

Gulliver v First Sigma Capital, Inc.

2022 NY Slip Op 34511(U)

September 20, 2022

Supreme Court, Kings County

Docket Number: Index No. 519323/2017

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, Brooklyn, NY 11201, on the ___ day of _____ 2022.

SEP 20 2022

**DECISION
and
ORDER**

2022 SEP 27 AM 9:15

KINGS COUNTY CLERK
FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
KENNETH GULLIVER,

Plaintiff,

-against-

FIRST SIGMA CAPITAL, INC. and MING'S CLEAN AND
FRESH INC,

Defendants.
-----X

Index No.: 519323/2017
Motion Date: 9/7/2022
Motion Cal. No.: 19-20
Mot. Seq. 4&5

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Defendant First Sigma Capital, Inc.'s motion (MS#4) a) granting summary judgment to First Sigma Capital, Inc. ("First Sigma") pursuant to CPLR 3212 dismissing the complaint and all cross-claims interposed against it on the ground that First Sigma did not owe a duty to inspect, repair or maintain the staircase where plaintiff's accident allegedly took place, b) granting summary judgment to First Sigma pursuant to CPLR 3212 dismissing the complaint and all cross-claims interposed against it on the ground that there was nothing wrong with the staircase where plaintiff's alleged accident took place and that it complied with all applicable codes; c). granting summary judgment to First Sigma pursuant to CPLR 3212 on its cross-claim for contractual indemnification against Ming's Clean and Fresh Inc. ("Ming's") and d). etc.; attorney affirmation of Michael D. Kern, affirmed on June 15, 2020; Exhibits A-N.....	57-72
Defendant Ming's Clean and Fresh Inc.' motion (MS#5) a. Pursuant to CPLR 3212, for summary judgment; b. dismissal of all cross-claims against Mings, etc.; attorney affidavit of Jarett L. Warner, Esq., affirmed on June 23, 2020; Exhibits A- Affirmations/Affidavits/Exhibits.....	74-93
Plaintiff's attorney affirmation in opposition of Bret Kaufman, Esq., affirmed on September 24, 2020 (MS#4); Exhibits A-H.....	95-103
Defendant Ming's Clean and Fresh Inc.'s attorney affirmation in opposition of Jarett L. Warner, Esq., affirmed on December 8, 2020 (MS#4); Exhibits A-B.....	125-127
Defendant First Sigma Capital's attorney affirmation in opposition of Michael D./ Kern, Esq., affirmed on December 1, 2020 (MS#5); Exhibits A-E.....	119-124
Defendant First Sigma Capital's attorney affirmation in reply (MS#4) of Michael D. Kern, Esq., affirmed on February 1, 2021 (MS#4).....	130
Defendant First Sigma Capital's attorney affirmation in reply (MS#4) of Michael D. Kern, Esq., affirmed on February 9, 2021 (MS#4).....	136
Defendant Mings and Fresh Inc.'s attorney reply of Jarett L. Warner, Esq., affirmed on February 9, 2021 (MS#5).....	133

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MONTELIONE, RICHARD J., J.

This is an action commenced by filing the summons and complaint on October 5, 2017 for personal injuries allegedly from a slip/trip on the premises owned, managed, or leased by the defendants located at 1101 1st Avenue, New York, New York 10065 or Block 1435, lot 25 ("subject premises"). Issue was joined by service and filing of an answer on November 29, 2017.

Defendant First Sigma Capital, Inc. moves for summary judgment (MS#4): a) pursuant to CPLR 3212 dismissing the complaint and all cross-claims interposed against it on the ground that First Sigma did not owe a duty to inspect, repair or maintain the staircase where plaintiff's accident allegedly took place, b) dismissing the complaint and all cross-claims interposed against it on the ground that there was nothing wrong with the staircase where plaintiff's alleged accident took place and that it complied with all applicable codes; c) on its cross-claim for contractual indemnification against Ming's Clean and Fresh Inc. ("Ming's") and d) for other relief. Defendant Ming's Clean and Fresh Inc.' moves for summary judgment (MS#5) dismissing the complaint and cross-complaint against it. Both motions are opposed by plaintiff.

There is no issue of fact that the accident happened when plaintiff, a Verizon employee, gained entrance to the vault (two side-by-side metal doors located on the surface of the sidewalk) leading down a stairway to the basement, where he intended to work on phone equipment located there, when he fell approximately on the fifth step from the top. The only entities with a key to the vault of the subject premises were non-party Verizon and defendant Ming's Clean and Fresh Inc. who rented space which includes the basement. Defendant First Sigma Capital, Inc. alleges there was prior litigation involving Verizon whereby Verizon prevailed in having a legal right or easement to gain entry through the vault to work on its equipment. No copy of any court decision was provided to this court or any information regarding the name of the case or index number. Notwithstanding, there is evidence of an easement placed on the subject premises by Verizon. Because some of the building records annexed as exhibits were difficult to read, the court utilized ACRIS to review some of the same records on-line and takes judicial notice of the website and the authenticity of its records.¹ There is in fact an easement given to Verizon by Fred Tuck Inc. who is described as one who "owns or in which the undersigned has an interest" at the subject premises. The court did not find any deed in the name of Fred Tuck, Inc. but this easement is in effect as found in a document dated July 15, 1986, Reel 1122, page 1481,

RECEIVED from New York Telephone Company, nominal in
consideration of which the undersigned hereby grants unto said

¹ The court, in its discretion, takes judicial notice of the publicly recorded and maintained records of the New York City Department of Finance on the Automated City Register Information System (ACRIS), which "supports the Office of the City Register in recording and maintaining official documents" (*La Sonde v Seabrook*, 89 AD3d 132, 137, 933 N.Y.S.2d 195 [2011] [holding that "[t]his Court has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State"]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-20, 871 N.Y.S.2d 680 [2009] [holding that judicial notice is taken of "public documents that are generated in a manner which assures their reliability" such as "material derived from official government websites"]; *Des Fosses v Rastelli*, 283 App Div 1069, 1070, 131 N.Y.S.2d 242 [1954] ["This court has taken judicial notice of the deed in the foreclosure action . . . recorded April 15, 1953"], *aff'd* 308 NY 850, 126 N.E.2d 182 [1955]).

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Telephone Company, its successors and assigned, the right, privilege and authority to construct, reconstruct, relocate, replace, operate, repair, maintain and at its pleasure remove the following facilities: CONDUIT, CABLE & TERMINAL BOX AS SHOWN ON THE ATTACHED SKETCH upon the property which the undersigned owns or in which the undersigned has an interest, situated 1101 1st Ave in the borough of Manhattan, County of New York, State of New York. It is understood that the work shall be performed in a workmanlike manner and that any damage to the premise caused thereby shall be corrected.

Defendants and plaintiff have offered expert opinion regarding the law. The court will not defer questions of law to any expert. (“The trial court erred in deferring to the opinion of the cooperative corporation's expert as to the legality of the apartment. Expert testimony as to a legal conclusion is impermissible. [See, *People v Kirsh*, 176 AD2d 652, 653, *lv denied* 79 NY2d 949.] The apartment's legality presented a pure question of law involving statutory interpretation, which, in the first instance, is the responsibility of the court. [*Matter of Newark Val. Cent. School Dist. v Public Empl. Relations Bd.*, 83 NY2d 315, 320; *Greater Johnstown School Dist. v Frontier Ins. Co.*, 252 AD2d 615;” see *Measom v Greenwich & Perry St. Hous. Corp.*, 268 AD2d 156, 159 [1st Dept 2000].) Existing buildings are generally exempt from changes in the building code except when there is an alteration or a change in use and occupancy. See *W. 58th St. Coalition, Inc. v City of New York*, 188 AD3d 1, 130 NYS3d 436, 2020 NY Slip Op 04521, 2020 WL 4679684 [1st Dept 2020], *affd as mod*, 37 NY3d 949, 170 NE3d 446, 147 NYS3d 571, 2021 NY Slip Op 03346, 2021 WL 2144169 [2021]. The court finds that the building in question was constructed either prior to 1900 as an old law tenement or in 1910. No certificate of occupancy has been provided to the court and the court will not speculate as to whether one exist or not. The plaintiff's expert provided the court with a photo from the New York City 1940's tax photos that does not appear to show the vault on the sidewalk (NYSCEF Doc.# 97, picture #9). Whether these vault doors and stairs existed at the time the building was constructed or at a later period of time is unknown. No party has provided the court with any proof of any building violation being placed upon the subject premises.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dept 1999); *Tassone v. Johannemam*, 232 A.D.2d 627, 628 (AD 2d Dept 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (AD 3rd Dept 1964).

Defendant First Sigma Capital, Inc. is an out of possession landlord who did not create the condition complained (*Bittrolf v. Ho's Dev. Corp.*, 77 N.Y.2d 896, 898, 568 N.Y.S.2d 902, 571 N.E.2d 72 [NYS Ct. of Ap. 1991], was not responsible for maintenance of the subject premises, and through a lease agreement contracted maintenance of the premises to co-defendant Ming's Clean and Fresh Inc. Plaintiff fails to raise an issue of fact. (“ ‘An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained

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control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct' [*Casson v. McConnell*, 148 A.D.3d 863, 864, 49 N.Y.S.3d 711 [internal quotation marks omitted]]; see *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 566, 516 N.Y.S.2d 451, 509 N.E.2d 51; *Byrd v. Brooklyn 46 Realty, LLC*, 129 A.D.3d 882, 883, 10 N.Y.S.3d 642; *Alnashmi v. Certified Analytical Group, Inc.*, 89 A.D.3d 10, 18, 929 N.Y.S.2d 620),” see *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 800, 113 NYS3d 235, 237-38, 2019 NY Slip Op 08237, 2019 WL 5945786 [AD 2d Dept 2019]).

Defendant Ming’s Clean and Fresh Inc. met is prima facie showing that it did not use the vault entrance, did not create any unsafe condition on the stairway, did not have actual or constructive notice of a dangerous condition (since 1986 Verizon employees have used the vault), and although this defendant had the keys to the vault, Verizon had its own set of keys and was able to enter without prior notice to either of the defendants. (“[Leasee] was required to support its summary judgment motion with a showing ‘that it maintained the premises in a reasonably safe condition and that it did not create or have notice of any allegedly dangerous condition’ (*Barley v. Robert J. Wilkins, Inc.*, 122 A.D.3d 1116, 1117, 997 N.Y.S.2d 758 [2014],” see *Scheffield v Vestal Parkway Plaza, LLC*, 139 AD3d 1161, 1165, 31 NYS3d 628, 631-32, 2016 NY Slip Op 03575, 2016 WL 2351070 [3d Dept 2016]).

The issue is whether the defendant Ming’s Clean and Fresh Inc. had a duty to maintain a safe means for Verizon’s employees accessing its basement where Verizon holds an easement which it exclusively uses for its own benefit and under the language of the filed easement to “repair, maintain and at its pleasure remove the following facilities: CONDUIT, CABLE & TERMINAL BOX AS SHOWN ON THE ATTACHED SKETCH upon the property.” The court finds that defendant Ming’s Clean and Fresh Inc. does not have such a duty. See *Scheffield v Vestal Parkway Plaza, LLC*, 139 AD3d 1161, 1165, 31 NYS3d 628, 632, 2016 NY Slip Op 03575, 2016 WL 2351070 [3d Dept 2016], (t)here had been no prior falls or accidents on the grassy slope, and neither (leasee) nor the property’s former owners received any complaints from Verizon about the slope’s steepness or any other difficulty in accessing the easement parcel in the 11 years during which its workers used this area;” See *Encompass Ins. Co. of Am. v Long Is. Power Auth.*, 128 AD3d 633, 10 NYS3d 110, 2015 NY Slip Op 03800, 2015 WL 2079224 [2d Dept 2015], where court held owner not responsible for trimming of vegetation near electrical lines where utility held an easement; *Anson v Inc. Vil. of Freeport*, 193 AD3d 799, 148 NYS3d 158, 2021 NY Slip Op 02266, 2021 WL 1396255 [2d Dept 2021], where owners of real property entitled to have village maintain its permanent easement with installation of a drain pipe with a bulkhead; Cf. *Raksin v Crown-Kingston Realty Assoc.*, 254 AD2d 472, 680 NYS2d 265, 1998 NY Slip Op 09402, 1998 WL 789373 [2d Dept 1998], when easement created for benefit of parties those parties are tasked with duty to maintaining and repairing the easement.

The plaintiff has failed to raise a triable issue of fact regarding the foregoing.

Defendant First Sigma Capital, Inc. cross claims against Ming’s Clean and Fresh Inc. for contractual indemnification and argues:

Pursuant to section 8, Ming’s is required to procure insurance naming both itself and First Sigma that covers accidents in and upon the demised premises. Id. That section also contains an

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indemnification clause that runs in favor of First Sigma and obligates it to indemnify First Sigma for claims that happen in or upon the demised premises. *Id.* The insurance procurement clause, in section 57, obligates Ming's to procure insurance for any claims taking place in, upon or about the demised premises. *Id.* at 15.

But the lease (NYSCEF#70), section 8, only obligates the tenant to indemnify the owner for those losses *not reimbursed by insurance*. (“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 attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees...”). Section 57 mandates that defendant Ming's Clean and Fresh Inc. obtain insurance coverage protecting owner and tenant. There is nothing to support the motion showing any losses suffered by defendant First Sigma Capital, Inc. that have not been covered by insurance or that defendant Ming's Clean and Fresh Inc. failed to name First Sigma Capital, Inc., as an additional insured for the limits indicated in the lease. Defendant First Sigma Capital, Inc. has failed to meet its prima facie burden of showing that it has suffered any damages obligating co-defendant to indemnify it as the cross claim is premature. On the other hand, defendant Ming's Clean and Fresh Inc.'s has met its burden of proof of showing adherence to its obligations under the lease.

Based on the foregoing, it is

ORDERED that defendant First Sigma Capital, Inc.'s and defendant Ming's Clean and Fresh, Inc.'s motion for summary judgment on the issue of liability is GRANTED and the complaint is dismissed; and it is further

ORDERED that the branches of defendants' motion for summary judgment dismissing all cross claims are DENIED as moot, as the defendants have stipulated to discontinue their cross claims in the event the complaint is dismissed; and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.


Hon. Richard J. Montelione

2022 SEP 27 AM 9:45

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FILED

