

Toribio v GVS Props. II
2022 NY Slip Op 30763(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 452095/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 452095/2021

DEBBIE TORIBIO,

Plaintiff,

MOTION SEQ. NO. 001

- v -

GVS PROPERTIES II, LLC, RITE HEALTH PHARMACY,
and VERIZON CORPORATE HEADQUARTERS,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112 were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Debbie Toribio, defendants GVS Properties II, LLC (“GVS”) and Dwaraka Mayi Drugs, Inc. d/b/a Rite Health Pharmacy (“RHP”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposes the motion and defendant Verizon Corporate Headquarters (“Verizon”) opposes the same in part. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on August 7, 2018, in which plaintiff was allegedly injured when she slipped and fell on a wet floor at a pharmacy operated by RHP and located at 3885 Broadway in Manhattan (“the premises” or “the pharmacy”). The floor of the pharmacy was allegedly wet because Verizon workers installing fiberoptic cable at the premises inadvertently drilled into a wall behind which there was a pipe. The pharmacy had been leased by GVS, the

owner of the premises, to Rite Health Pharmacy, Inc. in June 2013. Doc. 92. In May 2018, Rite Health Pharmacy, Inc. assigned its lease to Dwaraka Mayi Drugs, Inc., which answered in this action as Dwaraka Mayi Drugs, Inc. d/b/a Rite Health Pharmacy. Docs. 89, 92. The lease provided, inter alia, that: Rite Health Pharmacy, Inc. was to make all non-structural repairs to the premises (Doc. 92 at par. 4); GVS was not to be liable for “any injury to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of [GVS], its agents servants or employees (Doc. 92 at par. 8); Rite Health Pharmacy, Inc. was to allow GVS “to use and maintain and replace pipes and conduits in and through the demised premises and to erect new pipes and conduits therein, provided they are within the walls” (Doc. 92 at par. 13); GVS was permitted to enter the premises for the purposes of making repairs and complying with laws (Doc. 92 at par. 13); GVS was not required to allow Rite Health Pharmacy, Inc. to make any alterations which could affect the structure or plumbing of the building (Doc. 92, lease rider at par. 44 [A]); and GVS was obligated to maintain and repair the structural portions of the premises. Doc. 92, lease rider at par. 44(D).

Plaintiff commenced this action by filing a summons and complaint in the Supreme Court, Queens County on May 3, 2019. Docs. 1, 86. In her complaint, plaintiff alleged that GVS, RHP, and Verizon owned, operated, managed, maintained and/or controlled the premises. Id.

Verizon joined issue by its answer filed June 25, 2019, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against GVS and RHP for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 87.

RHP joined issue by its amended answer filed July 11, 2019, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed

against GVS and Verizon for contribution and common-law and contractual indemnification. Doc. 89.

GVS joined issue by its amended answer filed July 12, 2019, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against RHP and Verizon for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 90.

In her bills of particular against GVS, RHP and Verizon, plaintiff claimed that she was injured due to an accumulation of water on the floor at the premises. Docs. 63, 93-94. She further alleged that defendants created and/or had actual and/or constructive notice of the condition. *Id.* She also admitted that she was an employee of RHP. *Id.*

By order entered February 27, 2020, the Supreme Court, Queens County (Purificacion, J.) granted GVS' motion to change venue to the Supreme Court, New York County. Doc. 19.

To date, depositions have not been conducted in this matter.

GVS and RHP now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. Docs. 84-97. In support of the motion, GVS argues that it is entitled to dismissal since it is an out of possession landlord which did not retain control over the premises and had no responsibility to maintain the pharmacy. Doc. 85. Although GVS admits that an out of possession landlord may be found to have had constructive notice where it reserves a right to enter the premises to inspect or repair, it stresses that only a significant structural or design defect contrary to a specific statutory provision, which does not exist herein, will give rise to liability. *Id.*

RHP argues that it is entitled to dismissal since it was plaintiff's employer, plaintiff was acting during the course of her employment when she was injured, and that it had workers'

compensation insurance on the date of the occurrence. Id. Thus, RHP claims that plaintiff is barred by Workers' Compensation Law §§ 11 and 29(6) from seeking recovery against it. Id.

In support of the motion, GVS and RHP submit an affidavit written by Nikolaos Tsolkas, Commercial Field Manager for GVS, who attests, inter alia, that: GVS owned the premises on the date of the incident; RHP assumed the lease in 2018 and was the commercial tenant at the time of the incident; GVS had no involvement with the operation of the pharmacy; he had no notice of the wet floor and never received any complaints about a wet floor at the premises; and GVS was not aware that Verizon did any work on the day of the occurrence. Id.

GVS and RHP also submit an affidavit by Maheswari Kadiyam-Jhalani, a manager of the pharmacy, who attests that GVS did not operate the same. Doc. 97. Kadiyam-Jhalani further represents that plaintiff was an employee of RHP on the date of the incident; that RHP maintained workers' compensation insurance on the date of the incident through The Hartford Financial Services Group ("The Hartford"); and that, after the incident, The Hartford "opened a claim" which was "later closed." Doc. 97.

In partial opposition to the motion, Verizon argues that GVS is not entitled to summary judgment because it reserved the right to reenter the premises to inspect and make repairs and caused and/or contributed to the incident. Doc. 103. Verizon further contends that GVS had actual and constructive notice of the condition which caused the leak, i.e., the improper installation of the pipes, as well as of the wet floor which caused plaintiff to fall. Id. Additionally, Verizon contends that the motion is premature because no depositions have been held and that questions of fact exist precluding such relief. Id.

Annexed to Verizon's opposition is the affidavit of Peter Santagada, a Verizon Field Technician, who worked at the premises on the day of the incident with his colleague, Peter

Burgos. Id. Santagada states that, on the day of the incident, he and Burgos were installing internet wires at the pharmacy. Id. The men used ¾” thick molding to enclose the wires they installed. Id. The molding was to be fastened with standard 1” metal screws. Id. As Santagada inserted the screw, water began dripping out of the hole and the floor became wet. Id. Although Santagada “advised all pharmacy staff that the area was wet and to be cautious”, plaintiff walked towards the area, slipped, and fell. Id. Santagada maintains that, after the occurrence, he noticed a copper water pipe flush against the other side of the ¾” thick wall. Id. He represents that, based on his experience in the industry, a pipe should never be placed against a wall since this can lead to a puncture of the pipe and that the pipe “looked to be in violation of building codes.” Id.

Burgos also submits an affidavit, substantially reiterating Santagada’s representations. Doc. 106.

Martin R. Bruno, a Construction Health and Safety Technician retained by Verizon, submits an expert affidavit in opposition to the motion. Doc. 108. Bruno represents, with “a reasonable degree of certainty in the field of construction site safety”, that: the installation of the pipe at the premises violated New York City Building Code § 302, specifically MC 302, subsection 302.3.3, which addresses the boring of holes needed to install electrical or plumbing lines through a studded wall, and that, had the pipes been installed properly, the screw would not have been long enough to puncture the pipe. Id. He concludes that the “structural/installation defect of the wall and pipe” violated subsection 302.3.3. Id.

Plaintiff opposes the motion by incorporating by reference the arguments made by Verizon. Doc. 109.

In reply, GVS and RHP argue that RHP is entitled to summary judgment since neither plaintiff nor Verizon opposed the branch of the motion seeking dismissal against it. Doc. 112.

GVS reiterates its argument that it is entitled to summary judgment as an out-of-possession landlord. *Id.* Said defendants further assert that Bruno's affidavit must be disregarded since it is based on conjecture and that no structural defect existed at the premises. *Id.* They also contend that the affidavits of Santagada and Burgos must be disregarded as self-serving and conclusory and, thus, any opinions Bruno reached based on them is without any probative value. *Id.* Further, they maintain that the photographs reviewed by Bruno are unauthenticated. *Id.*

LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment 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], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also* CPLR 3212 [b]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). Only after the moving party makes a prima facie showing does "the burden shift[] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324). "The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega*, 18 NY3d at 503 [citation, internal quotation marks and alterations omitted]).

GVS

As noted previously, GVS seeks summary judgment on the ground that it is an out-of-possession landlord, which "is generally not liable for negligence with respect to the condition of

property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs . . . and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, 527 [1st Dept 2017] [citation omitted]).

GVS has satisfied its prima facie burden of demonstrating that neither of the foregoing exceptions to the out-of-possession landlord doctrine apply. Initially, GVS submits its lease with RHP, which reflects that RHP had the duty to maintain the premises in good condition. The defect complained of by plaintiff, *i.e.*, water on the floor, "involves simple general maintenance of the premises, which was the sole responsibility of [RHP]" (*Manning v New York Tel. Co.*, 157 AD2d 264, 270 [1st Dept 1990]).

Although GVS, as an out-of-possession landlord, retained the right to inspect and make structural repairs, "it cannot be held liable under a theory of constructive notice in the absence of a significant structural or design safety provision" (*McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept. 2003] [internal quotations marks and citations omitted]). Since plaintiff fails to allege the violation of any such provision in her complaint or bill of particulars, it cannot be held liable on this basis (*See Michaele v Steph-Leigh Assoc., LLC*, 178 AD3d 820, 820-821 [2^d Dept 2019]). Although Bruno opines that GVS violated the New York City Building Code, he cites § 302.3.3 of the New York City Mechanical Code, which falls under the subheading "Chapter 3 General Regulations NYC Mechanical Code 2022" (*emphasis added*). As a general regulation, this provision is "insufficiently specific to impose liability on an out-of-possession landlord" (*Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d at 528 [citation omitted]). Moreover, although Bruno describes the condition at the premises as a "structural/installation defect of the

wall and the pipe”, he does not refer to it as a “significant structural or design defect” (*Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d at 527) and, thus, his affidavit fails to raise a material issue of fact regarding the potential liability of GVS.

RHP

Workers' Compensation Law §§ 11 and 29 (6) provide that an employee who is entitled to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained (*Soto v Akam Assoc., Inc.*, 61 AD3d 665, 665 [2d Dept 2009]). An employer establishes its prima facie entitlement to summary judgment based on the Workers' Compensation Law by showing that: it employed plaintiff; plaintiff was injured during the course of his or her employment; and plaintiff was found eligible for benefits under the said law (*Dumervil v Port Authority of N.Y. and N.J.*, 163 AD3d 628, 629 [2d Dept 2018]). Here, Kadiyam-Jhalani represents in her affidavit that plaintiff was an employee of RHP on the date of the incident and was injured during the scope of her employment. Doc. 97. Although Kadiyam-Jhalani further states that RHP maintained workers' compensation insurance through The Hartford and that The Hartford opened a claim which it later closed (*id.*), she fails to state whether plaintiff was found eligible for benefits under the Workers' Compensation Law and submits no other evidence in this regard. The pay stubs annexed to the motion do not demonstrate that plaintiff received, or was eligible for, such benefits. Thus, RHP has failed to establish its prima facie entitlement to summary judgment. Given this failure, the fact that plaintiff and Verizon did not oppose that branch of the motion seeking dismissal of the claims against RHP is of no moment herein.

The remainder of the parties' contentions are either without merit or need not be considered given the conclusions above.

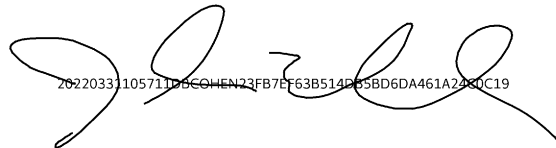
Accordingly, it is hereby:

ORDERED that the motion for summary judgment of defendants GVS Properties II, LLC and Dwaraka Mayi Drugs, Inc. d/b/a Rite Health Pharmacy is granted to the extent that the complaint and all cross claims are dismissed against GVS Properties II, LLC, and the motion is otherwise denied; and it is further

ORDERED that the said claims and cross claims against defendant GVS Properties II, LLC are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant GVS Properties II, LLC dismissing the claims and cross claims asserted against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the parties remaining in this action are to appear for a preliminary conference in this action on May 3, 2022 at 2:30 p.m. unless they email a proposed preliminary conference order to this Court at SFC-Part58-Clerk@nycourts.gov at least two business days prior to the conference.



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DAVID B. COHEN, J.S.C.

3/31/2022
DATE

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APPLICATION:

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