defendant in 1996, stating that they shall “continue in full force and effect.” The 2002 extension also is solely addressed to the amount of rent, and similarly incorporates the 1996 lease which is also stated to continue “in full force and effect.” Then, there is an assignment of the lease from one member of the Ripa family to another, on a Blumberg form of assignment. The last document is the lease, a standard form of store lease, the version promulgated in 1980 by the Real Estate Board of New York, according to the date at the top. As each store has its own address, the lease is for the property known as 2836 Coney Island Avenue.

Paragraph 4 of the pre-printed form lease titled “Repairs” states that tenant shall, “throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.” The Rider to the lease, at Paragraph 42, adds “[i]t is further agreed that Landlord shall be under no obligation to furnish any services whatsoever unless specifically set forth herein. Tenant is to make all interior repairs, including those as may become necessary to the storefront, and Landlord's only responsibility is to make repairs to the roof, foundation and structural elements. Painting and decorating is the responsibility of the Tenant.” Paragraph 47 of the Rider adds “Tenant

is fully familiar with the physical condition of the demised premises and the Landlord has made no warranty and/or representation concerning same nor has the Landlord promised to make any repairs whatsoever thereto except as herein provided." Paragraph 51 states "[t]he Tenant shall be permitted to use the basement and backyard immediately beneath the store upon the express understanding and agreement that there is no Certificate of Occupancy issued by the Building Department for the use thereof; and, in such event [a violation?], the Tenant agrees to quit, vacate and remove therefrom expeditiously without any deduction or adjustment from the rent and pay as additional rent any fine for the use thereof. Further, the Tenant agrees that under no circumstances will the Landlord be responsible for any damages whatsoever to persons and/or property in the Tenant's use of the said basement and backyard for any reason whatsoever. . . ." Finally, Paragraph 64 states "Tenant covenants and agrees that the Landlord is exempt from any and all liability for any damage or injury to person or property caused by or resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building or premises, from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or be due to the negligence of the Landlord."

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" (*Fox v Saloon*, 166 AD3d 950, 951 [2d Dept 2018]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18, 929 NYS2d 620 [2011]; see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 566, 509

NE2d 51, 516 NYS2d 451 [1987]; *Casson v McConnell*, 148 AD3d 863, 864, 49 NYS3d 711 [2017]).

Here, where the complaint sounds in common-law negligence and the pleadings do not allege the violation of a statute, including by referencing the plaintiff's Bill of Particulars (Doc. 139) or Supplemental Bill of Particulars (Doc. 143), the defendant property owner has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by establishing that it was an out-of-possession landlord which was not bound by either the lease or its course of conduct to maintain the premises (*see Fuzaylova v 63-28 99th St. Farm Ltd.*, 161 AD3d 946, 946, 78 NYS3d 159 [2018]; *Alnashmi*, 89 AD3d at 18-19). The court notes that the pharmacy had been in possession of the premises for fifteen years by the date of plaintiff's accident, and that the lease provides that the landlord is only obligated to repair the "roof, foundation and structural elements." Plaintiff testified that the area was poorly illuminated and should have been roped off or some other warning provided. When asked [Page 26] if there was anything wrong with the stairs, he says "no." The condition alleged by plaintiff does not involve the roof, the foundation, or the structural elements of the premises.

Plaintiff opposes the motion with an affirmation of counsel and does not raise an issue of fact to overcome the defendant's *prima facie* case with regard to defendant's claim that it was an out of possession landlord.

Therefore, this branch of the motion is granted, and the complaint is dismissed as against defendant Ford Coyle, along with Eve Pharmacy's cross claims.

The next branch of the motion seeks an order that co-defendant Eve Pharmacy must

indemnify Ford Coyle and provide it with a defense, and reimburse its costs, expenses and counsel fees. In light of the dismissal of the complaint as against Ford Coyle, this request is consequently limited to the issue of past counsel fees, costs and expenses. Eve Pharmacy opposes this branch of the motion, and, with respect to counsel fees, costs, and expenses, states that Ford Coyle requested a defense and indemnification from Eve Pharmacy's insurance company in 2013, which was denied because Ford Coyle was not named as an additional insured on the policy issued to Eve Pharmacy [¶ 19 of Subick aff.]. Counsel also claims the indemnification clause in the lease is not triggered unless and until two conditions are met: first, that Eve Pharmacy is proven to have been negligent; and second, that Eve Pharmacy is only obligated to indemnify Ford Coyle for amounts not reimbursed by Ford Coyle's own liability insurance. He cites Paragraph 8 of the lease, that is, of the Standard Store Lease, which does so provide, and specifically states that this clause includes "reasonable attorneys' fees, costs and expenses." Eve's counsel annexes proof of Ford Coyle's own insurance as exhibit A to his affirmation. However, Paragraph 40 of the Rider to the lease provides that Eve Pharmacy must obtain insurance and name Ford Coyle as an additional insured, and if it does not do so, the landlord can purchase the insurance itself and charge the premium as additional rent, should it choose not to call this a breach of the lease. There is no indication whether the owner's policy was obtained on this basis.

It is clear from the court file that defendant Ford Coyle is now represented by counsel assigned by the NY State Liquidation Bureau, as its insurer, Castlepoint, is in liquidation. It is not the same firm that initially appeared and answered the complaint. It is

not clear whether Ford Coyle has actually paid any counsel fees, costs or expenses in connection with its representation from the date this action was commenced up to today's date. The court orders and directs that both of the defendants' cross claims are severed and dismissed, and that, if either defendant wishes to pursue any of its cross claims, it must file and serve a third-party action.

The remaining relief requested in defendant Ford Coyle's notice of motion is denied.

This shall constitute the decision and order of the court.

Dated: December 2, 2020

ENTER:

A handwritten signature in black ink, appearing to be 'ds' or similar initials, written above a horizontal line.

Hon. Debra Silber, J.S.C.