

Tejada v 172 W. 77th St. Realty Co., LLC
2022 NY Slip Op 35153(U)
November 28, 2022
Supreme Court, Bronx County
Docket Number: Index No. 24949/2020E
Judge: Marissa Soto
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 22-----X
JAVIER C. TEJADA,

INDEX NO. 24949/2020E

Plaintiff,

DECISION AND ORDER

-against-

172 W. 77TH STREET REALTY CO., LLC,

Defendant,

MOT. SEQ. 4

-----X
Hon. Marissa Soto, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers:	NYSCEF Doc. No.
Notice of Motion, Affirmation/Affidavit in Support and Exhibits thereto:	
Opposition/Cross Motion Filings:	
Reply:	
Oral Arguments/Other:	

The above captioned personal injury action was brought by Javier C. Tejeda ("Plaintiff") against 172 West 77th Street Realty Co. LLC (hereinafter "Defendant"). Plaintiff alleges that he was injured at work while descending a ships ladder in the course of his employment (the "Incident"). Plaintiff alleges that Defendant was negligent in allowing its tenant, Plaintiff's employer, to have the ships ladder in the condition that it was at the time of the Incident. Defendant argues that (i) it is an out of possession landlord that does not have control over the space or the condition involved in the Incident, and alternatively, if it is not found to be out of possession, (ii) it had no notice of any dangerous condition prior to the Plaintiff's Incident. Defendant now moves for summary judgment dismissing Plaintiff's complaint against it in its entirety.

Plaintiff alleges that he sustained personal injuries on December 7, 2017, when he was caused to slip and fall down a set of stairs, more properly referred to as a ships ladder, located in the commercial space leased by the Plaintiff's employer, Chirping Chicken, and located at 355 Amsterdam Avenue, New York 10024 (hereinafter, the "Employer"). Plaintiff alleged general

negligence claims against Defendant. Additionally, Plaintiff alleged that Defendant violated NYS Multiple Dwelling Law Sections 52(1) through (3), 78(1) and 80(1) through (2); NYC Admin. Code Sections 28-301.1, 27-375(b), (e), (f) and (h) Sections 153-3, 13-4, 153-7 and 154 of the NYC 1926 Building Code; and Sections 6.2.1 and 1006.2.2 of the ASTM F1637-95; Sections 1009.1, 1009.2 and 1009.11 of the NYC 2014 Building Code. (Ex. C, ¶ 3).

Summary Judgment Standard

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72 (2003). The evidence must be viewed in the light most favorable to the nonmoving party on a motion for summary judgment. *Gronski v. County of Monroe*, 18 N.Y.3d 374, 381 (2011) (citing *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007)). The failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law. *Winegrad, et al., v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Liberty Taxi Mgt., Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dep't 2006). "In other words, even in the face of a nonmovant's silence or a poorly drafted response, summary judgment may not be granted unless the movant has met their burden of establishing entitlement to judgment as a matter of law." *Rivera v. State of New York*, 34 N.Y.3d 383, 401-402 (2019). The function of the court on a motion for summary judgment is issue finding rather than

issue determination, and the court must evaluate whether the alleged factual issues presented are genuine or unsubstantive. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 394 (1957).

Defendant's Summary Judgment

Defendant's motion for summary judgment alleges *inter alia* that (i) Defendant is an out of possession landlord and there are no structural defects in contravention of any building code that were identified as the cause of the Incident, (ii) the ships ladder where plaintiff's alleged accident occurred was not an interior staircase and therefore Defendant was not obligated to comply with regulations governing interior staircases and, if Defendant is not found to be an out of possession landlord that (iii) Defendant had no constructive or actual notice of the defective condition of the ships ladder. In support of its motion, Defendant submits, *inter alia*, the expert affidavit of Charles J. Schaffer, R.A. (hereinafter "Schaffer Affidavit"), which argues that there were no structural defects or violations of the applicable 1968 Building Code because the ships ladder did not qualify as an interior staircase. The Schaffer Affidavit alleges the 1968 Building Code to be the applicable code as it was the selection of the Employer when the relevant renovations were submitted to the New York City Department of Buildings (hereinafter the "DOB") for approval. No supporting documentation showing this selection was submitted with the Schaffer Affidavit. The Schaffer Affidavit opines that the only applicable legal violation was pursuant to OSHA rules that specifically address ships ladders. The Schaffer Affidavit opines that the proximate cause of the Incident was (i) the lack of handrails, (ii) the transient conditions of the ships ladder, namely its unclean nature, and (iii) Plaintiff's failure to descend the ships ladder in the forward facing position.

Plaintiff's Opposition

Plaintiff argues that Defendant has not carried its initial *prima facie* burden of establishing itself as an out of possession landlord. Plaintiff argues that because the lease explicitly states that (i) Tenant must get prior written consent to alterations to the premises and (ii) that the Defendant retained the right to inspect and repair that it was not in fact out of possession. Further, Plaintiff argues that even if the Defendant were an out of possession landlord that the lack of handrails is a material structural violation of a statute. Plaintiff here relies on the 1901 Housing Tenement Law rather than the 1968 Building Code cited in the Schaffer Affidavit. Plaintiff relies on the New York City Department of Buildings records that the subject building was constructed under the Old Law.

Plaintiff argues Defendant's prior approval of the Employer's construction plans was its notice of the installation of a ships ladder without handrails, which Plaintiff alleges was an unreasonably dangerous condition.

Out of Possession Landlord

Defendant argues in its summary judgment motion that it is an out of possession landlord and therefore not liable. Defendant argues that the lease expressly conveys to the tenant, Employer, the responsibility for all repairs and alterations and that while the Defendant/landlord retains the right to inspect and repair, the lease expressly states that such right is not an obligation or duty undertaken by the Landlord. Lease ¶5. Similarly, the Defendant argues that it never controlled the interior space after it was rented to Employer and that it never exercised its right under the Lease to inspect and repair, thus further supporting its out of possession claim. Specifically, the Defendant points to the testimony of its witness, David Rudnick, who testified that the ships ladder was installed by the Employer when the lease was first entered into in 2006. Mr. Rudnick further

testified that the ships ladder was wholly housed within the Employer and that no area involved in the Incident was a common area or an area under the control of the Defendant.

Plaintiff argues that Defendant has not carried its initial *prima facie* burden of establishing itself as an out of possession landlord. Plaintiff argues that because the lease explicitly states that Tenant must get prior written consent to alterations to the premises Defendant cannot be out of possession. Plaintiff argues that this approval requirement puts the Defendant in sufficient control over what alterations were made and gives them sufficient notice as well. Plaintiff further argues that even if the Defendant is an out of possession landlord that liability would still attach as the lack of handrails on the ships ladder presented a significant structural or design defect that was violative of safety statutory provisions. In support, Plaintiff submits the affidavit of Andrew R. Yarmus, P.E. (the "Yarmus Affidavit"). The Yarmus Affidavit states, in relevant part, that (i) Defendant should have taken steps to prevent the Incident, (ii) a ships ladder is not the safest way to provide access to an area, and (iii) that the ships ladder, which the Yarmus Affidavit refers to as an unsafe condition, was in existence for a long enough time for the "responsible parties" to repair. The Yarmus Affidavit does not cite to any statutory violations other than the OSHA violation identified in the Schaffer Affidavit. The Yarmus Affidavit does not address the applicable building code or provide any factual analysis of the ships ladder or the space generally. *See Vasquez v. Rector*, 40 A.D.3d 265, 266-267 (1st Dep't 2007). The Yarmus Affidavit does nothing more than state legal conclusions and accordingly, it is without evidentiary value.

The owner of real property's responsibility in any tort action is generally a question of control. *Gronski v County of Monroe*, 18 N.Y.3d 374, 379 (2011) (internal citations omitted). Accordingly, landowners that transfer both possession and control are generally not liable for dangerous conditions on the property. *Id.* Control is both a question of law and of fact. *Id.* Put

another way, a landowner's duty of care to anyone on the property is a question of whether such duty has been permissibly and effectively delegated to another. Courts have routinely held that "[A] landlord is not generally liable for negligence with respect to the condition of property once it has been transferred to its tenant unless it is contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." *Vasquez v. Rector*, 40 A.D.3d 265, 266 (1st Dept. 2007) (internal citations omitted). Furthermore, in order to hold an out-of-possession landlord liable for a defect, a plaintiff must establish that the landlord had notice. *Silverman v. Blenheim Associates Realty Corp.*, 291 A.D.2d 214, 215 (1st Dept. 2002).

Plaintiff cites to *Wright v. Olympia & York Cos. (USA) Inc.*, 273 A.D.2d 24 (1st Dept 2000). In *Wright*, the Court found there were questions of fact to be determined by a jury in connection with a landlord's liability when the lease stated that all material alterations were to be approved by landlord prior to and after construction. *Id.* The Court in *Wright* held "[t]his provision is sufficient to raise a triable issue as to whether appellants had notice of the alleged hazard . . . and retained sufficient control over the lease premises to be held responsible for the prevention or remediation of such hazard." *Id.* at 25. The *Wright* court also distinguished between the right to approve material alterations before and after construction with a right of reentry to examine the subject premises, finding the later to be facially insufficient to establish liability without a finding of some statutory violation. *Id.*

Defendant argues that *Wright* is not applicable here because *Wright* contained a right to pre-approve as well as to inspect after construction, which is not the case here. Here, the right was to pre-approve only. The distinction raised by Defendant is bolstered in light of the First

Department's decision in *Schlesinger v. Rockefeller Center, Inc.*, 119 A.D.2d 462, 463 (1st Dep't 1986). The First Department held that a reservation to approve did not amount to a covenant to maintain or repair the premises sufficient to impose liability. *Id.* Further, there is no evidence before the Court that Defendant's right to consent contributed to Employer's failure to install the handrail or whether the lack of a handrail on the ships ladder was indicated on the plans that were submitted to and presumably consented to by the Defendant. Without more, the mere reservation of the right is not sufficient to find the Defendant maintained sufficient control to be held liable. Therefore, the required consent to alterations, improvements, and additions does not raise a genuine triable issue of fact as to whether Defendant retained control or an obligation to repair. Based on the above, the Defendant is an out of possession landlord.

Plaintiff further argues that even if Defendant is an out of possession landlord that it remains liable because it reserved the right of reentry, inspection and repair and that the ships ladder was violative of statutory safety requirements.

Courts have held that an out-of-possession landlord with a right of reentry may be liable for injuries if it has constructive notice of a significant structural or design defect in violation of a specific statutory safety provision. *Brignoni v 601 W. 162 Assoc., L.P.*, 93 A.D.3d 417, 418 (1st Dep't 2012) (citing *Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507, 917 NYS2d 159 [2011], quoting *Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24, 603 NYS2d 130 [1993]). It has been held that for constructive notice to be found there must be a finding of "a significant structural or design defect that is contrary to a specific safety provision." *Torres v. W. St. Realty Co.*, 21 A.D.3d 718, 721 (1st Dep't 2005) (internal citations omitted).

The question then turns on whether the ships ladder was a significant structural or design defect that is contrary to a specific safety provision. Here, both sides submitted expert affidavits.

The Defendant submitted the Shaffer Affidavit, which stated that no statutory violations, other than an OSHA violation, were found. The Plaintiff submitted the Yarmus Affidavit, which states that the ship's ladder was an OSHA violation. The only other allegations of structural or design defect contrary to a specific safety provision are from the attorneys, who argue which building code is even applicable. However, these statements are merely legal conclusions with no factual support. Therefore, the Court finds the question of which law is applicable to be a red herring since Plaintiff does not allege a violation of either the 1901 Tenement Law or the 1968 Building Code.

The only question remaining for the Court is whether the OSHA violation may serve as the predicate statutory violation for constructive notice. *Conti v. Kimmel*, 255 A.D.2d 201, 201-202 (1st Dept 1998) (holding OSHA regulations are non-statutory and cannot form the basis of constructive notice imputed to the landlord).

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted; and it is further

ORDERED that Defendant serve a copy of this decision with Notice of Entry upon the Plaintiff within thirty (30) days of the date hereof.

This constitutes the decision and order of the Court.

Dated: November 28, 2022


HON. MARISSA SOTO, J.S.C.