Davis v J&A Plush Toys Inc.
2022 NY Slip Op 33835(U)
November 1, 2022
Supreme Court, Kings County
Docket Number: No. 513853/19
Judge: Larry D. Martin

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11 day of May, 2022.

PRESENT: **Larry D. Martin, J.S.C.**

ANNA DAVIS,

Plaintiff,

No. 513853/19

-against-

DECISION & ORDER
Motion No. 7

J&A PLUSH TOYS INC., MARIS MANAGEMENT LLC, and J&A PLUSH TOYS LLC,

Defendants.

J&A Variety Store ("Store") is one of several stores in a building owned by Defendant Maris Management LLC ("Management"). Pursuant to a 2017 lease agreement ("Lease") with Management, non-party J&A Toys Inc. rents a space in the building to operate the Store. Plaintiff Anna Davis alleges that, in 2018, rolls of carpet fell on her head at the Store. Following the accident, Plaintiff sued Management, J&A Plush Toys Inc., and J&A Plush Toys LLC for personal injuries. Having never answered or otherwise appeared, default judgments were taken against J&A Plush Toys Inc. and J&A Plush Toys LLC.[1] Under CPLR 3212, Management now moves for the Complaint's dismissal by summary judgment on the grounds that it did not own, control, or operate the Store.

A.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact." *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.

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1 Management's failure to address non-party-lessee J&A Toys Inc.'s relationship, if any, with J&A Plush Toys Inc. and J&A Plush Toys LLC may alone preclude summary judgment.

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers;" that is, the burden finds no occasion to shift. *Id.* at 324; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Since summary judgment is a "drastic remedy," *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978), the "parties' competing contentions must be viewed in a light most favorable to the party opposing the motion," *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990).

B.

Management submits Plaintiff's deposition transcript, Gail Nisman's deposition transcript and client affidavit on behalf of Management, as well as the Lease. But its story is confusing. Specifically, Management states that it owns the property at 2375 Flatbush Avenue, which *includes* the space with an address of 2381 Flatbush Avenue. Management further states that "on or about June 22, 2017, *J & A Toys, Inc.* leased a space at 2378 Flatbush Avenue . . . with the address of 2381 Flatbush Avenue . . . from [] Management to operate [the] Store." Management asks this Court to conclude from there that it never owned, controlled, nor operated the Store or its inventory and was, thus, without a duty to Plaintiff in this case.

In opposing Management's motion, Plaintiff argues first that she is a third-party beneficiary of the Lease, and second, even if she is not a third-party beneficiary to the Lease, Management's failure to enforce a clause therein, which obligated J&A Toys Inc. to procure commercial general liability insurance covering both itself and Management,[2] was foreseeably negligent to invitees such as Plaintiff. As set forth below, both arguments fail.

C.

With respect to Plaintiff's argument that she is a third-party beneficiary to the Lease, a party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption

2 Section 13.01(a)(iii) provides that such policies shall have a minimum combined single limit of at least $1,000,000 for any one occurrence and $2,000,000 aggregate and be written to apply to all bodily injury, property damage, personal injury and or the covered loss, however occasioned, occurring during the policy term and shall afford coverage for all claims based on acts, omissions, injury and damage which claims occurred or arose, in whole or in part during the policy period. Owner may increase such limits from time to time to the amount of insurance that in Owner's reasonable judgment is then being customarily required by owners of comparable buildings in the Union Square neighborhood of New York.

by the contracting parties of a duty to compensate him if the benefit is lost. *State of California Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434–35 (2000). Against this backdrop, it is well established that members of the public obtaining a mere incidental benefit does not make them a third-party beneficiary to a lease. *See, e.g.*, *Green v. Fox Island Park Autobody, Inc.*, 255 A.D.2d 417, 419 (2d Dept. 1998). Accordingly, the argument is meritless as a matter of law.

D.

Plaintiff's second argument appears to be that Management was foreseeably negligent in failing to enforce a Lease provision obligating non-party J&A Toys Inc. to procure commercial indemnification insurance, which would have inexplicably resulted in potential coverage in the event of Defendant J&A Plush Toys' default. Thus, the argument goes, Management owed a duty of care to the public to enforce that Lease provision, and that this public duty supersedes analysis of whether Plaintiff is a third-party beneficiary of the Lease.

Landowners are indeed obligated to act as reasonable persons in maintaining their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). And Plaintiff correctly notes that parties outside a contract may sue in tort for negligently performed or omitted contractual duties. *See, e.g.*, *Palka v. Servicemaster Mgt. Services Corp.*, 83 N.Y.2d 579 (1994). Plaintiff further correctly notes that the existence and scope of a duty is a threshold question of law requiring courts to balance sometimes competing public policy considerations. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002).

Plaintiff's own proffered authorities, however, indicate that "a contractual obligation, standing *alone*, will generally not give rise to tort liability in favor of a third party." *Espinal*, *supra* at 138 (emphasis added). In this regard, Management correctly notes that the duty of care argued by Plaintiff generally does not extend to an out-of-possession landlord "unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct.'" *Fox v. Patriot Saloon*, 166 A.D.3d 950, 951 (2d Dept. 2018) (quoting *Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 18 (2d Dept. 2011)).

Nonetheless, both the discrepancy in the two underlying addresses, relationship between Management and the various Defendants is too vague to find that Management has established a prima facie entitlement to dismissal.

E.

Accordingly, the motion (Mot. No. 7) is **denied**, without prejudice to Management's right to move for such relief, after the completion of discovery as to the issue of whether Management retained control over the subject premises.

Dated: November 01, 2022
Brooklyn, New York

Hon. Larry D. Martin
Supreme Court of the State of New York

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT