

Noble v Deco Towers Assoc. LLC

2024 NY Slip Op 30146(U)

January 10, 2024

Supreme Court, New York County

Docket Number: Index No. 157141/2019

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

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MACK NOBLE,

Plaintiff,

- v -

DECO TOWERS ASSOCIATES LLC, GROUP HEALTH
INCORPORATED

Defendant.

-----X

INDEX NO. 157141/2019
MOTION DATE 10/03/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This negligence action arises out of injuries allegedly sustained by plaintiff Mack Noble (plaintiff) when he slipped and fell on and oil-like substance on a loading dock at 330 West 42nd Street, New York, New York (the subject building) on August 12, 2018.

Defendant Deco Towers Associates (Deco), the owner of the subject building, now moves for summary judgment to dismiss all of plaintiff's claims against it pursuant to CPLR 3212. Plaintiff opposes.

I. Alleged Facts

Pursuant to a master lease dated May 22, 1992 (the lease), Deco leased the eighth floor and part of the fifteenth floor of the premises to DHU Realty Corp. (DHU). The parties subsequently executed a Third Lease Modification which expanded the leased space to include the building's

westerly loading dock (the loading dock) where plaintiff fell. Plaintiff's employer, 1199 Service Employees International Union (1199 SEIU), is a part of DHU.¹

On the day of the accident, plaintiff was employed by 1199 SEIU in its logistics department. Plaintiff was working on the loading dock carrying a case of full drink bottles when he allegedly slipped on an oil-like substance and fell. As a result of the accident, plaintiff claims that he suffered a left ankle fracture that required open reduction and internal fixation.

Deco now moves for summary judgment dismissing plaintiff's claims against it on the grounds that it owed no duty to plaintiff because it is an out of possession landlord pursuant to the terms of the lease. In opposition, plaintiff argues that Deco retained responsibility for maintaining the loading dock through its course of conduct and that the lease is ambiguous with respect to Deco's responsibility for injuries that may occur on the loading dock.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985).

Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims, the opponent, in turn, is required to "lay bare [its] proof and come forward with

¹ It is unclear from the moving papers what the exact relationship between the two entities is. Deco's witness, Michelle Campbell, a building manager, testified at her deposition that DHU is the official tenant on the lease. When asked about the connection with 1199 SEIU, Ms. Campbell testified that, "Well, there is a connection there, but I don't understand the way – yes. They are somehow a part of DHU." NYSCEF doc. no. 82 at 10, lines 6-9. Neither Deco nor plaintiff offer any additional information on the issue, and no sublease has been proffered as between DHU and 1199 SEIU.

some admissible proof that would require a trial of the material questions of fact on which [its] claims rest.” *Ferber v Sterndent Corp.*, 51 NY2d 782, 783 (1980). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

The First Department has held that:

A landlord that has transferred possession and control over property to a tenant is generally not liable for accidents caused by a subsequently arising dangerous condition... [but t]his rule does not apply where the landlord, either contractually or through a course of conduct, has become obligated to maintain or repair the property or a portion of the property which contains the defective condition.” *Melendez v Am. Airlines, Inc.*, 290 AD2d 241, 242 (1st Dept 2002) (citations omitted).

Proof of the out of possession landlord’s control can be shown by a landlord’s course of conduct when it demonstrates that the landlord undertook the responsibility of maintaining the area at issue. *See Haner v De Vito*, 152 AD2d 896 (3d Dept 1989).

Deco maintains that it is an out of possession landlord pursuant to both the terms of the lease and its course of conduct. In its memorandum of law, Deco emphasizes that “...in accordance with the explicit terms of the agreed-upon terms of the lease, it is undisputed that 1199/DHU was solely responsible for maintaining, and did maintain, the Loading Dock.” NYSCEF doc. no. 84 at 5. However, Deco does not cite to or identify any specific provision of the lease that states that DHU or 1199 SEIU is solely responsible for maintaining the loading dock, or that their course of conduct showed that they were.

With respect to Deco’s course of conduct, Deco submits the deposition testimony of Michelle Campbell, a building manager. Ms. Campbell testified that Deco Towers had its own staff who worked in certain areas of the subject building throughout the day, such as a building

manager, or superintendent, and a porter, who once wore brown uniforms but, at some point, switched to green. She also noted that the cleaning staff wore blue uniforms. However, she testified that Deco's staff never handled cleaning or maintenance duties in the loading dock, as per the subject lease. Indeed, Ms. Campbell stated that she personally knew the loading dock was not to be cleaned by Deco Towers "as per the agreement." NYSCEF doc. no. 82 at 60, lines 15-17. Thus, Deco argues that it did not perform maintenance duties in the loading dock sufficient to retain control over the premises to impose liability.

In opposition to Deco's motion, plaintiff similarly does not point to any particular provision of the lease clarifying who was responsible for maintaining and cleaning the loading dock. Rather, plaintiff relies upon his own observations. He states in his deposition that the building maintenance department was responsible for cleaning the loading dock, and he had seen the maintenance workers clean the loading dock area from time to time. Plaintiff identified the maintenance workers as wearing green uniforms. Further, plaintiff points to Ms. Campbell's deposition testimony to support his argument that Deco retained responsibility of maintaining the loading dock. For example, Ms. Campbell testified that defendant Deco had its own cleaning staff in the premises consisting of 19 people, and that defendant Deco had keys and could enter any space in the building. Moreover, she asserts that defendant Deco supplied cleaning services to various floors of the building, and the cleaning staff were supervised by an employee of defendant Deco. As such, plaintiff argues that Deco undertook the responsibility of maintaining the loading dock.

At the outset, the Court notes that the relevant terms of the lease do not provide clarity as to the respective responsibilities of Deco, DHU, and 1199 SEIU with respect to the subject loading dock. As noted, neither Deco nor plaintiff cite to any specific provisions of the lease that are dispositive of the issue. The Court notes that the lease between Deco and DHU, which is a standard

form of office lease, contains a provision entitled “Maintenance and Repairs,” which states that “Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein...” NYSCEF doc. no. 32 at ¶ 4. The lease further directs that:

Owner or its agents shall not be liable for any damage to property of Tenant or of others entrusted to employees of the building, nor for loss of or damage to any property of Tenant by theft or otherwise, *not for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner*, its agents, servants or employees. Owner or its agents will not be liable for any such damage caused by other tenants or persons in, upon or about said building or caused by operations in construction of any private, public or quasi public work. *Id.* at 2 (emphasis added).

Although the lease provides that the tenant maintains the leased premises, plaintiff alleges that Deco retained responsibility for the maintenance of the subject dock, thereby modifying the terms of the lease through its course of conduct. *See Ficus Investments, Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 (1st Dept 2009) (“Parties to a contract are able to alter or waive portions of an agreement by their course of conduct”). Further, although the lease provides that Deco shall not be liable for injury to persons “from any cause whatsoever,” there is an exception when the injury is caused by Deco’s negligence. Therefore, as plaintiff alleges that Deco was negligent in its responsibilities, the lease does not exculpate Deco from liability.

Therefore, the analysis turns to the evidence of Deco’s conduct and whether it undertook the responsibility of maintaining the area at issue. Although Deco characterizes itself as an out of possession landlord, it can enter any space in the building at any time, it provides cleaning services to various portions of the building, and it has a building manager, super, and porter present during the daytime. With respect to the loading dock at issue, plaintiff testified at his deposition that there were Deco maintenance workers in the area of his fall, and they cleaned around the loading dock from time to time. Ms. Campbell’s deposition testimony directly contradicts that of plaintiff, in that she attests that Deco’s maintenance workers were not in the loading dock area nor were they instructed to be there or to clean or maintain the loading dock.

Given the conflicting testimony of plaintiff and Ms. Campbell, which details the presence of Deco’s staff at the premises, there are issues of fact as to whether Deco is an out of possession landlord immune from liability for plaintiff’s injuries due to the oil condition on the loading dock. Plaintiff specifically testified at his deposition that he saw Deco employees in green uniforms, which are worn by the buildings’ superintendent and porter, maintaining the loading dock, while Ms. Campbell testified that the cleaning staff wore blue uniforms and were instructed not to clean the loading dock. Plainly, an issue of credibility arises as to whether Deco assumed responsibility for the maintenance of the loading dock. Moreover, the plain terms of the lease are unclear as to which entity – Deco, DHU, of 1199 SEIU – is responsible for the maintenance of the loading dock. Therefore, Deco’s motion for summary judgment is denied.

III. Conclusion

Accordingly, it is

ORDERED that the motion of defendant Deco Towers Associates for summary judgment dismissing plaintiff’s complaint is denied.

The foregoing constitutes the decision and order of the Court.



LESLIE A. STROTH, J.S.C.

1/10/2024
DATE

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APPLICATION:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
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