

Philanthrope v Papa Johns Pizza
2022 NY Slip Op 30207(U)
January 24, 2022
Supreme Court, New York County
Docket Number: Index No. 450723/2018
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

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INDEX NO. 450723/2018

MARIE PHILANTHROPE,

MOTION DATE 09/13/2021

Plaintiff,

MOTION SEQ. NO. 005

- v -

PAPA JOHNS PIZZA, PAPA JOHNS USA, INC.,146-148
LAWRENCE, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant 146-148 Lawrence (hereinafter “defendant”) moves for summary judgment dismissing the complaint against it pursuant to CPLR §§ 3211(a)(1) and (a)(7), and § 3212, contending it is an out of possession landlord to whom liability for the alleged accident cannot attach. The motion is unopposed.

For a recitation of the facts underlying this matter, the interested reader is referred to the Court’s Decision and Order on motion sequence 001 and the Appellate Division, First Department, decision regarding same (NYSCEF Doc. No. 77; 191 AD3d 563 [1st Dept 2021]).

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (see e.g. *Leon v. Martinez*, 84 NY2d 83 [1994]). “Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]).

To the extent that the motion seeks dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions

and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As relevant to the instant motion, landowners who transfer possession and control of the property are generally not subject to liability for injuries

caused by dangerous conditions therein (*Chapman v. Silber*, 97 NY2d 9 [2001]). However, where a landlord has notice of the defect and has consented to be responsible for maintenance or repair, an out-of-possession landlord may be liable (*Velazquez v. Tyler Graphics*, 214 AD2d 489 [1st Dept 1995]). Constructive notice of a defect may be found where the out-of-possession landlord has reserved the right to re-enter the premises for the purpose of inspection/maintenance/repair and a specific statutory violation exists; however, the defect must be significant to impose liability (*id.*; see also *Quinones v. 27 Third City King Rest.*, 198 AD2d 23 [1st Dept 1993]).

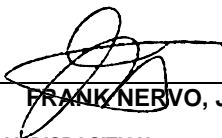
Here, on this combined dismissal and summary judgment motion, defendant concedes that it retained the right of re-entry for the purposes of inspection, repair, or maintenance (NYSCEF Doc. No. 172, see also Lease Agreement at ¶ 4-13). Furthermore, and contrary to defendant's assertions herein, the lease provides that defendant shall maintain and repair the public portions of the property (see Lease Agreement at ¶ 4). However, this right of re-entry, standing alone, is insufficient to impute liability on defendant – the defect must be significant and violate a specific statute (see *Velasquez v. Tyler Graphics, Ltd.*, *supra*). The defect alleged by plaintiff is an improper/defective/improperly placed floormat, and is not the type of

structural defect contemplated by the Lease Agreement (Bill of Particulars at ¶ 4, 5; Lease Agreement at ¶ 4). Furthermore, there is no evidence that defendant had notice of the alleged defective floormat. Nor has plaintiff identified a specific statute violated by the allegedly improper floormat, and having failed to appear on this motion, has likewise failed to establish the significance of the alleged defect. Consequently, defendant, as an out of possession landlord, is entitled to summary judgment dismissing the complaint.¹

Accordingly, it is

ORDERED and ADJUDGED that the motion is granted to the extent of granting defendant 146-148 Lawrence LLC summary judgment dismissing the complaint against it.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>1/24/2022</u> DATE					 FRANK NERVO, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	

¹ In the interest of judicial economy, the Court has not addressed those portions of the instant motion seeking dismissal under § 3211, as same is unnecessary. Were the Court to address same, it would find, assuming the allegations to be true and providing the complaint every favorable inference, that plaintiff has sufficiently pled a cause of action. To the extent that defendant has sought dismissal based upon documentary evidence, such relief overlaps with that sought under § 3212, addressed herein.