

Foddrill v Middletown I Resources LP
2023 NY Slip Op 35255(U)
August 31, 2023
Supreme Court, Orange County
Docket Number: Index No. EF005792-2021
Judge: David S. Zuckerman
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DISPO MOTION 1

To commence the 30 day statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with notice
of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
PATRICIA FODDRILL,

Plaintiff,

-against -

DECISION/ORDER

Index No:
EF005792-2021

MIDDLETOWN I RESOURCES LP,

Defendant.

-----X
ZUCKERMAN, J.

The papers numbered 1 to 50 in NYSCEF were considered in connection with this motion by Defendant Middletown I Resources LP for an Order, pursuant to CPLR §3212, granting summary judgment. Plaintiff Patricia Foddrill opposes the motion.

In this negligence action, Plaintiff alleges that she suffered serious injuries when she tripped and fell on the sidewalk located at 470 Route 211 East, Middletown, NY ("the premises"). Plaintiff further alleges that Defendant owned, maintained, managed, controlled, and was both lessee and lessor of the premises.

CONTENTIONS OF THE PARTIES

Defendant asserts that it is entitled to summary judgment because it "is an out-of-possession landlord of the area where plaintiff was allegedly injured. MIR did not assume a duty by the lease to conduct repairs of the sidewalk. MIR does not engage in a course of conduct of maintaining the sidewalk" (Affirmation in Support, p. 3). In support, Defendant submits, *inter alia*, the affidavit of Noel T. Mannion, Executive Vice President of Property Operations for Defendant's managing agent, a lease agreement for the premises indicating that Defendant leased the premises to Wal-Mart Real Estate Business Trust ("Wal-Mart"), and correspondence from Wal-Mart. In his Affidavit, Mannion attests that, at the time of the alleged accident, Walmart "exclusively maintained said sidewalk and ingress/egress area and WALMART has contracted for all maintenance and/or repair for that sidewalk and ingress/egress area. Pursuant to the lease, the CAM opt out letter, and by custom and practice, MIR does not maintain the subject WALMART sidewalk and ingress/egress area in Middletown, New York. It does not contract for any maintenance or repair services to be performed in the subject WALMART sidewalk and ingress/egress area in Middletown, New York. MIR has ceded all control over that sidewalk,

the sidewalk outside the entrance/exit to the Walmart store, to Walmart" (Mannion Affidavit, p. 2).

Plaintiff correctly notes that "[t]he only question raised in the Defendant's Motion was whether MIDDLETOWN I RESOURCES LP remained in possession or control of the premises on the date of the Plaintiff's accident" (Affirmation in Opposition, p. 3) (capital letters in original). Plaintiff argues that the demised premises in the lease (to non-party Wal-Mart) references a location on the second floor of a two-story building. The only reference to sidewalks describes them as "common areas" over which Defendant retained possession. While the lease provides that Wal-Mart could opt to maintain the common areas (in return for an abatement of its share of the common area maintenance fee), the relevant lease clause "did not purport to transfer possession or control of the premises to Wal-Mart or to provide Wal-Mart with quiet enjoyment of the MIR common area" ((id at 5). Plaintiff adds that Defendant's submissions do not establish that it was an out-of-possession landlord for the sidewalk where the accident allegedly occurred.

DISCUSSION

1. Summary Judgment

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The Court of Appeals has explained that "[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law ... when there is no genuine issue to be resolved at trial, the case should be summarily decided, and any unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent and admissible form, establishing the absence of any material issues of fact. (*Viviane Etienne Medical Care v Country-Wide Insurance Company*, 25 NY3d 498 [2015]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2017]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). In the event that initial burden is met, the non-moving

party must come forward with proof, also in admissible form, that there are material issues of fact which require a trial of the action. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

In *Celardo v. Bell*, 222 AD2d 547 [2d Dept 1995], the court stated:

It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957.)) If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied (*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 AD2d 572 (1989) ...

In analyzing the contrasting factual allegations, the court may not engage in weighing the evidence. Rather, the court must draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.* 215 AD2d 546 [2d Dept 2000]). Then, the court must determine whether "by no rational process could the

trier of facts find for the non-moving party" (*Jastrzebski v. N Shore Sch Dist*, 232 AD2d 677 678 [2d Dept 1996]). Where facts are in dispute, there are issues of credibility, or conflicting inferences may be drawn from the evidence, summary judgment will not lie. (*Id.* at 678).

2. Out-of-Possession Landlord

"The Court of Appeals has restated several times in recent years the general common-law rule of limited liability for out-of-possession landlords with respect to leased premises; an out-of-possession landlord has a duty imposed by statute or assumed by contract or a course of conduct, and not merely through its 'control' as that term is currently used" (*Alnashmi v Certified Analytical Grp., Inc.*, 89 AD3d 10, 18 [2d Dept 2011]). "Here, the complaint sounds in common-law negligence and the pleadings do not allege the violation of a statute" (*Ferraro v 270 Skip Lane, LLC*, 177 A.D.3d 651, 652 [2d Dept 2019]).

In its moving papers, Defendant asserts that

By letter dated September 9, 2002 (Ex. E [CAM Opt Out Letter]), Walmart exercised its right under the lease to opt out of Common Area Maintenance (CAM) and Walmart assumed sole control of the maintenance and repair of the Walmart sidewalk outside the Walmart store's entrance/exit (Ex. C, D, E).

(Affirmation in Support, p. 2).

In support, Defendant offers the letter in which Wal-Mart purported to exercise its right to accept the duty of maintaining some of the common areas of the premises in return for being relieved of its duty to pay its fractional share of the common area maintenance fee (the "Opt Out letter"). Defendant argues that the Opt Out letter is evidence that Wal-Mart agreed to perform all of the maintenance required in the area in which the accident occurred. Consequently, for purposes of this action, Defendant is an out-of-possession landlord. Therefore, it is not liable for the injuries Plaintiff sustained as a result of the trip and fall.

In the Opt Out letter, Wal-Mart noted that it had the option to accept the duty of "maintaining the common areas of the Wal-Mart tax plat area, which is clearly stated in Article #30 of the Lease." Article #30 of the lease, however, only generally defines "Common Areas" to include

the vehicle parking and other Common Areas of the Shopping Center (including the parking deck), any common roadways, service areas, driveways, areas of ingress and egress, sidewalks and other pedestrian ways, landscaped areas, retaining walls, enclosed malls, fire hydrants,

traffic signalization only to the extent signals are not a public improvement, storm water detention and retention ponds located within the Shopping Center or offsite wetlands areas, utility systems to include sanitary lift stations and the like and ring roads and other means of ingress and egress servicing the Shopping Center, but shall not include the Demised Premises or any other leasable areas of the Shopping Center where buildings are located...

Notably, it does not define the "common areas of the Wal-Mart tax plat area" referenced in the Opt Out letter.

Further, the Opt Out letter goes on to recite

Therefore, upon receipt, please accept this letter as Wal-Mart Real Estate Business Trust exercising its option to maintain the common areas for the Wal-Mart tax plat as defined on the as-built survey.

(emphasis added). Thus, Wal-Mart accepted maintenance responsibilities in the common areas of the Wal-Mart tax plat, but solely as that area is defined on the as-built survey. Defendant, however, has not submitted the as-built survey¹. Absent proof that the location of Plaintiff's accident was in "the Wal-Mart tax plat as defined on the as-built survey," Defendant failed to prove that the location of Plaintiff's accident was in the area in which Wal-Mart had undertaken Defendant's maintenance duties. Consequently,

¹It would appear from the moving papers that the "as-built survey" appears in Exhibit C of the Lease. Defendant did not attach Exhibit C to the submitted lease.

Defendant failed to submit admissible evidence to establish, *prima facie*, that it was an out-of-possession landlord for the location of Plaintiff's accident.

In sum, Defendant's submissions fail to establish, *prima facie*, that it is "an out-of-possession landlord" with no duty to maintain the premises "such that liability could not be imposed upon it" (*Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546, 547 [2d Dept 2014]; *McDonnell v Blockbuster Video, Inc.*, 203 A.D.3d 713 [2d Dept 2022]). Having failed to prove that it was an out-of-possession landlord, Defendant failed to establish entitlement to judgment as a matter of law. Consequently, the burden did not shift to Plaintiff "to raise a triable issue of fact as to whether the defendant retained control over the premises or had a contractual duty to maintain and repair the area of the premises where the accident occurred" (*Villarreal v CJAM Assocs., LLC*, 125 AD3d 644, 645 [2d Dept 2015]). Therefore, Defendant's motion for summary judgment on Plaintiff's cause of action for negligence must be denied.

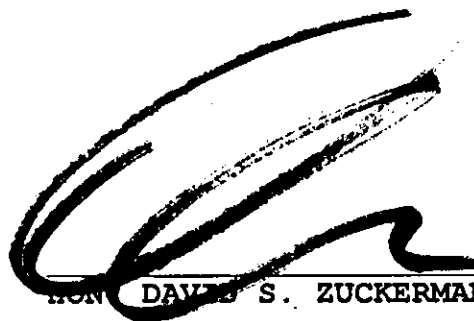
The remaining contentions, if any, do not compel a different result. Any additional relief requested by any party not expressly considered herein is denied.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that Defendant Middletown I Resources LP's motion for an Order, pursuant to CPLR 3212, granting summary judgment on liability is denied.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: Goshen, New York
August 31, 2023



HON. DAVID S. ZUCKERMAN, J.S.C.

To: All parties via NYSCEF