Amodeo v ASN 50th St. LLC
2022 NY Slip Op 31570(U)
May 12, 2022
Supreme Court, New York County
Docket Number: Index No. 160293/2019
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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JILL AMODEO,

Plaintiff,

- v -

ASN 50TH STREET LLC,

Defendant.

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INDEX NO. 160293/2019

MOTION DATE 03/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

ASN 50TH STREET LLC

Plaintiff,

-against-

PALM WEST CORPORATION

Defendant.

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Third-Party
Index No. 595333/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

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

BACKGROUND

This action arises out of claims for personal injuries allegedly sustained by the plaintiff, on June 11, 2019 at approximately 10:30 p.m. at The Palm West Side restaurant located at 250 West 50th Street, New York, NY 10019.

Plaintiff was an employee of The Palm and was in the process of cleaning, clearing and closing down Private Dining Room 1 (PDR1) after the conclusion of a private dinner party. While in the process of doing these activities, plaintiff's right foot became ensnared in a

galvanized cable affixed to the bottom of the room divider partition wall separating PDR1 from PDR2 and PDR3, causing her to fall.

ASN 50th Street LLC (ASN) is the landlord of the restaurant pursuant to a lease renewal agreement entered into by its sole member Avalon Bay and Palm West Corporation (Palm West).

ASN filed a Third-Party Complaint against Palm West alleging that it was the owner of the subject premises and that pursuant to a lease with Palm West it was owed indemnity.

PENDING MOTIONS

On September 30, 2021, Palm West moved for summary judgment in favor of ASN pursuant to CPLR 3212 and CPLR 1008, and ASN cross-moved for summary judgment and dismissal of plaintiff's complaint as well as summary judgment on their claims against Palm West.

On January 31, 2022, plaintiff cross-moved for an order compelling discovery and for related relief.

On April 29, 2022, the motions were fully briefed and submitted to the court for determination.

ALLEGED FACTS

Plaintiff's accident occurred at night on June 11, 2019, when she was cleaning up after a party in Private Dining Room 1 (PDR1). The private dining rooms at Palm West had two sets of retractable walls that slid on a track and when put into place would create smaller private dining areas. The servers would put the panels into place depending on the size of the party. There is a pulley system in the panel that when pulled secures the panel and allows the bottom of the panel to lie flush with the floor. The pulley is connected to a wire that is at the bottom of the panel.

Plaintiff was putting chairs on top of tables when her foot got caught in a wire that was sticking out from under the panel door. She never saw the wire sticking out from under the panels before she fell. The wire that caused her fall is not an electrical wire but one that she described as being part of the pulley system.

Cosmin Anghel, the maintenance manager for Avalon Bay and the subject building at the time of the accident testified on behalf of ASN. Mr. Anghel testified that the only aspect that the owner of the building oversees for the commercial spaces are the mechanicals that are shared with the rental spaces in the building. This refers to booster pumps; cooling towers; and ejecting pits. The only reason Avalon Bay/ASN would be called would be because of issues with shared mechanicals such as a leak. The building did not do inspections or walk-arounds of the retail spaces as, commercial spaces are completely responsible for everything that's built inside their space.

Mr. Anghel testified that if there was an issue Palm West had with an interior panel in their space, they would not ask Avalon Bay/ASN to fix it.

Kelsey Coughlin, the Palm West Assistant General Manager at the time of the accident, also testified that Palm West used Jason Perna, a contractor, to deal with any interior issues in Palm West that needed to be fixed, including the panels. In November 2018, the Assistant Manager of Palm West emailed Jason Perna to ask for an immediate repair on the door to PDR 1.

The only time Avalon Bay/ASN came into the space was for a leaking pipe that was shared with the building.

The owners of the building never did work in the private dining room or any other parts of Palm West. Craig Levy, the General Manager of Palm West told Ms. Coughlin that the owner of the building was only in charge of maintaining the shared mechanicals with the building such

as HVAC and plumbing. Ms. Coughlin was working at Palm West at the time of the accident and it was reported to her. She did not notify the building owners of the wire issue because it did not fall under their responsibility for maintenance.

On May 24, 2018, Palm West renewed its lease with AvalonBay Communities, Inc. as Landlord.

Article 4, "Repairs" provides that Tenant shall take good care of the demised premises and the fixtures and appurtenances therein at its sole cost and expense. Specifically, "Tenant shall, throughout the term of this lease take good care of the demised premises and the fixtures and appurtenances therein at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear….".

