SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
FRANK VATEL,

Plaintiff,

-against-

COOPER SQUARE REALTY, MENSIL REALTY CORP., THE GRANGE FOOD COMPANY, LLC, THE NORTHERN SPY FOOD CO. LLC, and NOVUM PROPERTIES, INC.,

Defendants.
----------X
MENSIL REALTY CORP.,

Third- Party Plaintiff,

-against-

LA VRAIE RACLETTE LLC,

Third-Party Defendant.
----------X

Index No.: 524715/2018
Motion Date:
Mot. Seq. No.:10

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 179-184, 187-190, the motion is decided as follows:

The plaintiff, FRANK VATEL, moves for an Order pursuant to CPLR §2221, for an Order granting re-argument of defendants, MENSIL REALTY CORP.'S ("Mensil") and NOVUM PROPERTIES, INC'S ("Novum") motion for summary judgment, which was granted by Order dated June 9, 2021, and upon re-argument, for an Order vacating the order and denying the motion.

Background:

The plaintiff, Frank Vatel, commenced this action alleging that on August 3, 2018, while working at a restaurant operated by third-party defendant, LA VRAIE RACLETTE LLC ("Raclette"), he sustained personal injuries as a result of slipping and falling on an interior staircase leading to the basement of the restaurant which is located at 511 East 12th Street, New York, New York. Plaintiff stated in an affidavit the following:

> My accident occurred on the third step down from the top as I was descending from the second step to third step. In the photographs, it is evident that the first step is a triangular step that angled across the second step. As such, the area to step on in the triangular second step is extremely small. As I was descending, the unsafe landing on the second stair caused me to lose my balance and as I was attempting to regain my balance on the third stair down, the third stair was shaky, loose and slanted. I was unable to regain my balance which caused me to fall down the stairs.

The subject premises were originally leased to THE GRANGE FOOD COMPANY, LLC ("GRANGE"), who changed its name to THE NORTHERN SPY FOOD CO. LLC ("NORTHERN"), who then assigned the lease to RACLETTE. The plaintiff alleges in his bill of particulars, among other things, that the steps violated various provisions of the New York City Building Code.

Section 82 of the Rider to the Lease states:

> Except to the extent the need for such repairs is caused by the acts of the Tenant, its agents, employees, contractors, licensees and/or invitees, **Landlord agrees to be responsible at its sole cost and expense, for all structural repairs to the Building** and for repairs to portions of the plumbing, heating and electrical systems that are located outside the Demised Premise.

In its original opposition to defendants' motion for summary judgment, the plaintiff submitted admissible proof demonstrating that Russell Cooper, an employee of Novum, the managing agent of the building, went up and down the stairs in question on a regular basis. The plaintiff also submitted proof that there was a prior accident on the same staircase that possibly involved one of the same steps that are at issue in this action which the defendants were aware of.

In granting defendants' motion for summary judgment by Order dated June 9, 2021, the Court held that that Mensil was an out-of-possession landlord, the defendants could not be held liable because Mensil did not retain control of the premises, was not contractually or statutorily obligated to repair or maintain the premises, and never assumed a duty to repair or maintain the premises by virtue of a course of conduct.

Discussion:

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). While the determination to grant leave to reargue lies within the sound discretion of the court (*see Barnett v. Smith,* 64 A.D.3d 669, 670–671, 883 N.Y.S.2d 573; *Long v. Long,* 251 A.D.2d 631, 675 N.Y.S.2d 557; *Loland v. City of New York,* 212 A.D.2d 674, 622 N.Y.S.2d 762), a motion for leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v. Goldman,* 261 A.D.2d 593, 594, 691 N.Y.S.2d 75; *see Woody's Lbr. Co., Inc. v. Jayram Realty Corp.,* 30 A.D.3d 590, 593, 817 N.Y.S.2d 391; *Foley v. Roche,* 68 A.D.2d 558, 567–568, 418 N.Y.S.2d 588).

"An out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, **by contract**, or by a course of conduct" (*Mercer v. Hellas Glass Works Corp.,* 87 A.D.3d 987, 988, 930 N.Y.S.2d 18; *see Notskas v. Longwood Assoc., LLC,* 112 A.D.3d 599, 976 N.Y.S.2d 176; *Lee v. Second Ave. Vil. Partners, LLC,* 100 A.D.3d 601, 602, 953 N.Y.S.2d 259; *Lugo v. Austin–Forest Assoc.,* 99 A.D.3d 865, 952 N.Y.S.2d 603; *Alnashmi v. Certified Analytical Group, Inc.,* 89 A.D.3d 10, 929 N.Y.S.2d 620). Assuming Mensil was an out-of-possession landlord, in order to be awarded summary judgment, an out-of-possession landlord who has a contractual duty to maintain leased premises must establish, *prima facie*, that it neither created the alleged hazardous condition nor had actual or constructive notice of the condition (*see DeMilo v. Weinberg Bros., LLC*, 122 A.D.3d 895, 895–96, 998 N.Y.S.2d 97, 98; *Quituizaca v. Tucchiarone,* 115 A.D.3d 924, 982 N.Y.S.2d 524; *Salaices v. Gar–Ben Assoc.*, 82 A.D.3d 740, 918 N.Y.S.2d 510). One of the arguments raised by the plaintiff in support of the motion is that the Court overlooked the fact that Mensil was contractually obligated under the lease agreement to make all structural repairs. Plaintiff contends that since plaintiff is alleging that his accident was caused by structural defects in the staircase, to be awarded summary judgment, it was incumbent upon the moving defendants to demonstrate as a matter of law that they neither created the structural defects nor had actual or constructive notice

of them. Plaintiff maintains that since no such showing was made, the Court improperly granted the motion. The court agrees.

The lease agreement clearly placed upon Mensil the contractual duty to make all structural repairs (Paragraph 82). Since the record on the prior motion raised triable issues of fact exist as to whether plaintiff's accident arose out of a structural defect on the staircase, to be awarded summary judgment, Mensil and Novum were obligated to demonstrate on the prior motion that they neither created the alleged structural defects or that they lacked actual or constructive notice of them. The record on the prior motion raised triable issue of fact on these issues and accordingly, defendants' motion for summary judgment should have been denied.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for reargument is **GRANTED**, and upon reargument, the defendant's motion for summary judgment is **DENIED,** and the decision and order dated June 9, 2021 is vacated; and it is further

ORDERED that all parties are to appear in CCP for a discovery conference on September 6, 2023.

This constitutes the decision in order of the court.

Dated: August 14, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020