

De Paz v 4221 Broadway Owner LLC

2022 NY Slip Op 31375(U)

April 28, 2022

Supreme Court, New York County

Docket Number: Index No. 159720/2019

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**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. 159720/2019

JOSE DE PAZ,

Plaintiff,

MOTION SEQ. NO. 003

- v -

4221 BROADWAY OWNER LLC and TIERRA Y MAR
RESTAURANT INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Jose De Paz, defendant 4221 Broadway Owner LLC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. 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 May 31, 2019, in which plaintiff was allegedly injured at 4221 Broadway in Manhattan ("the premises" or "the building") when he fell into an open cellar door located on the sidewalk adjoining the premises. The building was owned by defendant 4221 Broadway Owner LLC ("the landlord") and leased to defendant Tierra y Mar Restaurant Inc. ("the restaurant") (collectively "the defendants"). The lease, dated May 1, 2018, required the restaurant to make all non-structural repairs to the premises. Doc. 49 at par. 4. Additionally, the lease required the restaurant to "take good care of the demised premises",

including the sidewalks adjacent thereto, and to make all non-structural repairs. Doc. 49 at par. 4. Further, it allowed the landlord to enter the premises to inspect the same and to make repairs. Doc. 49 at par. 13.

In his complaint, filed October 7, 2019, plaintiff alleged that he was injured as a result of the negligence of the defendants in their ownership, operation, maintenance, and management of the premises. Doc. 1.

The landlord initially joined issue by its answer filed January 9, 2020. Doc. 8. On January 28, 2020, the landlord filed an amended answer, in which it denied all substantive allegations of wrongdoing, asserted numerous affirmative defenses, and asserted cross claims against the restaurant. Doc. 11.

In his bill of particulars dated January 14, 2020, plaintiff alleged that he was injured when he fell into “an open, unhitched, unsecured and unattended cellar door that lacked warning signs/cones.” Doc. 44 at pars. 6 and 8. He further claimed that the landlord created and/or had actual and/or constructive notice of the condition. Doc. 44 at pars. 8-11.

By order entered November 2, 2020, this Court granted plaintiff a default against the restaurant and directed that any damages to be awarded against the restaurant would be determined at the time of trial. Doc. 26.

At his deposition, plaintiff testified that, on May 31, 2019, he was standing in front of the restaurant and, as he went to read a sign in the window, he fell into an open door located in the sidewalk which led to the basement of the premises. Doc. 45 at 22-24, 29, 31. Plaintiff could not identify any problem or defect with the door other than that it was open. Doc. 45 at 36-37.

Vinny Mrkulic testified that, on the day of the incident, he was employed by New Amsterdam Property Management (“NAPM”) as the landlord’s property manager. Doc. 46 at 10-

11, 13-14, 38. The landlord owned the building located at 4221 Broadway, which consisted of street level commercial space and residential apartments (which had an address of 701 West 179th Street) located on the floors above. Doc. 46 at 20-21. As of May 2019, the restaurant was the tenant of the corner store located in the building. Doc. 46 at 23-24.

According to Mrkulic, who identified the lease, the restaurant leased a store front and the basement space underneath it. Doc. 46 at 29-30, 40-41. The restaurant gained access to the basement through the cellar doors located in the sidewalk. Doc. 46 at 41, 46-47. As the commercial tenant, the restaurant was responsible for opening, closing, and maintaining the cellar doors. Doc. 46 at 34, 42-44, 52. Only the restaurant's employees had access to the doors leading to its cellar, and they were allowed to open and close the doors as needed. Doc. 46 at 48-49, 66.

Prior to plaintiff's alleged accident, Mrkulic never received any complaints about the cellar doors, and the restaurant never told him that any maintenance was performed or needed on the doors. Doc. 46 at 51-52. He was not aware of any other incident in which someone was injured falling into the opening where the cellar doors were located. Doc. 46 at 61-62.

At his deposition, Mrkulic was shown a photograph of the front of the restaurant which depicted the cellar doors open with warning cones positioned around them. Doc. 46 at 55. Mrkulic previously observed the cones positioned around the cellar doors which led to the restaurant's portion of the cellar, maintained that the restaurant was responsible for placing the cones there, and that the photographs fairly and accurately represented the front of the restaurant. Doc. 46 at 55-57. He had never seen the cellar doors open without warning cones placed around them. Doc. 46 at 57.

Matthew John Keller, Chief Operating Officer (“COO”) for NAPM, appeared for deposition on behalf of that entity. In his capacity as COO, he ensured that NAPM’s property managers had the financial resources and other tools they needed to perform their jobs. Doc. 48 at 8. Although he was not familiar with the restaurant’s lease, he represented that a tenant was ordinarily responsible for safety issues relating to cellar doors located on sidewalks. Doc. 48 at 15. Keller was unaware of any complaints associated with the sidewalk cellar doors maintained by the restaurant. Doc. 48 at 16-17.

Plaintiff filed a note of issue and certificate of readiness on January 27, 2021. Doc. 29.

By order entered May 7, 2021, this Court granted plaintiff a special preference. Doc. 35.

The landlord now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Docs. 39-50. In support of the motion, it argues that, as a landlord out-of-possession, it had no responsibility for the accident. Doc. 41. It further asserts that it neither created, nor had actual or constructive notice of, the allegedly defective condition. Doc. 41.

In opposition, plaintiff argues that the landlord failed to establish its prima facie entitlement to summary judgment. Doc. 54. Alternatively, plaintiff argues that, if the landlord made such a prima facie showing, then it raised a material issue of fact in opposition regarding whether the landlord, which had the right to enter the premises to make repairs, had notice of the condition. Doc. 54.

LEGAL CONCLUSIONS

It is well established that an out-of-possession landlord "is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) 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" (*DeJesus v Tavares*, 140 AD3d 433, 433 [1st Dept 2016] [internal quotation marks omitted]). As noted previously, the lease between the landlord and the restaurant obligated the restaurant to maintain the premises and make all non-structural repairs. Nothing in the lease required the landlord to repair or safeguard the cellar doors, and there is no indication that they were defective in any way. That the cellar doors were safe and did not have a "significant structural or design defect" is demonstrated by the testimony of Mrkulic and Keller, who stated that there had never been a prior accident or complaint about them. (*See Matias v W. 16th Realty LLC*, 189 AD3d 681, 682-683 [1st Dept 2020]; *cf Hernandez v 34 Downing Owners Corp.*, 148 AD3d 554, 554-555 [1st Dept 2017]). Indeed, plaintiff admitted that he noted nothing wrong with the cellar doors except that they were open. Therefore, the landlord has established its prima facie entitlement to summary judgment dismissing the complaint.

Although the landlord reserved the right to enter the premises for the purpose of inspection and repair, the properly functioning cellar door, left open by someone within the restaurant's control, did not constitute a significant structural or design defect, and plaintiff did not allege a violation of an applicable specific statutory provision which could give rise to liability on the part of a landlord out-of-possession. On the contrary, the evidence submitted reflects that the doors were unsafe solely because they were improperly kept open by the restaurant (*See Raffa v Verni*, 139 AD3d 441, 441 [1st Dept 2016] [citations omitted]). Therefore, plaintiff fails to raise a material issue of fact in opposition to the motion (*See Rojas v P&B Bronx Props. LLC*, ___ AD3d ___, 2022 NY App Div LEXIS 1589, 2022 WL 773979, 2022 Slip Op 01753 [1st Dept, March 15, 2022]).

Accordingly, it is hereby:

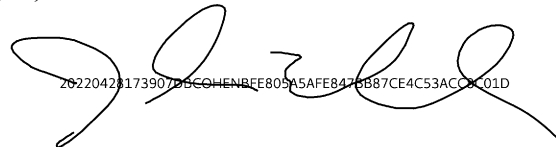
ORDERED that the motion by defendant 4221 Broadway Owner LLC seeking summary judgment pursuant to CPLR 3212 is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendant 4221 Broadway Owner LLC; and it is further

ORDERED that the claims against defendant 4221 Broadway Owner LLC are hereby severed, and the balance of the action, as asserted against defendant Tierra y Mar Restaurant Inc. shall continue; and it is further

ORDERED that the Clerk is to schedule a trial as to the amount of damages to be awarded against the remaining defendant, Tierra y Mar Restaurant Inc., against which defendant a default was entered on November 2, 2020; and it is further

ORDERED that the said trial as to the amount of damages to be awarded as against defendant Tierra y Mar Restaurant shall take place as soon as practicable given that plaintiff was awarded a special trial preference by order entered May 7, 2021.



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DAVID B. COHEN, J.S.C.

4/28/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: