

Torres v City of New York
2022 NY Slip Op 30623(U)
February 28, 2022
Supreme Court, New York County
Docket Number: Index No. 159726/2019
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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CLARA TORRES,

Plaintiff,

- v -

CITY OF NEW YORK, 181ST WASHINGTON HEIGHTS ASSOCIATES LLC, RAINBOW USA INC, METROPCS COMMUNICATIONS, INC., VENATOR GROUP SPECIALTY INC, JANCO CENTRAL INC, 601 WEST 180 STREET NYC LLC, 1419 BURGER CORP.

Defendants.

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INDEX NO. 159726/2019
MOTION DATE 01/06/2022
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to DISMISS.

Upon the foregoing documents, defendant Venator Group Specialty, Inc's motion for summary judgment dismissing this action is granted.

Plaintiff Clara Torres alleges that on September 3, 2018, she tripped and fell on the sidewalk between 1407 and 1409 St. Nicholas Avenue, New York, NY 10033 (NYSCEF Doc. No. 68 [Verified Bill of Particulars at ¶4]). She further alleges, as relevant here, that defendant Venator Group Specialty, Inc.1 ("Venator"), owned, leased, operated, managed maintained, controlled, and repaired the premises at 1409 St. Nicholas Avenue (the "Premises") at the time of her accident (NYSCEF Doc. No. 46 [Am. Compl. at ¶¶52-58]).

On January 13, 2021, co-defendants 181st Washington Heights Associates LLC and Rainbow interposed a joint Answer which, inter alia, asserted crossclaims against Venator for

1 The Court notes that Venator is currently operating under the name Foot Locker Specialty, Inc. – however, for the sake of clarity, the Court will refer to the moving defendant as Venator.

contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance (NYSCEF Doc. No. 51 [Answer at ¶¶24-28]).

Venator now moves for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint as well as all crossclaims asserted against it. In support of this motion, Venator submits the lease to the Premises that it entered into with 181st Washington Heights Associates LLC, the owner of the Premises, on May 1, 1999 (the “Lease”) (NYSCEF Doc. No. 89 [Lease]). By its terms, the Lease expired on April 30, 2009 (Id. at p.1).

Venator submits an Assignment of Lease and Assumption Agreement, dated October 10, 2001, in which Venator assigned the remainder of the Lease term to co-defendant Janco Central, Inc. (NYSCEF Doc. No. 90 [Assignment of Lease and Assumption Agreement]). Venator asserts that 181st Washington Heights Associates LLC and Janco subsequently entered into an Extension and Amendment Agreement² and as a result, Venator terminated the Lease by letter to 181st Washington Heights Associates LLC dated on May 17, 2007, stating, in relevant part that 181st Washington Heights Associates LLC and Janco Central, Inc. had

substantially and materially modified the [Lease] ... including without limitation, the term, base annual rent, taxes, percentage rent, alterations, options to cancel, assignment rights, notice provisions and various other provisions, all without the knowledge or consultation with Foot Locker, as the Original Tenant. Accordingly, [the Lease] dated May 1, 1999, as it relates to Foot Locker Specialty, Inc., is hereby extinguished and of no further force and effect

(NYSCEF Doc. No. 91; see also NYSCEF Doc. No. 88 [Siegel Aff., ¶6]).

Venator further notes that discovery has revealed that on December 31, 2017, Janco assigned its lease to the Premises to 1419 Burger Corp. (NYSCEF No. 79 [Assignment and Assumption of Lease]). Finally, Venator submits affidavits from Joseph Maletz, the Director of Facilities at Foot Locker, and Steven Spiegel, its Senior Director of Leasing Services/Senior Real

² This Extension and Amendment Agreement is not in the record before the Court.

Estate Counsel, in which they aver that Venator has not made any repairs to any adjacent sidewalk since at least 2010, was not a tenant of the Premises on the date of plaintiff's accident, and, moreover, had no stores in the area of the accident on the date of the accident (See NYSCEF Doc. No. 92 [Maletz Aff., ¶¶ 6-8]; see also NYSCEF Doc. No. 88 [Siegel Aff., ¶9]).

DISCUSSION

As a threshold matter although plaintiff's Amended Complaint was served after the submission of this motion, the Court will treat the motion as directed to the Amended Complaint, since the new pleading does not substantively alter the existing causes of action (See Sobel v Ansanelli, 98 AD3d 1020, 1022 [1st Dept 2012]).

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). In this negligence action, plaintiff bears the burden to establish that: (1) defendant owed a legal duty to plaintiff; (2) defendant breached this breach duty and (3) plaintiff suffered injuries as a proximate cause of said breach (See e.g. P.W.B. Enterprises, Inc. v Moklam Enterprises, Inc., 221 AD2d 184, 185 [1st Dept 1995]). Venator has established its entitlement to summary judgment through documentary evidence demonstrating that it had no connection with the Premises by – at the latest – 2009, when the term of the Lease expired. As this uncontroverted evidence establishes that Venator did not own, occupy, or otherwise control the Premises for many years prior to plaintiff's accident, it follows that Venator had no duty towards plaintiff at the time of her accident and cannot be held liable in this negligence action (Ingrao v New York City Tr. Auth., 161 AD3d 683, 684 [1st Dept 2018] [internal citations omitted]; see also Kellog v All Saints Hous. Dev. Fund Co., Inc., 146 AD3d 615, 617 [1st Dept 2017]

[commercial tenant that vacated premises two years before accident owed no duty to plaintiff with regard to hazardous condition on sidewalk which allegedly caused accident]).

In opposition, plaintiff fails to establish that an issue of fact remains necessitating the denial of Venator's motion (See Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Plaintiff argues that it is premature to grant Venator's motion because discovery has not been completed. This argument is undercut by the fact that Venator has responded to all of plaintiff's discovery demands (See NYSCEF Doc. No. 112). Moreover, the issues that plaintiff suggests require further discovery are irrelevant to Venator's defense established here (See Bailey v New York City Trans. Auth., 270 A.D.2d 156, 157 [1st Dept 2000] ["a grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"]).

Accordingly, it is

ORDERED that the motion by Venator Specialty, Inc. (currently known and operating as Foot Locker Specialty, Inc.) for summary judgment dismissing this action is granted and the complaint and all cross-claims asserted against Venator Specialty, Inc. are hereby dismissed; and it is further

ORDERED that within twenty days of the date of this decision order, the movant shall serve a copy of this decision and order with notice of its entry upon all parties and upon the Clerk of the Court (60 Centre St., Room 141B) and the Trial Support Office (60 Centre St., Rm. 158M) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon proof of service of a copy of this decision and order with notice of entry upon all parties, the Clerk of the Court is directed to enter judgment accordingly and to amend the Court's records to reflect the change in the caption herein.

This constitutes the decision and order of the Court.



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2/28/2022

DATE

JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE