

Smith v Dubai Furniture III Corp.

2022 NY Slip Op 32462(U)

January 4, 2022

Supreme Court, Queens County

Docket Number: Index No. 714837/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

CARMETA SMITH,

Index No.: 714837/2019

Plaintiff,

Motion Date: 12/23/21

- against -

Motion No.: 19

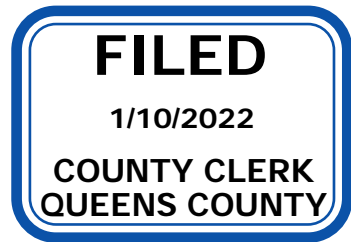
DUBAI FURNITURE III CORP., DUBAI
FURNITURE CORP. and IG SECOND
GENERATION PARTNERS LP,

Motion Seq.: 1

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendant IG SECOND GENERATION PARTNERS LP (IG) for an Order pursuant to CPLR 3212, granting summary judgment in favor of IG, dismissing the complaint and all cross-claims asserted against IG:



	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 21 - 32
Plaintiff's Affirmation in Opposition-Exhibits.....	EF 47 - 49
Dubai's Affirmation in Opposition-Exhibits.....	EF 57 - 59
Reply Affirmation.....	EF 67 - 69

This is an action to recover damages for personal injuries sustained by plaintiff on November 28, 2018 when she was struck by a board as she walked on the sidewalk in front of the Dubai Furniture store located at 89-31 164th Street, Jamaica, New York.

Plaintiff commenced this action on August 28, 2019 by filing a summons and verified complaint. IG joined issue by service of an answer with cross-claims on November 1, 2019. Dubai Furniture III Corp. and Dubai Furniture Corp. (collectively hereinafter Dubai) joined issue by service of an answer with cross-claims on November 19, 2019. IG now moves for summary judgment.

Plaintiff appeared for an examination before trial on September 2, 2020 and testified that on the date of the accident, the weather was nice with no precipitation. The accident occurred just passed the door leading into the Dubai furniture store. She was looking straight ahead when a piece of plywood struck her on her left side and pushed her onto a hand truck on the sidewalk. She did not see the board until it came in contact with her side. A woman who was walking behind her told her that the board came from a stack of such boards on the sidewalk. A gust of wind blew the plywood from the curb where it was stacked.

Majbi Nofal appeared for an examination before trial on behalf of Dubai on March 2, 2021 and testified that at the time of the accident, he was the owner and president of Dubai. The premises were leased pursuant to a written lease. The store was open 7 days a week. The store had two entrances. The front entrance is located on 165th Street. The back entrance is located on 164th Street. In November 2018, Dubai had two employees. Ayman Khalil was the store manager. Tommy Kaher was the salesman. The store manager was responsible for receiving merchandise, assembling the furniture for store displays, and handling customer service. Part of customer service involves assisting customers load their purchases into their vehicles. This is done from the back entrance.

Non-party Ayman Khalil appeared for an examination before trial on April 30, 2021 and testified that he was the store manager at Dubai in November 2018. Deliveries, both in and out of the store, are performed on 164th Street as there is an entrance on that side of the building that leads to the elevator that takes you into the storage area in the basement. Dubai had both a hand truck and dolly to assist with moving the furniture.

Sara Fontanet appeared for an examination before trial on behalf of IG on March 22, 2021 and testified that she is employed by BLDG Management (BLDG), the real estate management company for the subject premises. She is a property manager. Her responsibilities include collecting rents, handing tenant complaints, and visiting the sites. The subject building is owned by IG. The building has ten retail store spaces. Dubai is a tenant pursuant to a written lease. She visits the building approximately once a month. She does not go on any regular basis. Neither IG nor BLDG performed any construction or renovation to or at the premises in November 2018. Pursuant to the Lease, the tenant had the responsibility to keep the sidewalks clean and clear of debris. There were no sidewalk repairs being performed at the time of the accident.

IG also submits a copy of the Standard Form of Store Lease between IG and Dubai. In pertinent part, Paragraph 30 provides that "Tenant shall at Tenant's expense, keep the demised premises clean and in order. . . and if the demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalk and curbs adjacent thereto, keep said sidewalks and curbs free from snow, ice, dirt and rubbish and maintain said sidewalks in a reasonably safe condition in compliance with requirements of law." Paragraph 52 of the Addendum to Agreement of Lease states that "It is agreed and understood that Tenant will, at its own cost and expense, keep the sidewalk in front of the demised premises in good condition and repair, free and clear of ice, sleet, snow, dirt and rubbish at all times."

Based upon the submitted evidence, IG contends that it is entitled to summary judgment as it was an out-of-possession landlord who did not operate or work on the premises and never received any complaints about the premises.

In opposition, plaintiff argues that based on Fontanet's testimony that she did not know when she last went to the subject property before the accident occurred, never performed a physical inspection of the exterior of the property, and did not inspect the sidewalk in front of Dubai when she visited the property, IG failed to establish that it maintained the sidewalk in a reasonably safe condition.

Dubai also opposes the motion on the grounds that IG retained a right to reentry, and failed to establish that it maintained the property in a reasonable safe condition or lacked notice of the plywood.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (see Kwong On Bank, Ltd. v Monroe Knitwear Corp., 74 AD2d 768 [2d Dept 1980]). The evidence will be construed in a light most favorable to the non-moving party (see Benincasa v Garrubbo, 141 AD2d 636 [2d Dept 1988]).

Generally, an out of possession landlord will not be responsible for injuries occurring on its premises unless the landlord "has a duty imposed by statute or assumed by contract or a course of conduct" (Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10 [2d Dept. 2011]; Rossal-Daub v Walter, 58 AD3d 992 [3d Dept. 2009]). Thus, an out of possession landlord may be liable for failing to repair a dangerous condition, of which it had notice, if the landlord assumes a duty to make repairs and reserves the right to enter to inspect or make such repairs (see Litwack v Plaza Realty Investors, Inc., 11 NY3d 820 [2008]; Chapman v Silber, 97 NY2d 9 [2001]).

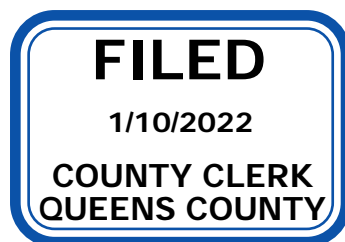
Here, IG established, prima facie, that it was an out of possession landlord and had no duty to maintain or repair the allegedly dangerous sidewalk condition. Although the opposition contends that IG is liable because it retained a right of reentry pursuant to the lease, IG merely retained a general right of reentry, and thus, is only liable for structural failures or specific statutory violations (see Reichberg v Lemel, 29 AD3d 664 [2d Dept. 2006][finding that the out of possession was not liable as the cause of the injuries did not involve the structure of the building]; Hausmann v UMK, Inc., 296 AD2d 336 [1st Dept. 2002]; Stryker v D'Agostino Supermarkets Inc., 88 AD3d 584 [1st Dept. 2001]; Whaley v JJ Realty of NY, LLC, 16 Misc.3d 1117[A][Sup Ct, Queens Cnty 2007]).

The opposing parties failed to demonstrate that the plywood on the sidewalk was either a structural defect or a statutory violation.

Accordingly, and based upon the above reasons, it is hereby

ORDERED, that the summary judgment motion by defendant IG SECOND GENERATION PARTNERS LP is granted, the complaint and all cross-claims asserted against defendant IG SECOND GENERATION PARTNERS LP are hereby dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: January 4, 2022
Long Island City, N.Y.



Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.