

Gomez-Duque v Masood

2024 NY Slip Op 34754(U)

October 31, 2024

Supreme Court, Queens County

Docket Number: Index No. 717084/19

Judge: Timothy J. Dufficy

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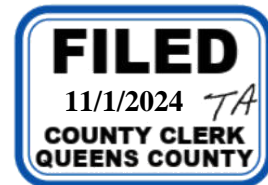
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X

GLORIA YOJANA GOMEZ-DUQUE,

Index No.: 717084/19

Plaintiff,

-against-

Mot. Date: 8/27/24

Mot. Seq. 1

GULRAIZ A. MASOOD,

Defendant.

-----X

GULRAIZ A. MASOOD,

Third-Party Plaintiff,

-against-

QUIJOTE TAPAS BAR,

Third-Party Defendant.

-----X

The following papers were read on this motion by defendant/third party plaintiff Gulraiz A. Masood (Masood) for an order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the plaintiff's complaint against him.

**PAPERS
NUMBERED**

Notice of Motion-Affidavits-Exhibits.....	EF 22-32
Answering Affidavit-Exhibits.....	EF 36-37
Replying Affidavit-Exhibits.....	EF 41-42

Upon the foregoing papers, it is ordered that this motion by defendant/third party plaintiff Gulraiz A. Masood (Masood) is granted.

Plaintiff alleges that she was injured, on May 8, 2019, inside the premises known as 31-06 36th Avenue, Queens, New York. (premises). The record reflects that the

premises were owned by Masood and consist of a three-story mixed use building. Masood leased the commercial space on the ground floor, which consisted of a bar, to third-party defendant Quijote Tapas Bar (Quijote), pursuant to an oral lease agreement with the principal of Quijote, Antonio Rama (Rama). According to Masood, the leased space included the basement within the premises.

In her verified complaint, which sounds in common law negligence, the plaintiff, a bartender employed by Quijote, alleges that she was caused to trip and fall, due to a defective step on a negligently maintained staircase.

At her deposition, the plaintiff testified that the accident occurred at about 2:00 p.m. After arriving at the premises to begin work at the bar, she walked across the floor of the bar, that was “very wet,” due to the fact that the manager had just mopped the floor. She “assumed” that her sneakers were wet at the time of the accident. It was her intention to go downstairs to the basement, where the bar had a changing room, to change into her work clothes. She walked over to a door that leads to the staircase to the basement and opened the door. Although the testimony was unclear at times, the transcript reflects that she was asked the following questions and gave the following answers:

Question: I assume logically that you took a step down to go to descend the staircase; is that fair to say? **Answer:** Yes, how do I walk

Question: Approximately, how many steps did you take before the alleged accident occurred? **Answer:** It was instantly

Question: Were you able to take one step down before the accident occurred or no steps down before the accident occurred? **Answer:** . I don't remember. I just remember that I opened the door and I intended to go down the stairs and I fell down.

Question: What first alerted you that you were about to fall? Did you lose your balance, did you slip, or something else? **Answer:** I slipped.

Question: What did you slip on? **Answer:** In the staircase.

Question: You slipped on the staircase or you said right before the staircase or something else? **Answer:** I don't know. I just stepped, I slipped and I fell.

Question: Before you slipped and fell, did you take any step onto one of the steps or was it before your first step? **Answer:** I don't know.

Question. Did you slip because of the wet floor at the bar. **Answer:** I don't know. The surface was dry.

Question: Would it be fair to say that you slipped because of the wet floor that your manager was mopping? **Answer:** I don't know.

Question: After one of your feet slipped, what happened then? Did you fall down one or two steps, five steps, the entire flight of stairs or something else? **Answer:** All of the staircase.

Question: Before taking that fall, are you able to recall whether you took one step onto the stairs or no steps onto the stairs? **Answer:** I don't remember.

After being shown a photograph of the staircase, marked as Exhibit 'A', plaintiff testified as follows:

Question: You slipped at the top of the staircase before you took a step off it; correct? **Answer:** No. I opened the door and I stepped into the staircase and I fell down.

Question: Did you have to take a step down onto that first step or not? **Answer:** First you had to step to get into the first step.

Question: Did you take that initial step or no? **Answer:** I don't remember

Masood testified that, since 2004, he had been leasing the ground floor commercial space, including the basement, to Quijote, pursuant to an oral agreement with Antonio Rama, the principal of Quijote. According to Masood, the oral agreement required Rama to pay rent on a month to month basis and to maintain and make any necessary repairs to the interior portions of the premises, including the staircase and basement area. He testified that he would visit the premises once a month to collect rent from the commercial and residential tenants. He denied performing any maintenance, repair work, or alterations to the leased space. He denied having any keys or direct access to the bar and basement area.

