

Priester v 624 S. Conduit Ave. LLC

2022 NY Slip Op 34912(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 514760/2019

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE
-----X
KINROD PRIESTER,

Plaintiff,

Index No. 514760/2019

- against -

DECISION AND ORDER

624 SOUTH CONDUIT AVENUE LLC, HWM SOUTH
CONDUIT LLC, SYED RESTAURANTS
ENTERPRISES INC., 624 SOUTH CONDUIT OPERATING
CORP., d/b/a BURGER KING and 624 CONDUIT
OPERATING CORP., d/b/a POPEYES,

~~NS~~ 3.4

Defendants.
-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of
Defendants' Motions:

| <u>Papers</u> | <u>Numbered</u> |
|--|--|
| Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed..... | NYSCEF #'s 58, 59, 60, 84, 85, 86, 104 |
| Cross-Motion and Affidavits/Affirmations..... | |
| Answering Affidavits/Affirmations..... | 115, 125 |
| Reply Affidavits/Affirmations..... | 137, 138 |
| Defendant's Memorandum of Law..... | |

Upon the foregoing cited papers and after virtual oral argument, 1) defendants, 624 South
Conduit Avenue, LLC, and HWM South Conduit, LLC (collectively, Defendants-Landlords"),
move pursuant to CPLR §3212 for an Order: (i) dismissing the complaint and all claims and
cross-claims asserted against them; and (ii) granting them summary judgment on their cross-
claims (Mot. Seq. #3) and; 2) defendants, Syed Restaurants Enterprises Inc., (Syed Restaurants)
624 South Conduit Operating Corp. d/b/a Burger King (Burger King), and 624 Conduit
Operating Corp., d/b/a Popeyes (Popeyes) (collectively, "Defendants-Tenants") move, pursuant
to CPLR §3212, for summary judgment, dismissing plaintiff's complaint (Mot. Seq. #4).

The underlying action arises out of a trip and fall accident on September 13, 2018, allegedly caused by poor lighting and a pothole in the parking lot of Defendants-Landlords' property located at 624 South Conduit Boulevard, Brooklyn, New York ("subject premises"). Defendants-Tenants are the lessees of the subject property where they operate fast-food restaurants.

Defendant Landlords' and Defendant Tenants' Summary Judgment Motions (Seq. 3 and 4)

In support of their motion, Defendants-Landlords contend that they were out-of-possession landlords; did not have an obligation to maintain and repair the parking lot; did not create the dangerous condition; and did not have any notice of same. Defendants-Landlords assert that pursuant to a lease agreement, dated December 29, 1994 ("lease"), Defendants-Tenants are responsible for maintenance and repairs.

As for the branch of their motion for summary judgment on their cross-claims, Defendants-Landlords argue that they are entitled to contractual indemnification from non-party Inocente Sport Bar Restaurant & Lounge, Inc. ("Inocente Sport") pursuant to the lease. However, Defendants-Landlords do not explain their relationship to Inocente Sport.

In opposition, Plaintiff contends that Defendants-Landlords have not met their prima facie burden to establish that they are out-of-possession landlords with no duty to maintain or repair the parking lot. Plaintiff asserts that the lease agreement is silent on the maintenance and repair of the parking lot. Furthermore, Plaintiff argues that triable issues of fact exist as to whether the out-of-possession landlords were on constructive notice of the alleged dangerous condition. Plaintiff submits photographs of the pothole in the parking lot, and an affidavit from the photographer, who attests that the photographs were taken 8 days after the accident.

Turning to Defendants-Tenants' application, they contend that they were not on actual or constructive notice and did not create the dangerous condition. In opposition, Plaintiff contends that a material issue of fact exists as to whether Defendants-Tenants were on notice.

"An out-of-possession landlord and its agent may be liable for injuries occurring on its premises if it has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct to perform maintenance and repairs" (*Taltana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1351 [2d Dept 2021])[internal citations and quotations omitted].

"Even if a defendant is considered an out-of-possession landlord who assumed the obligation to make repairs to its property, it cannot be held liable for injuries caused by a defective condition on the property unless it either created the condition or had actual or constructive notice of it" (*Davidson v Steel Equities*, 138 AD3d 911, 912 [2d Dept 2016]).

"[P]hotographs may be used to prove constructive notice of an alleged defect shown in the photographs if they are taken reasonably close to the time of the accident, and if there is testimony that the condition at the time of the accident was similar to the condition shown in the photographs" (*Gonzalez v NY City Tr. Auth.*, 87 AD3d 675, 677 [2d Dept 2011])[internal citations and quotations omitted].

Here, the Defendants-Landlords failed to demonstrate, prime facie, that they were out-of-possession landlords with no duty to maintain and repair the parking lot at the subject premises; and that the Defendants-Tenants were contractually obligated to do so. Notably, the lease agreement is silent as to maintenance and repairs of the parking lot. Furthermore, a triable issue of material fact exists as to whether the out-of-possession Defendants-Landlords were on constructive notice of the allegedly dangerous condition.

As for the branch of their motion seeking contractual indemnification, Innocente Sport is not a party to the instant action. Accordingly, Defendants-Landlords' motion is **DENIED** in its entirety (Mot. Seq. #3).

Defendants-Tenants' motion must also be **DENIED** as material issues of fact exist as to whether they were on notice of the alleged dangerous condition. (Mot. Seq. #4).

This constitutes the Decision and Order of the Court.

DATED: 10/13, 2022



HON. CAROLYN E. WADE, J.S.C.

KINGS COUNTY CLERK
FILED
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