The Rider dated 11/17/98 at Article 75: "Landlord's Exercise of Self Help: Any reservation of right by Landlord to enter upon the demised premises to make or perform any repairs, alterations, or other work in, to, or about the demised premises that, in the first instance, is Tenant's obligation pursuant to this lease, shall not be deemed to (a) impose any obligation on Landlord to do so; (b) render Landlord liable to Tenant or to any third party for Landlord's failure to do so; or (c) relieve Tenant from any obligation to indemnify Landlord as otherwise provided in this lease.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must

be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

"On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

ASN is entitled to Summary Judgment as an Out of Possession Landlord

It is widely accepted under New York law that property owners have a non-delegable duty to maintain their premises in a reasonably safe condition for the protection of persons whose presence thereon is reasonably foreseeable. *Peralta v. Henriquez, et al.*, 100 N.Y.2d 139 (2003). However, a property owner is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant, unless: (1) the landlord is either contractually obligated to make repairs and/or maintain the premises, or has retained a right to re-enter, inspect, and make repairs; and (2) liability is based on a significant structural or design defect contrary to a specific statutory safety provision. *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325 (1st Dep't. 1996). See also *Henry v. Hamilton Equities, Inc., et al.*,

161 A.D.3d 418 (1st Dep't. 2018); *Sapp v. S.J.C. Lenox Ave. Family Ltd. Partnership*, 150 A.D.3d 525, 527 (1st Dep't. 2017); *Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d 489, 489 (1st Dep't 1995); *Brooks v. Dupont Associates, Inc.*, 164 A.D.2d 847, 848- 49 (1st Dep't 1990).

ASN fully transferred possession and all maintenance responsibilities to a tenant, retaining only a limited right of re-entry but with no obligation to perform inspections, maintenance or repairs. As such, the wire sticking out from under a panel/partition door, cannot impose liability on ASN because it is not a significant structural or design defect and does not violate a specific statutory provision.

In *Devlin v. Blaggards III Rest. Corp.*, 80 A.D.3d 497 (1st Dep't. 2011), the First Department made clear that violation of a specific statute that constitutes a structural or design defect is the *sine qua non* of a claim against an out-of-possession landlord. *See also Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 420 (1st Dep't 2011); *Malloy v. Friedland*, 77 A.D.3d 583, 584 (1st Dep't. 2010).

Defects pertaining to interior doors have generally not been considered to be a structural defect for which an out of possession landlord may be held liable. *See, Angwin v SRF Partnership*, 285 A.D.2d 570 (2nd Dept. 2001); *Pavon v Rudin*, 254 AD2d 143, 147 [1st Dept 1998]; *Weeks v. Green 485 TIC LLC*, 2019 NY Slip Op 32434(U)(N.Y. Sup. Ct. Aug. 15, 2019).

Additionally, the plaintiff in *Davis v. HSS Properties Corp*. allegedly tripped and fell when she stepped into a 10-inch depression created by the removal of a tile in a floor the defendant landowner had installed at the tenant's request. 1 A.D.3d 153, 154 (1st Dep't. 2003). The owner in *Davis* reserved the right to make certain repairs for which the tenant was responsible, at the tenant's expense. *Id*. The First Department noted that the out-of-possession landowner could only be held liable for injury where it reserved the right to re-enter to perform

inspection, maintenance and repairs and where injury was caused by "a significant structural or design defect that is contrary to a specific statutory safety provision." *Id.*

ASN contracted away its possession, maintenance and control of Palm West's interior as well as the responsibility to keep it in good order and repair, whether those repairs be structural or non-structural, ordinary or extraordinary. While it did retain the right under the above clause to enter the subject premises for inspection, such a contractual right of re-entry explicitly does not oblige ASN to make inspections or repairs. Case law in this Department holds that such a limited right to re-enter does not vitiate a ground lessor's out-of-possession status. *Li v. 37-65 LLC*, 114 A.D.3d 538, 539 (1d Dep't. 2014).

Plaintiff's primary opposition to the motions is that they are premature because there is still outstanding discovery. Palm West has provided an additional statement that it has produced all documents responsive to outstanding discovery requests. Plaintiff also focuses on an email and invoice showing that Palm West reached out to a contractor to repair the door approximately one year prior to the incident.

Pursuant to a Compliance Conference Order, dated January 14, 2021, all discovery was supposed to be complete, and a Note of Issue was supposed to be filed on or about June 30, 2021. On July 13, 2021, because the Note of Issue had not been filed and believing that discovery had appeared to have been completed, counsel for Palm West sent an e-mail to all attorneys asking if there was any remaining discovery. Plaintiff did not respond until December 21, 2021, which was after the date the pending motions had been filed. Plaintiff sought additional documents pertaining to the above referenced email and invoice for the repair of the door and Palm West responded by stating it had produced everything in its possession.

Plaintiff's claimed need for discovery, is unsupported by the procedural history in this action, where depositions of all parties have been completed, and is essentially no more that "mere hope," insufficient to forestall summary judgment (*Moran v Regency Savings Bank, F.S.B.* 20 AD3d 305 [2005]; *National Union Fire Ins. Co. v. Marangi,* 214 A.D.2d 469, 470 [1995]). Plaintiff "had a reasonable opportunity to pursue discovery" and "has not shown that it was diligent in pursuing discovery[.]" *Singh v. New York City Hous. Auth*., 177 AD3d 475, 476 [1st Dept 2019]; *see also Island Federal Credit Union v. I&D Hacking Corp*., 194 AD3d 482 [1st Dept 2021]. "Summary judgment may not be defeated on the ground that more discovery is needed, where, as here, the side advancing such an argument has failed to ascertain the facts due to its own inaction[.]" *Ward v. New York City Hous. Auth*., 18 AD3d 391, 392 [1st Dept 2005], *quoting Meath v Mishrick*, 68 NY2d 992, 994 [1986].

Moreover, the court does not find the email and invoice showing that Palm West reached out to have the door fixed and was invoiced for the cost to be the smoking gun plaintiff appears to believe it is. In fact, it supports the argument that Palm West, and not ASN, was responsible for maintenance of the door.

Plaintiff also argues that ASN is not an out of possession landlord and retained control over the premises based upon a right to reenter provision in the lease. The court does not find Plaintiff's arguments persuasive.

Liability may not be imposed on an out of possession landlord who retains a right of reentry. The circumstances for imposing liability to an out of possession landlord has been clearly carved out in *Guzman v. Haven Plaza Housing Development Fund Company, Inc*., 69 N.Y.2d 559 (1987) where the alleged defect must be either a significant structural and/or design defect involving specific code violations. In *Manning v. New York Telephone Company*, 157

A.D.2d 264 (1st Dept. 1990), the court held that evidence of a landlord's general duty to keep the premises in good repair is insufficient to impose liability without a violation of a specific safety provision. *Id.*at 270. The Court further commented in support of its holding granting summary judgment to the landlord:

> The general rule has been that, absent statutory duties, a landlord's reservation of the right to reenter the leased premises to make repairs or correct improper conditions does not impose liability for a subsequently arising dangerous condition." (citations omitted)

Id. At 267.

While the lease speaks to a right of reentry for ASN, a landlord's contractual right to reenter the premises for the purpose of conducting inspections, alterations, and repairs, does not constitute a sufficient retention of control over the premises to impose liability. *Canela v. Foodway Supermarket*, 188 A.D.2d 416 (1st Dept. 1992).

ASN's Motion for Summary Judgment Against Palm West is Granted

Palm West entered into a lease with Resnick Eighth Avenue Associates (owner) on November 17, 1998. On May 24, 2018, Palm West renewed its lease due to terminate on July 31, 2024. The lease was signed by AvalonBay Communities, Inc. as Landlord and noted that Resnick Eighth Avenue Associates was its predecessor. The lease was signed by James Longo for Palm West and Jeffrey Topchick for AvalonBay.

Pursuant to the Third Amended Restated Operating Agreement of ASN, ASN was a limited liability Delaware corporation formed on August 30, 2005. The agreement reflects that AvalonBay Communities, Inc. is the sole member of ASN. According to §(6)(b) of the agreement, AvalonBay was entitled to enter into and perform, on behalf of ASN, all documents, agreements, certificates… According to §(10) entitled "Powers," the business and affairs of ASN shall be managed by or under the direction of AvalonBay.

Prior to June 11, 2019, Resnick Eighth Avenue Associates merged with, acquired, or was acquired by ASN or otherwise became related in such a way that Palm West was subject to the same duties and obligations towards ASN under the lease as was Resnick Eighth Avenue Associates.

There is no question Palm West contractually agreed to defend, indemnify, and hold harmless ASN against and from all liabilities, damages, and claims arising out of any breach of the lease by Palm West. Article 8 of the lease specifically states:

> Owner or its agents shall not be liable for any… injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees… Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney's fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, or licensees, of any covenant or condition of this lease, or the negligence of the Tenant…

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Cuellar v. City of New York*, 139 A.D.3d 996, 998 (2d Dep't 2016).

The intention to indemnify can be clearly implied from the language of the lease, there are no ambiguities. Palm West is definitively charged with the duty to maintain its space in a good working order and to make all repairs to the non-structural fixtures and appurtenances within its space. The purpose of the "Repairs" clause of the lease is also clearly implied, which is to maintain Palm West's space in a safe operational state and to prevent injuries and/or accidents such as the one that is the subject of this lawsuit from occurring. Plaintiff alleges she tripped over a non-electrical wire which was protruding from a panel meant to separate space within Palm

West's space, a defect which Palm West admits both in its underlying motion and by way of its own testimony was within its purview of the lease.

Palm West does not deny in its opposition papers ASN's claim that they were negligent or in breach of the lease by allowing the condition that caused plaintiff's injury to exist. The acknowledged breach of the lease triggers the indemnification language in favor of ASN.

Palm West's insurer, Everest National Insurance Company, by way of its third-party Administrator Sedgwick, accepted ASN's tender of defense on December 10, 2020. Notwithstanding that the tender acceptance was with a reservation of rights, it provides some evidence of Palm West's acknowledgement of a defense obligation to ASN.

Based on the foregoing, ASN is entitled to summary judgment on its contractual defense and indemnification claim against Palm West.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that defendants' motions for summary judgment are granted and plaintiff's complaint is dismissed with costs and disbursements 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; and it is further

ORDERED that Third-Party Plaintiff is entitled to judgment on liability as against Third-Party Defendant and that the only triable issues of fact arising on Third-Party Plaintiff's motion for summary judgment relate to the amount of damages to which Third-Party Plaintiff is entitled; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that Third-Party Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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5/12/2022
DATE

SABRINA KRAUS, J.S.C.

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