Rama testified that he has been the sole owner of Quijote, since 2005, and has been leasing space at the premises, pursuant to an oral agreement, since that time. The leased space includes the basement. In the basement, there was an ice machine and an office area where the employees could change clothes. According to Rama, there are two means of access to the basement: through the cellar door located on the adjacent sidewalk; and the interior staircase. It was "understood" that Quijote would handle all maintenance and repairs to the leased space. Masood did not make any repairs or alterations to the leased space, including the staircase. No one other than himself or

employees of Quijote can access the bar and basement area without permission. Only himself or the employees of Quijote have access to the basement through the cellar door. If Masood wished to access the bar or basement area, he would need permission.

Masood moves for summary judgment on the grounds that, *inter alia*, he is an out-of-possession landlord who was not in control of the premises. The motion is opposed by plaintiff. There is no opposition submitted by Quijote.

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact, and he or she must do so by tender of evidentiary proof in admissible form (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Alvarez v Prospect Hosp.*, *supra*, 68 NY2d 320, 324).

"An owner or tenant in possession of [real property] owes a duty to maintain the property in a reasonably safe condition" (*Patterson v H.E.H., LLC*, 217 AD3d 879, 880, [2d Dept. 2023] [internal quotation marks omitted]). However, an out-of-possession landlord is not liable for injuries caused by a dangerous condition on leased premises in the absence of a duty imposed by statute or assumed by contract or a course of conduct" (*Achee v Merrick Vil., Inc.*, 208 AD3d at 543-544 [2d Dept 2022]; *see Sweeney v Hoey*, 211 AD3d 1071, 1071-1072 [2d Dept 2022]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept. 2011]). Although reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception applies only where 'a specific statutory violation exists and there is a significant structural or design defect' (*Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686, 687 [2d Dept. 2006] [internal citations omitted]).

A defendant can establish, *prima facie*, that he or she is was an out-of-possession landlord with evidence of the terms of an oral lease (*see Sawicka v Schwimmer*, 187 AD3d 957 [2d Dept 2020]; *Hart v O'Brien*, 72 AD3d 1257 [3d Dept 2010];

McClenan v Brancato Iron & Fence Works, 282 AD2d 722 [2d Dept. 2001]).

Here, Masood has established its *prima facie* entitlement to summary judgment by submitting, *inter alia*, his deposition testimony and the testimony of Rama, that demonstrate that he was an out- of- possession landlord not responsible for maintaining the staircase and that he did not assume a duty by course of conduct.

In opposition, the ntiff fails to raise an issue of fact. Even assuming without deciding, that Masood had a right to enter the premises, and further assuming that the plaintiff properly pled statutory violations in her bill of particulars, there is no evidence of a specific statutory violation and a significant structural defect. Plaintiff’s reliance on former New York City Administrative Code §§ 27-127 and 27-128 (now recodified as Administrative Code §28-301.1) is misplaced, as § 28-301.1 is insufficiently specific to impose liability on Masood (*see Souma v Third Avenue Realty Mgt., Inc.*, 204 AD3d 622 [1st Dept 2022].)

The affidavit of the plaintiff’s expert, who affirms that the plaintiff fell, due to “irregular tread depths and irregular riser heights,” contradicts the plaintiff’s testimony that she did not know where she was when she began to fall and what caused her to fall, and, thus, is speculative (*see Rivera v J. Nazzaro Partnership, L.P.* 122 AD3d 826 [2d Dept 2014]). Furthermore, irregular riser heights are not structural defects sufficient to impose liability on an out-of-possession landlord (*see Souma v Third Avenue supra*, 204 AD3d at 488; *Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept 2014], lv denied 24 NY3d 903 [2014]).

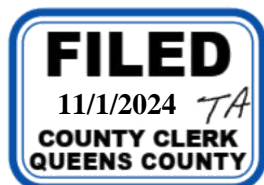
Accordingly, it is

ORDERED, that the motion for summary judgment by defendant/third party plaintiff Gulraiz A. Masood (Masood) for an order, pursuant to CPLR 3212, summary judgment in his favor and dismissing the plaintiff’s complaint against him is granted.

Dated: October 31, 2024



TIMOTHY J. DUFFICY, J.S.C.



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