McKenna v City of New York
2021 NY Slip Op 30011(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 157951/2017
Judge: Francis A. Kahn III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 32

Acting Justice

----------X

MICHAEL MCKENNA,

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

----------X

CITY OF NEW YORK,

Third-Party Plaintiff,

-v-

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.

Third-Party Defendant.

----------X

INDEX NO. 157951/2017

MOTION DATE 10/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party
Index No. 595065/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32-54 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing papers the motion is determined as follows:

In this action, Plaintiff Michael McKenna alleges that on November 13, 2016, he tripped and fell on a staircase in a parking garage located at 140 West 65th Street, New York, New York. At the time of this accident, Defendant City of New York ("City") owned the parking garage that was under the supervision of the Department of Parks and Recreation ("DPR"). Prior to this accident, Defendant had entered into a licensing agreement with Third-Party Defendant Lincoln Center for the Performing Arts, Inc., ("LCPA") for LCPA to manage, operate and maintain this property. Working as a HVAC Engineer for LCPA at the time of his accident, Plaintiff claims he was walking to check on the fire system when the heel of his work shoe got caught on a two-inch raised piece of metal trim that ran along the front lip of a step and caused him to fall down the rest of the staircase.

Plaintiff commenced this action and asserted one cause of action in negligence alleging that Defendant, their agents, servants and/or employees were negligent in the ownership, operation, maintenance, management and control of the staircase. The City answered and commenced a third-party action against LCPA for contractual indemnification, common-law indemnification, contribution and breach of contract. LCPA never appeared in this action, but the City sought leave to discontinue the third-party action.

In the instant motion, the City moves for summary judgment to dismissing Plaintiff's complaint. By its motion, the City argues two bases for this relief: that it does not owe Plaintiff a duty of care and that it neither created nor had notice of the dangerous condition. In support of these claims, the City

points to various provisions of the licensing agreement which it claims require LCPA to manage, operate and maintain this property. In opposition, Plaintiff *inter alia* relies on other provisions in the same licensing agreement to show that the City retained a right to re-enter and to control repairs performed by LCPA, to make structural repairs if LCPA failed to do so and to inspect the property.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). As the movant, the City is required to demonstrate, *prima facie*, that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

As to the argument that the City owed no duty of care to the Plaintiff, since the City and LCPA entered into a licensing agreement and not a lease agreement[1], the out-of-possession landlord standard does not apply in this case (*see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). Rather "when a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct — including, but not limited to, the landowner's ability to access the premises — to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*id* at 380-381). In other words, a landowner, "remains in presumptive control over its property and subject to the attendant obligations of ownership until it is found that control was relinquished, either as a matter of law or by a factfinder after presentation of all of the evidence" (*id* at 382; *D'Angelo v City of New York*, 179 AD3d 1015 [2d Dept 2020]). In this context "[c]ontrol is both a question of law and of fact" (*Augustine v City of New York*,___AD3d___, 2020 NY Slip Op 06739 [2d Dept 2020]).

In support of its motion, the City relied on, among other things, the deposition testimony of Matthew Genrich ("Genrich"), Administrative Parks and Recreation Manager, Jonathan Li ("Li"), Assistant General Counsel for New York City Department of Parks and Recreation, an affidavit from Steven DeStefano ("DeStefano"), Senior Director of Operations at Lincoln Center and the License Agreement between the parties.

In his deposition, Genrich averred that despite the LCPA being located within Community Board District 7 that falls under Mr. Genrich's area of responsibility, he was only "somewhat" familiar with the location. While Genrich averred the New York City Parks Department was not responsible for any maintenance of the facilities inside Lincoln Center, he stated he was not aware if the Department actually maintained any area on that property. As for inspections, Genrich testified the Parks Department has an inspection program whereupon park supervisors inspected structures and would enter their findings into a database computer system called AMPS. However, Genrich was unaware of any Parks Department inspection program that dealt with the underground parking at the Lincoln Center for the Performing Arts.

---

[1] Section 2.1 of the License Agreement provides that ". . . no ownership, leasehold or other property interest shall vest in LCPA by virtue of this Agreement"

Li testified that LCPA, and not the City would be responsible for cleaning up and picking up debris in the parking garage pursuant the licensing agreement. He also testified that the agreement required LCPA to repair defects to the garage flooring and stairs. However, he did not know whether anyone on behalf of the City inspected the garage to see if it was being maintained properly. He also did not know if the license agreement allowed for the City to do inspections of the parking garage. He could not recall if the license agreement allowed for the City to do inspections with regards to defects that may be located in the stairwells of the parking facility. He also could not say which City department might be tasked with inspecting such a property.

DeStefano averred that the defect that Plaintiff claims caused him to fall was repaired as part of a full renovation of the stairway. He averred that LCPA is required to maintain that area.

The parties' relationship as it relates to Lincoln Center is governed by their 10-year licensing agreement dated July 1, 2010. The license provides that it does not create a "leasehold or other property interest" for LCPA and that LCPA accepted the premises in "as is" condition irrespective of the condition or repair of the premises (*see* License, sections 2.1 and 2.5). The License also states that LCPA is required to "at its sole cost and expense, . . . maintain, repair and take good care of the Public Areas and the Garage and the property contained therein" and to "[m]ake all non-structural repairs, interior and exterior" including the garage and to employ personnel to fulfil these obligations (*see* License, section 7.1 and 7.5).

The City, however, retained a broad right of inspection under Article 21 of the License which reads:

> "At all times during the Term, the City and its designee shall have the right, but not the obligation, to inspect the Premises to verify compliance with the terms, covenants and conditions on the part of LCPA to be performed or observed under this Agreement and for any other lawful purpose, provided, that, except in the case of an emergency, the City shall give LCPA reasonable notice of the City's intention to inspect the Premises. The City shall take reasonable steps to minimize interference with LCPA's operations, programs and activities when conducting such inspections."

Also, under the License, maintenance performed by LCPA, including at the garage, is required to meet standards set by the DPR (*see* License, section 7.2[a]). The agreement provides that LCPA was required to develop a "comprehensive maintenance plan" which meets with approval from the DPR and the Department of Cultural Affairs ("DCA") and which must be "regularly updated and presented to both agencies after each update and upon request by either agency." As to structural repairs and alterations, the License also granted the City "sole and absolute discretion, to undertake, at any time, such repair or repairs as the City determines adequately remedies any Structural Condition(s) affecting the Premises or portion thereof", as well as pre-approval of all "alterations" as defined by the agreement (*see* License, sections 8.7 and 9.1). The City is also granted the right to inspect LCPA's books and records (*see* License, sections 14.2). The License also permitted the City the cancel the agreement based upon "the DPR Commissioner's determination that in his/her sole and absolute discretion termination is in the best interest of the City" (*see* License, section 24.1[a]). As concerns the garage in particular, the License allows for the City to oversee LCPA's acquisition, installation, removal and inventory of any equipment at the garage, any change of parking rates and the retention of a garage manager (*see* License, section 6.2, 6.5 and 6.6).

Based on the foregoing, the City failed to meet its burden. The licensing agreement was revocable at-will and gave the City broad supervisory rights over maintenance and near unrestricted access to LCPA. Contrary to Movant's assertion, the City's witnesses failed to establish that the City did not, by it conduct, exercise the inspection and supervisory authority granted to it under the License. At most, Genrich testified that he was unaware of any inspection "programs" that dealt with LCPA but did not offer testimony concerning whether inspections were ever performed. Li expressly stated he lacked knowledge concerning whether inspections were performed at LCPA. Although DeStefano averred that LCPA was responsible for maintaining the accident location, he also offered no proof as to whether the City inspected the premises as it is authorized under the License. As such, viewing the evidence most favorably to Plaintiff as the court must (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), the Movant failed to establish that the City relinquished complete control of the premises to LCPA such that it can be held, as a matter of law, that the City owed no duty of care to Plaintiff (*see Gronski v County of Monroe*, 18 NY3d supra at 381-382; *D'Angelo v City of New York*, *supra* at 1017; *Agbosasa v City of New York,* 168 AD3d 794, 796 [2d Dept 2019])

Concerning the City's notice argument, Movant posits that Plaintiff failed to satisfy the prior written notice requirement of section 7-201[c][2] of the Administrative Code of the City of New York. In support of its motion, Movant relied on unsworn records annexed to its attorney's affirmation in support of the motion which is insufficient to meet its *prima facie* burden (*see* CPLR §4518; *Rupp v City of Port Jervis*, 10 AD3d 391 [2d Dept 2004]; *Goldberger v Vill. of Kiryas Joel*, 31 AD3d 496 [2d Dept 2006]; *cf. Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]; *Cruz v City of New York*, 218 AD2d 546 [1st Dept 1995]). The City's attempt to correct this fundamental deficiency in its moving papers in its reply is improper (*see Ruland v 130 FG, LLC,* 181 AD3d 441 [1st Dept 2020]; *Migdol v City of New York*, 291 AD2d 201 [1st Dept 2002]).

Accordingly, Defendant's motion for summary judgment is denied.

1/4/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE