

Rodriguez v Trinity Evangelical Lutheran Church

2022 NY Slip Op 35029(U)

September 20, 2022

Supreme Court, Bronx County

Docket Number: Index No.28132-2020E

Judge: Elizabeth A. Taylor

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
ALICIA RODRIGUEZ,

Plaintiff,

Index No. 28132-2020E

-against-

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

TRINITY EVANGELICAL LUTHERAN CHURCH,
Defendants.

The following papers numbered 1 to ___ read on this motion, _____

	PAPERS NUMBERED (NYSCEF Conf. Notice #s)
No On Calendar of	
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	12-22
Answering Affidavit and Exhibits-----	25-31
Replying Affidavit and Exhibits-----	32
Affidavit-----	
Pleadings -- Exhibit-----	
Stipulation -- Referee's Report --Minutes-----	
Filed papers-----	

In compliance with this Part's rules, the above enumerated working copies were submitted directly to chambers for the court's review. Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for an order granting summary judgment, dismissing plaintiff's complaint against defendants Trinity Evangelical Lutheran Church, is denied.

Plaintiff commenced this personal injury action seeking damages for injuries allegedly sustained on January 3, 2020, as a result of a slip and fall within the premises owned by defendant Trinity Evangelical Lutheran Church (Church) and leased by plaintiff's employer/non-party, Lutheran Social Services of New York (LSSNY). Defendant seeks summary judgment, on the ground that it owed no duty to plaintiff as it is an out-of-possession landlord.

"To obtain summary judgment it is necessary that the movant establish his cause

of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

Although plaintiff will bear the burden at trial of proving the defendant's negligence, on this motion, defendant bears the burden of establishing the lack of negligence on its part (*see Pentacon, LLC v 422 Knickerbocker, LLC*, 165 AD3d 829, 832 [2d Dept 2018] [Court held that defendants cannot meet their prima facie burden by pointing to alleged gaps in the plaintiff's evidence]).

In support of the motion, movant submits, *inter alia*, the subject lease, and the affidavits of Samantha Morales-Thiem, Site Director for LSSNY, and Pastor Matthew Gonzalez of the Church. The lease reads, in pertinent part:

MAINTENANCE. Tenant shall have the responsibility to maintain the Premises in good repair at all times during the term of the Lease.

REMODELING OR STRUCTURAL IMPROVEMENTS. Tenant shall have the right and obligation to conduct any construction or remodeling that may be required to use the premises as specified above. Tenant may also construct such fixtures on the premises (at Tenant's expense) that appropriately its use for such purposes. Landlord may participate in the financing, to the extent needed or practical

ACCESS BY LANDLORD TO PREMISES. Subject to Tenant's consent (which shall not be unreasonably withheld), Landlord shall have the right to enter the Premises to make inspections, provide necessary services, or show the unit to prospective buyers, mortgages, tenants, or workers. However, Landlord does not assume any liability for the care or supervision of the Premises. As provided by law, in the case of an

emergency, Landlord may enter the premises without Tenant's consent.

Ms. Morales-Thiem avers that her "duties include overseeing the child development/preschool program and *working with LSSNY's maintenance supervisor in overseeing maintenance and cleaning operations . . .*" Ms. Morales-Thiem attests that: 1) LSSNY leased a portion of the church for a full time school for pre-kindergarten children; 2) "[t]he church and the school have separate entrances;" 3) plaintiff slipped in the hallway that they call the "multipurpose area;" 4) "[t]he hallway was made of commercial tile that was installed for LSSNY by a contractor paid for by the New York City Administration for Children's Services . . .," and 5) LSSNY "assumed sole responsibility for the maintenance, repair and cleaning of the leased portion of the building." Ms. Morales-Thiem further maintains that:

The church pursuant to the lease terms, did not exercise any control over the hallway floor. It did not participate in the decision to install the tiles, it did not sweep, wax, buff, clean or otherwise maintain the hallway floor. LSSNY never requested the church to participate in the repair, maintenance, cleaning or other care of the hallway or in fact any of the portion of the building that it leased. LSSNY never complained to the church about the hallway or floor, and the church never complained to LSSNY about the maintenance of the leased portion of the building.

Pastor Gonzalez' affidavit does not contradict Ms. Morales-Thiem's affidavit. Pastor Gonzalez avers that he is "*familiar with the ownership and use of the building, and the general rights and obligations of the church as landlord and Lutheran Social Services of New York . . .*" He affirms that "[t]he church and LSSNY have separate entrances and function independently [that] LSSNY exercises complete control over its leasehold; and particularly, its flooring" and that "LSSNY never sought church approval" for any changes to the floor. Pastor Gonzalez maintains that "[a]lthough church

representatives can walk on that floor to access another area, as a rule [they] never do during school hours, and rarely, if ever, when school is not in session.”

“A motion for summary judgment shall be supported by affidavit . . . [t]he affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit” (CPLR 3212[b]). To demonstrate personal knowledge, the affiant must describe the basis of his or her knowledge of the facts (*see e.g. Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227 [1st Dept 1997] [court held plaintiff’s affidavit in support of a default judgment, was insufficient as plaintiff did not describe “the source of the information or the grounds for the belief.”]).

While Ms. Morales-Thiem may work with LSSNY’s maintenance supervisor in overseeing maintenance and cleaning operations, and Pastor Gonzalez is familiar with the ownership and use of the building, the affidavits are inadmissible as they do not explain the nature of Ms. Morales-Thiem’s work with LSSNY maintenance supervisor in overseeing maintenance and cleaning operations or the Pastor’s familiarity with the ownership and use of the building, to establish the basis for their knowledge. The motion would be denied even if the affidavits were admissible.

It is well settled that a landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant, unless the landlord either: 1) was contractually obligated to make repairs or maintain the premises; or 2) has a contractual right to re-enter, inspect and make needed repairs at the tenant’s expense, and liability is based on a significant structural or design defect that is in violation of a specific statutory safety provision (*Malloy v Friedland*, 77 AD3d

583 [1st Dept 2010] [citations and quotations omitted]). To establish entitlement to summary judgment, an out of possession landlord must establish that it had no duty to maintain the alleged defective condition (see *Paniagua v Bridge Food Ctr. Corp.*, 59 AD3d 356 [1st Dept 2009]). “W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct-including, but not limited to, the landowner's ability to access the premises-to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law” *Gronski v County of Monroe*, 18 NY3d 374, 380-81 [2011]).

Plaintiff Alicia Rodriguez submits her affidavit, in which she avers that her “fall happened in an interior hallway of the premises just inside the entranceway to the building from the parking lot, and where there was tile floor.” Plaintiff believes this is the same area referred to by the defendant as the “multipurpose area.” Ms. Rodriguez claims that immediately after her fall the floor “appeared to have been recently waxed, and that the floor had on it an accumulation of wax and was extremely slippery, and [she] believe[s] this wax accumulation caused [her] fall.” She claims that prior to her fall, the premises was closed for about three to four months and when the school returned to the premises, she noticed that the subject floor was replaced. Ms. Rodriguez maintains that during the years that she:

[W]orked at the premises [she] also observed that the school personnel and the church personnel freely used the various exits and entrances on the premises and shared facilities throughout the building. This included the church chapel where school graduations were held and the outdoor

parking lot area where church functions would go on and where everybody parked their cars, and including the "multipurpose area" which was used by both the church personnel and the school personnel.

Based upon the record before this court, issues of fact, including but not limited to whether defendant surrendered control over the area in question, preclude a finding of summary judgment.

It is noted that where a client is represented by counsel, a motion on behalf of the client shall include the attorney's affirmation in support to summarize counsel's legal position (see 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:18[d]; *Petralia v New York State Dept. of Labor*, 191 AD3d 1466 [4th Dept 2021], *rearg denied*, 193 AD3d 1442 [4th Dept 2021], and *appeal dismissed*, 37 NY3d 1036 [2021], *reconsideration denied*, 37 NY3d 1138 [2022] [Court held that although respondent asserts that it raised its adequate-remedy contention in its memorandum of law to that court, the memorandum of law is not part of the record on appeal and thus cannot evidence respondent's preservation of that particular contention]).

The foregoing shall constitute the decision and order of this court.

Dated: SEP 20 2022



J.S.C.

Elizabeth A. Taylor