

Frenza v Four State Commercial Devs. LLC
2022 NY Slip Op 32333(U)
January 20, 2022
Supreme Court, Bronx County
Docket Number: Index No. 32920/2018
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 6

Index No. 32920/2018

JULIA M. FRENZA,

Plaintiff,

-against-

FOUR STATE COMMERCIAL DEVELOPERS LLC,

Defendant.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 2):

<u>Papers</u>	<u>Numbered</u>
Defendant’s Notice of Motion, Affirmation of Paul M. Tarr, Esq. dated December 21, 2020, in Support of Motion, and Exhibits (“A” through “G”).....	1
Affidavit of Gina Kotsar dated November 24, 2020, in Support of Motion.....	2
Affidavit of John T. Snook dated November 30, 2020, in Support of Motion.....	3
Affidavit of David Behnken dated December 15, 2020, in Support of Motion.	4
Memorandum of Law by Paul M. Tarr, Esq. dated December 21, 2020, in Support of Motion.....	5
Affirmation of John S. Manassis, Esq. dated February 14, 2021, in Opposition to Motion and Exhibits (“A” and “B”)	6
Reply Affirmation of Paul M. Tarr, Esq. dated March 15, 2021.....	7
Reply Affidavit of David Behnken dated March 12, 2021.....	8
Reply Affidavit of Christopher Morella dated March 12, 2021.....	9

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendant (“FSCD”) seeks summary judgment pursuant to CPLR § 3212 dismissing the

plaintiff's complaint in its entirety. The motion is granted.

The plaintiff ("Frenza") seeks monetary damages for personal injuries allegedly sustained on September 18, 2018, when she tripped and fell due to a crack in an interior floor of premises owned by FSCD. At the time of her accident, Frenza was working as a courier for Federal Express Corporation ("FedEx") at the premises, which were leased and operated by FedEx as a warehouse. The accident occurred inside a facility in an area used to house vehicles. Frenza claims that FSCD was negligent in failing to properly maintain and repair the interior flooring.

FSCD contends that it cannot be held liable for Frenza's injuries, since it was an out-of-possession landlord with no on-going presence at the premises and with limited access to the premises under its lease with FedEx. In addition, FSCD argues that the lease made FedEx solely responsible for the repair and maintenance of the interior ground where the allegedly hazardous condition was located. Finally, FSCD claims that the subject crack in the ground did not constitute structural damage for which an out-of-possession landlord would normally be responsible.

In order to obtain summary judgment, FSCD must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, Frenza must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). In this premises liability action, Frenza must demonstrate the existence of a defective or dangerous condition and either that FSCD created such condition or had actual or constructive notice of the hazard and failed to timely correct it (*see Litwack v. Plaza Realty Investors, Inc.*, 11 NY3d 820 [Ct App 2008]).

In support of its motion, FSCD notes Frenza's deposition testimony that she tripped and fell as she was walking diagonally across an empty parking space in the interior of the facility while heading towards a conveyor belt. She identified that crack in certain photographs shown to her. The crack admittedly appears as a wide, one- to two-foot-long crack (*see Tarr Affirmation*, ¶ 23). Frenza testified that she had never walked through that spot previously, did not know that the crack was there prior to her fall, had never been warned about the crack, had never heard anyone complain about the crack, and did not know of anyone having previously reported the crack to a supervisor.

In addition, FSCD submits an affidavit from Gina Kotsar (“Kotsar”) dated November 24, 2020, as well as Kotsar’s deposition testimony. Kotsar is employed as a Portfolio Manager for FSCD and is familiar with the landlord-tenant relationship existing at the subject premises. In pertinent part, she avers as follows:

“[FSCD] never received any complaints from FedEx or any other person or entity regarding the crack in the floor at the alleged accident site. Regardless, FedEx, as the tenant, was and is solely responsible for maintaining the interior of the premises, including the floor where plaintiff fell.”

“Further, at the relevant time, [FSCD] did not have an automatic right of access to the premises but could request access if needed. Since [FSCD] was unaware of the crack in the pavement at issue in this case, and in any event had no contractual obligation to maintain or repair that part of the interior floor, [FSCD] had no need occasion to request access in connection with that crack.”

FSCD also submits an affidavit from John T. Snook (“Snook”) dated November 30, 2020. Snook works as a Real Estate Manager for FedEx and is responsible for overseeing a staff which leases buildings and land to operate FedEx’s business. He is familiar with the landlord-tenant relationship existing at the subject facility. In pertinent part, Snook states as follows:

“FedEx, as the tenant, was and is solely responsible for maintaining the interior of the premises, including the floor where plaintiff fell, pursuant to Section 9 of the original 1988 lease. Four State is responsible for the structure of the premises, which includes the roof and exterior wall, but which does not include the interior floor where the accident is alleged to have occurred.”

“Four State is and at the relevant time was an out-of-possession landlord of the premises. In this capacity, Four State did not have an automatic right of access to the premises but could request access from FedEx if needed. Four State did not request access from FedEx in connection with the crack on the facility floor underlying this case. Nor did FedEx request that Four State maintain or repair that section of the facility floor, as Four State has no obligation under the lease to do so.”

FSCD also submits an affidavit from David Behnken (“Behnken”), a forensic engineer retained by FSCD to inspect and report on the crack and the ground in the area of the accident. Behnken inspected the area of the accident in the company of the plaintiff and her own expert witness. Frenza pointed out the subject crack to the experts. Behnken states that the crack measured 15 inches in length, with various widths maxing out at 2 ½ inches and depths of 7/8 to ¾ of an inch. The crack did not present a tripping hazard, since the concrete on each side of the crack was flush. Behnken notes that

the crack is located on a raised concrete slab measuring 22 feet 10 inches by 19 feet 8 inches, with a 1-inch lip surrounding the slab. Behnken opines that the crack in the ground was not a structural defect in the premises. Specifically, Behnken concludes as follows:

“[T]he floor, including the crack along which Ms. Frenza was allegedly caused to fall, was structurally sound, capable of performing its designed and constructed function – i.e., structurally supporting any vehicular and pedestrian loads thereon.”

Finally, FSCD submits a copy of the lease to the premises dated April 4, 1998, and subsequent amendments. FSCD became FedEx’s landlord as assignee of the lease on February 4, 2015. FedEx was the only occupant of the premises. FSCD highlights Section 9 of the lease, which provides for maintenance obligations as follows:

Section 9. Maintenance of Premises. (a) At its expense, Landlord shall maintain in good condition the structure of the building, including the roof, foundation, load-bearing and exterior walls (excluding windows, window glass, plate glass, doors and overhead doors), and Landlord shall also maintain the heating, ventilating and air conditioning systems serving the Premises and the parking lots, drives and sidewalks around the Premises. (b) Landlord shall accomplish all maintenance for which it is responsible as soon as practicable following receipt of notice from Tenant; provided, however, that Landlord shall have the maintenance performed immediately if a hazardous or emergency situation exists. If Landlord does not perform its maintenance timely, Tenant may have it performed and may deduct the cost of doing so from the next installments of the Base rent until Tenant is fully compensated. (c) Tenant shall be responsible for maintaining in good condition at its expense the interior of the Premises and shall perform any and all necessary repairs and maintenance. If following notice from Landlord Tenant fails to make any necessary repairs or perform any necessary maintenance for which Tenant is responsible, Landlord may have such repairs or maintenance performed and Landlord’s costs of doing so shall be payable as Additional Rent with the next due installment of Base Rent.

FSCD also cites the following lease provisions to demonstrate that it had a limited right of access to the premises:

Section 12. Landlord’s Right of Access. (a) Landlord and its authorized representatives shall have the right to enter the premises following notice to Tenant during Tenant’s regular business hours and at all other reasonable times for the purpose of (i) determining whether the Premises are in good condition and whether Tenant is complying with its obligations under this Lease, (ii) performing any

maintenance or repairs for which Landlord is responsible under this Lease or (iii) posting “for sale” signs at any time during the Initial Term or any Renewal Term or posting “for rent” signs during the last three months of the Initial Term or the last Renewal Term. (b) Landlord shall conduct its activities in the Premises in a manner that will cause the least possible interference with Tenant’s business operations, and Base Rent shall abate for any period in excess of 48 hours during which Tenant is deprived of beneficial occupancy of the Premises as a result of Landlord’s presence in the Premises.

With this evidence, FSCD has satisfied its initial burden to show the absence of any material factual issues and entitlement to judgment as a matter of law. The admissible evidence submitted on this motion demonstrates that responsibility for the maintenance of the area where Frenza fell and repair of the crack that caused her to fall lay with FedEx, not with FSCD. FedEx and FSCD agree on their respective maintenance and repair obligations under the lease, with FedEx clearly assuming liability for the condition of the flooring where Frenza fell. Kotsar and Snook agree that FSCD had no obligation to maintain or repair the premises’ interior, but only the premises’ roof and building exterior. They agree that FedEx had a duty of repair with respect to the subject crack. Behnken’s expert opinion confirms that the that the subject crack did not present the type of condition that required FSCD to attend to its repair because it did not threaten the structural integrity of the premises. Finally, there is no evidence that FSCD created the crack.

In opposition to the motion, Frenza submits an affidavit dated February 15, 2021. Frenza avers that she had returned to the facility around 7:45 p.m. after having completed her route. She parked her vehicle inside the building in an area designated for parking. The flooring in that area was made of cement and/or concrete. She exited her van and was taking a bin from her truck to a conveyor belt located at the back of the building when her right foot tripped in a large crack. The area of her accident was an empty spot where a vehicle would normally park. She was carrying the bin directly in front of her when she tripped. She states that she tripped on a large crack, which she noticed for the first time only after her fall. She had never seen it before. The crack was located within parking space #52. There were no signs warning about the crack. Frenza also submits several photographs which depict the crack and the parking area.

Frenza also submits an affidavit from Harold Krongelb (“Krongelb”), an engineer whom she retained to inspect and report on the crack. Krongelb inspected the accident site on December 12, 2019. He measured the subject crack as approximately 16 inches by 2 ½ inches and is somehow “part” of a

larger crack that is over 12 feet long. The crack's "elevation" is from ½ inch to ¾ inch. The crack is located in a concrete floor ramped with a pitch of approximately 1 in 14. Krongelb cites the New York State Building Code for the proposition that premises owners shall maintain structures in compliance with the requirements set forth in the Code. However, Krongelb cites no specific building code section that was violated by the existence of this crack. While he concludes that the crack presented a tripping hazard, he does not state that the crack impacted the floor's loading capacity. Krongelb opines in conclusory fashion that the crack was a structural defect.

To defeat the initial showing made by FSCD, Frenza must demonstrate the existence of a material issue of fact that would preclude summary judgment. Frenza contends that questions remain whether FSCD, in fact, retained some control over the facility and whether the crack was structural in nature. However, an owner's right to re-enter leased premises does not impose liability where the hazardous condition does not constitute a significant structural or design defect (*see Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Frenza does not submit any evidence, expert or otherwise, that the crack constituted a structural defect or somehow affected the premises' foundation or structural soundness, a condition that that FedEx, as the tenant, would not be expected to disavow. Krongelb merely surmises that the crack was structural in nature and, therefore, the owner's responsibility, a supposition in direct contradiction not only of FSCD's expert, but of the premises' only tenant.

Frenza also argues that the clause in Section 9 of the lease should be read to hold FSCD responsible for maintaining HVAC systems serving the premises, in addition to the parking lots, drives, and sidewalks around the premises. FSCD reads that provision to mean the HVAC systems for which it is responsible includes those systems servicing the facility's parking lots, drives, and sidewalks, and not the parking lots, drives, and sidewalks themselves. Clearly, the sworn testimony reveals that the parties to the lease agree on the latter reading, rendering Frenza's reading unavailing. Even if Frenza's interpretation were correct, the clause would only apply to parking lots "around" the premises, not within the premises as is the case here.

Finally, Frenza's speculation that FSCD and FedEx have somehow colluded in order to defeat her claims is unavailing. It cannot be said that Snook's affidavit is self-serving, since it essentially exposes FedEx to liability for injuries caused by the existence of the crack. That this result may legally operate to prevent Frenza from certain recovery, since FedEx was her employer, does not defeat FSCD's

entitlement to judgment under the circumstances presented here. With FedEx in agreement that FSCD had no responsibilities with respect to this crack, it cannot be said that FSCD owed and breached a duty of care to Frenza. For these reasons, the motion is granted.

Accordingly, it is hereby

ORDERED that summary judgment is granted to the defendant dismissing the plaintiff's complaint in its entirety; and it is further

ORDERED that the Clerk of the Court make all necessary entries to reflect this disposition, including entry of a judgment of dismissal, if one is submitted.

The foregoing constitutes the Decision/Order of this Court.

DATED: January 20, 2022
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.