

Hidalgo v 2358-2364 Realty Group, LLC
2023 NY Slip Op 35110(U)
December 6, 2023
Supreme Court, Bronx County
Docket Number: Index No. 21742/2019E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
FELIPA HIDALGO,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 21742/2019E

2358-2364 REALTY GROUP, LLC, FOOD UNIVERSE
MARKETPLACE, KEY FOOD STORES
COOPERATIVE, INC., 2358 FOOD CORP.,

Motion Sequence No. 3

Defendants.
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GUZMAN, J.

Plaintiff commenced this action on February 11, 2019, to recover damages for personal injuries she allegedly sustained in June 2018,¹ as the result of a slip and fall accident inside of a grocery store located at 2358 University Avenue, Bronx, New York.

At the time of Plaintiff's alleged accident, Defendant 2358-2364 Realty Group, LLC ("Realty Group"), the owner of the property, leased the premises to Defendant 2358 Food Corp.² The lease was assigned by 2358 Food Corp. to Defendant Key Food Stores Co-Operative, Inc. ("Key Food") on September 8, 2017. The name of the grocery store at the location is Food Universe Marketplace ("Food Universe"). Roberto Espinal, the sole owner of 2358 Food Corp., managed and operated Food Universe from 2017 to 2020.

At her deposition, Plaintiff testified that she had picked up some items at the produce section at the grocery store and was walking towards the check out area when she slipped and fell. Plaintiff, who was wearing sneakers that day, described the surface where she fell as a sloped or elevated part of the floor that was made of wood, situated approximately ten feet away from the cash registers. Plaintiff testified that she took "two steps" on the sloped surface, slipped, and fell backwards, landing on her left side. Plaintiff testified throughout her deposition

¹ Plaintiff's bill of particulars states that the accident occurred on June 9, 2018, however Plaintiff testified at her deposition that the accident occurred on June 29, 2018.

² The original lease, for a ten year period commencing on October 1, 1997, was executed by Realty Group's predecessor in interest, Stramac Limited Liability Company in favor of B&F Foods Corp., as tenant. The lease was subsequently modified and assigned by B&F Foods Corp. to JFA Food Corp. By Assignment of Lease dated August 16, 2017, JFA Food Corp. then assigned the lease to 2358 Food Corp. See NYSCEF Doc. 80.

that she fell because the floor was dirty and greasy where she slipped; there was grease on her hands and clothing after she fell, and she noticed the grease, a grayish color, on the yellow planks of the wood floor. *See* NYSCEF Doc. 72.

On the motion presently before the Court,³ filed on March 11, 2022, Defendants Realty Group and Key Food move for summary judgment dismissing the complaint insofar as asserted against each of them.

Realty Group contends that it is an out-of-possession landlord with no responsibility for maintenance of the subject premises.

A landowner owes a duty of care to maintain his or her property in a reasonably safe condition. *Peralta v. Henriquez*, 100 N.Y.2d 139, 760 N.Y.S.2d 741 (2003). This duty, however, is premised on the landowner's exercise of control over the property, since the entity in control of the property is in the best position to identify and prevent harm to others. *Butler v. Rafferty*, 100 N.Y.2d 265, 762 N.Y.S.2d 567 (2003). A landowner who transfers possession and control is generally not liable for injuries caused by dangerous conditions on the property. *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001). However, exceptions to this general rule apply when the landlord is either contractually obligated to maintain the premises, or has a contractual right to re-enter, inspect, and make repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. *Sapp v. S.J.C. 308 Lenox Ave. Family L.P.*, 150 A.D.3d 525, 527, 56 N.Y.S.3d 32 (1st Dep't 2017) (an out-of-possession landlord "is generally not liable for negligence with respect to the condition of property. . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision).

In support of its argument, Realty Group has submitted, *inter alia*, Plaintiff's deposition testimony; the deposition testimony and a purported affidavit of Roberto Espinal (the owner of 2358 Food Corp.);⁴ a copy of the various lease agreements, modifications and assignments; and an expert affidavit of Bernard P. Lorenz, a professional engineer. *See* NYSCEF Docs. 64-87.

³ This motion was previously denied due to the moving parties' failure to appear for oral argument. Defendants thereafter moved to vacate this Court's Decision & Order. Counsel for all parties stipulated to vacate the default and restore the motion to the calendar.

⁴ The affidavit of Roberto Espinal, in addition to an affidavit from Lee Tirella, a co-owner of Realty Group, are not signed or notarized, and thus lack any evidentiary value.

Although Realty Group does not set forth any specific lease provisions which control the issues herein, the Court notes that the second paragraph of the relevant lease provides that the tenant “will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition. . . promptly pay the expense of such repairs. . . permit at all times during usual business hours, the Landlord and representatives of the Landlord to enter the demised premises for the purpose of inspection. . . suffer the Landlord to make repairs and improvements to all parts of the building, and to comply with all orders and requirements of governmental authority applicable to said building or to any occupation thereof...” See NYSCEF Doc. 75. Paragraph 18 of the lease further states that “the Landlord and the Landlord’s agents shall be permitted at any time during the term to visit and examine [the premises] at any reasonable hour of the day and workmen may enter at any time, when authorized by the Landlord or the Landlord’s agents, to make or facilitate repairs in any part of the building. . . it is, however expressly understood that the right and authority hereby reserved, does not impose, nor does the Landlord assume, by reason thereof, any responsibility or liability whatsoever for the care or supervision of said premises, or any of the pipes, fixtures, appliances or appurtenances therein contained or therewith in any manner connected.” *Id.*

Defendants’ expert, Bernard Lorenz, P.E., states in his affidavit that based on his inspection of the area of the floor where Plaintiff fell, “[t]he cause of the accident was not due to a structural failure of any building component and the floor surface where Ms. Hidalgo’s accident occurred was not a structural component of the building.” See NYSCEF Doc. 77 at ¶ 11.⁵ As noted above, Plaintiff’s deposition testimony, also submitted by Defendants, establishes that she slipped and fell due to a greasy and dirty condition of the floor.

In view of this proof, Realty Group has established, *prima facie*, that it was not contractually obligated to maintain the premises, and although it retained the right and duty to reenter, inspect and make repairs, any liability was not the result of a significant structural condition or design defect that is contrary to a specific statutory safety provision. *Devlin v. Blaggards III Rest. Corp.*, 80 A.D.3d 497 (1st Dep’t 2011), *lv. den’d*, 16 N.Y.3d 713 (2011) (an out-of-possession landlord is liable for failing to exercise its right of re-entry to repair only if the

⁵ The Court also notes that Plaintiff’s Bill of Particulars dated August 4, 2019, does not allege the existence of any code violations or structural or design defects.

nature of the defect that caused the injuries was a significant structural or design defect that was contrary to a specific statutory provision).

In opposition, Plaintiff does not contest Realty Group's status as an out-of-possession landlord, but argues only that the area where Plaintiff allegedly fell, described as a "ramp" by Plaintiff's counsel and expert, was in violation of the New York City Building Codes from 1939 and 2014. In support of her argument, Plaintiff has submitted an expert affidavit from Rudolph Rinaldi, a licensed architect and expert in architectural design and construction. Rinaldi did not inspect the premises, instead relying only upon Plaintiff's deposition testimony and Defendants' expert affidavit. Rinaldi also states that he reviewed "photographs," however no such photographs are attached to his report or otherwise authenticated. In any event, Rinaldi opines that:

[T]he design, construction and the maintenance of the subject wood ramp at the time of the accident was in violation of the building codes and was extremely unsafe. The major deficiency was: That the subject ramp floor did not have a non-slip surface as required by all the applicable building [codes] since 1916 including, the 1939 Building Code Section 6.1.2.1 and the 2014 New York City Building Code. . . Section 1010.7.1.

See NYSCEF Doc. 90.

Chapter 10 of the 2014 Building Code, entitled "Means of Egress," provides that "[b]uildings or portions thereof shall be provided with a means of egress system as required by this chapter." *Id.* at § 1001.1. "Means of Egress" is defined as a "continuous and unobstructed path of vertical and horizontal egress travel from any occupied portion of a building or structure to a public way." "Public Way" is defined as "a street, alley or other parcel of land open to the outside air leading to a street that has been deeded, dedicated or otherwise permanently appropriated to the public for public use." Here, Plaintiff has not established that the area where Plaintiff fell constituted a "means of egress" within the meaning of the 2014 Building Code. Moreover, Section 1010.7.1, as cited by Plaintiff's expert, entitled "Ramp Surface," provides only that "[t]he surface of ramps shall be of slip-resistant materials that are securely attached."

Plaintiff has not established that any failure to comply with this section constitutes a significant structural or design defect. The fact that there were no slip-resistant materials on the floor in question does not mean that its structure or design was defective. *See, e.g., Kamara v. 323 Pas Owner LLC*, 211 A.D.3d 606, 181 N.Y.S.3d 212 (1st Dep't 2022) (treads of the staircase

on which plaintiff slipped did not constitute a significant structural or design defect). Finally, the Court notes that Section 6.1.2.1 (a)(4) of Article 7 of the 1939 Building Code, also entitled “Means of Egress,” and cited by Plaintiff’s expert, similarly provides that all ramps shall have a maximum pitch of one foot in eight and shall be provided with non-slip surfaces. The same analysis discussed above with respect to non-slip surfaces applies to this Section of the 1939 Code. Additionally, where an alleged defect is not a significant structural or design defect contrary to a specific statutory safety provision, it is immaterial whether the out-of-possession defendant landlord had notice of the allegedly dangerous condition. *Matias v. West 16th Realty LLC*, 189 A.D.3d 681, 139 N.Y.S.3d 161 (1st Dep’t 2020).

Accordingly, Plaintiff has failed to raise a triable issue of fact in opposition to Defendant Realty Group’s prima facie showing that (1) as an out of possession landlord, it was not contractually obligated to make repairs and/or maintain the premises; and (2) although it had a contractual right to reenter, inspect and make needed repairs at the tenant’s expense, any liability is not the result of a significant structural or design defect that is contrary to a specific statutory safety provision. Realty Group is therefore entitled to summary judgment dismissing Plaintiff’s complaint insofar as asserted against it.

Key Food, the assignee of the main lease from Realty Group to 2358 Food Corp., also moves for summary judgment on the grounds that it lacked actual or constructive notice of the allegedly greasy condition of the floor.

A party in possession or control of real property who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence. *Gomez v. Samaritan Daytop Vil., Inc.*, 216 A.D.3d 456, 188 N.Y.S.3d 60 (1st Dep’t 2023). A defendant establishes that it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell. *Frederick v. New York City Hous. Auth.*, 172 A.D.3d 545, 545, 100 N.Y.S.3d 258 (1st Dep’t 2019).

“Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition” that caused plaintiff’s injury. *Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419, 421, 927 N.Y.S.2d 49 (1st Dep’t 2011). “A defendant demonstrates lack of

constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell.” *Id.* at 421.

In support of its motion, Key Food relies primarily on the deposition transcripts of Plaintiff and the operator of the grocery store, Roberto Espinal. As noted above, Espinal testified at his deposition that in June 2018, he worked at the premises during the day, six days per week, and did not recall being notified of any complaints or accidents in the store in June 2018. *See* NYSCE Doc. 50 at 10-11, 23-24. He further testified that the cleaning schedule was “as needed,” and that the store was “usually” cleaned in the morning, and before closing and that everyone “watched” and if an employee saw a wet condition on the floor, it would be cleaned up right away. *Id.* at 15, 29. Additionally, there was a porter who was in charge of cleaning the floor. *Id.* at 26-27.

The Court notes that the true date of Plaintiff’s alleged accident--June 29, 2018--was not referenced at Espinal’s deposition; instead, the questioning was based on the erroneous date of June 9, 2018.⁶ Nevertheless, in order to establish the lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time of the accident. The transcript contains no such testimony. “Reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question.” *Rong Wen Wu v. Arniotes*, 149 A.D.3d 786, 50 N.Y.S.3d 563 (2d Dep’t 2017). Moreover, as noted above, the affidavit submitted by Espinal, filed on March 11, 2022, is unsigned and unsworn, and no explanation has been provided by counsel as to why the affidavit was not submitted in admissible form. It has therefore been disregarded by this Court. *See SunTrust Bank v. Morris*, 169 A.D.3d 951, 952, 92 N.Y.S.3d 710 (2d Dep’t 2019) (unsigned affidavit that is not in admissible form is insufficient to support or oppose a dispositive motion).⁷

The Court also notes that Plaintiff’s deposition testimony that she observed the greasy condition of the floor only after she had fallen is not conclusive as to Key Food’s entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent. *See*,

⁶ Plaintiff testified at her deposition on March 9, 2021, that the true date of the accident was June 29, 2018. Espinal’s deposition took place several months later on June 2, 2021.

⁷ Only in reply did counsel for Plaintiff file an executed affidavit from Espinal, again without an explanation for the error and delay. However, as discussed below, inasmuch as the Court has not addressed Plaintiff’s opposition to Key Food’s arguments, the executed affidavit is not material.

e.g., Navetta v Onondaga Galleries LLC, 106 A.D.3d 1468, 1469-70, 964 N.Y.S.2d 835 (4th Dep't 2013). Key Food has therefore failed to establish, prima facie, that it lacked constructive notice of the alleged greasy condition of the floor. The failure of Key Food to meet its initial burden requires denial of the motion, "regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986).

Finally, Defendants move to dismiss the complaint as against Food Universe on the grounds that it is a "d/b/a," not a separate legal entity, but instead a trade name. The designation "d/b/a" means "doing business as" and is merely descriptive of the person or corporation who does business under some other name. Plaintiff offers no argument in opposition. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion for summary judgment filed by Defendants to dismiss the complaint insofar as asserted against 2358-2364 Realty Group, LLC is GRANTED; and it is further

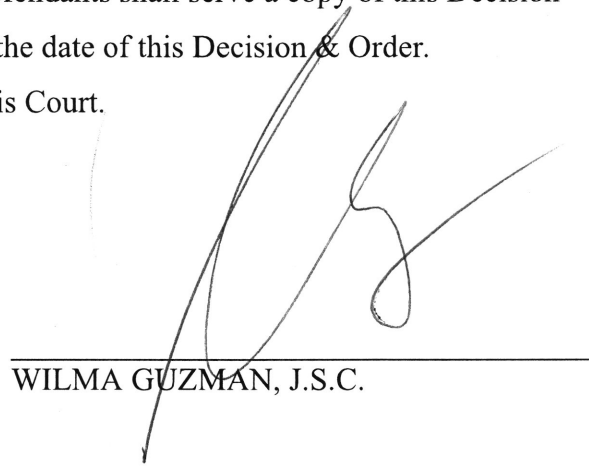
ORDERED AND ADJUDGED that the motion for summary judgment filed by Defendants to dismiss the complaint insofar as asserted against Key Food Stores Cooperative, Inc. is DENIED; and it is further

ORDERED AND ADJUDGED that the complaint is dismissed as to Defendant Food Universe Marketplace; and it is further

ORDERED AND ADJUDGED that said Defendants shall serve a copy of this Decision & Order with Notice of Entry within thirty days of the date of this Decision & Order.

This Constitutes the Decision & Order of this Court.

Dated: Bronx, New York
December 6, 2023



WILMA GUZMAN, J.S.C.