SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS **PART 36 MOTIONS**

Justice

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MARIA MIRANDA,

Plaintiff,

- v -

ADRI LLC,

Defendant.

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INDEX NO. 700112/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

ADRI LLC

Third-Party Plaintiff,

-against-

WINSTAR FABRIC CARE INC. D/B/A CLASSIC CLEANERS,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41- 66 were read on this motion by defendant ADRI LLC for SUMMARY JUDGMENT, dismissing plaintiff's complaint against it.

Upon the foregoing papers, it is ordered that defendant's motion is decided as follows:

According to the Complaint, on Friday, September 13, 2019, plaintiff MARIA MIRANDA fell on the stairs inside the property located at 351 Great Neck Road, Nassau, New York, owned by defendant, ADRI LLC. According to the Statement of Material Facts, uploaded by defendant, plaintiff's fall occurred at her place of employment ("the drycleaner"), where she worked in the basement washing and ironing laundry. According to the Statement of Material facts, she was injured when, upon going downstairs, the top step of the basement staircase gave way, and her left leg and foot went through the step.

Defendant ADRI LLC now moves for summary judgment, dismissing the complaint as against it. Defendant asserts that it was the landlord of the property where plaintiff's accident occurred but that the lease in effect at the time of plaintiff's accident indicates that her employer, WINSTAR FABRIC CARE INC. D/B/A/ CLASSIC CLEANERS ("WINSTAR"), was responsible for repairing or replacing the subject step, rather than defendant. Defendant also argues that it was an out-of-possession landlord and did not have actual or constructive notice of the alleged defective condition, and therefore the Complaint as asserted against it must be dismissed. In support thereof, defendant submits, among other things, the WINSTAR lease and accompanying Rider. The lease states in pertinent part:

> "Owner shall maintain and repair the public portions of the building, both exterior and interior…. Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and . . . make all nonstructural repairs thereto as and when needed to preserve them in good working order and condition . . . ."

Defendant also submits the affidavit Sang Kim ("Kim"), the owner, operator, and president of WINSTAR, who stated therein that "[p]er the lease, Winstar was solely responsible for the repair of the step that broke." She also stated that neither plaintiff "nor any other employee ever complained of any condition involving the subject step prior to [plaintiff's] incident." Defendant also submits plaintiff's deposition transcript, wherein she testified that she would go up and down the stairs approximately 50 times a day. She also testified that during the "hot season," the lights at the drycleaner would go out "two or three times a month," and as a result, Asher Benshar ("Benshar"), one of the members of ADRI LLC, would go to "check the breakers" in the basement. She further stated that "[Benshar] would only come in when [the lights went out] or when he wanted to speak with the boss." Benshar's deposition transcript, also submitted by defendant, indicated that defendant was the owner of the entire strip mall of which Winstar's leasehold was a part, and while defendant was responsible for structural repairs, the tenant, WINSTAR, was responsible for "[e]verything that is not structural." Benshar further testified that he would "[o]nce a month maybe . . . go upstairs and give [Winstar] the bill for rent" and either "hand them the bill," or slip the rent bill in WINSTAR's door or mailbox. He testified that in September 2019 (the month of plaintiff's accident), he went "a few times" to the Winstar basement, using the staircase where plaintiff's accident allegedly occurred, to work on the electricity fuse boxes, as the fuse boxes for the entire strip mall were in Winstar's basement. However, he testified that "[t]here were no issues with any staircase," and he had not "had any complaints." Based on the foregoing, defendant argues that it established its prima facie entitlement to summary judgment because it did not owe plaintiff a duty, and plaintiff's complaint against it should be dismissed.

Plaintiff opposes. She argues, among other things, that defendant has failed to make its prima facie case because, among other reasons, it failed to prove that it is the type of out-of-possession landlord that can avoid liability, notwithstanding the lease's terms, as defendant has failed to prove it relinquished control over the premises. In opposition, plaintiff also argues that it raised issues of fact regarding whether defendant retained control over the premises and therefore cannot be absolved of liability, by submitting an affidavit from plaintiff and an affidavit from Maria Tenezaca ("Tenezaca"), a former employee whose last day of work at Winstar was in February 2013. Plaintiff stated in her affidavit that "Benshar came into the dry cleaner to check on things, to get rent each month, and [to] supervise[] repair work in the basement. He came in at least once per week," and he "entered through the back door in the basement, he used the stairs to go up to the street level." Based thereupon, plaintiff argues it has provided sufficient evidence to raise an issue of fact as to whether defendant retained some control over the premises such that it should retain liability.

Defendants reply and argue, among other things that the submission of Tenezaca's affidavit should not be considered by the Court because plaintiff disclosed Tenezaca as a notice witness for the first time in opposition to the instant motion. Defendant also argues that even if Tenezaca's affidavit were considered, it has no bearing on the facts of this case, as Tenezaca failed to indicate that she was present at the time of the accident or immediately prior, and Tenezaca left Winstar almost six years before plaintiff's accident.

As the movant on a motion to dismiss the Complaint pursuant to CPLR 3212, defendant bears the burden to establish its prima facie entitlement to summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden

shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*; *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 (*see Winegrad*).

Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). However, "a 'landowner who has transferred possession and control [i.e., an out-of-possession landlord] is generally not liable for injuries caused by dangerous conditions on the property' "(*Maharaj v Kreidenweis*, 214 AD3d 717, 718 [2d Dept 2023]). The duty of care "is premised on the landowner's exercise of control over the property, as the person in possession and control of [the] property is best able to identify and prevent any harm to others" (*Santiago v City of New York*, 206 AD3d 679, 681 [2d Dept 2022]). "It has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889 [1970]). "In assessing an out-of-possession landowner's duty in tort, the court should look not only to the terms of the agreement but also to the parties' course of conduct" (*Santiago* at 681). "[I]t is possible for an out-of-possession landlord to have a limited duty to maintain or repair a leased property in some specific respect while having no responsibility to maintain or repair the leased property in another respect" (see *Broughal v. Kwon*, 181 A.D.3d 641, 641, 117 N.Y.S.3d 873) (where defendant had a "responsibility under the lease to make certain repairs to the premises," such responsibility did "not defeat the defendant's claim that it was an out-of-possession landlord.").When an out-of-possession landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing condition fell within the landlord's contractual responsibilities" (*King v Marwest, LLC*, 192 AD3d 874, 876-77 [2d Dept 2021])).

In the instant case, it is clear that the injury-producing condition, that is, the defective stair, did not fall within the defendant-landlord's contractual responsibilities. WINSTAR's owner stated in her affidavit that maintenance of the stairs were "solely" Winstar's responsibility. The lease stated that the tenant, WINSTAR, was responsible for taking "good care of the demised premises and fixtures and appurtenances therein . . . and . . . make all non-structural repairs thereto as and when needed to preserve them in good working order and condition . . . ." *See Gomez v Brodsky Org., Inc.*, 38 Misc 3d 1223(A) [Sup Ct 2013] (Where plaintiff had an accident on the interior stairs in store leading to basement, court held the lease, which stated landlord shall make all structural repairs, "does not impose an obligation on [(defendant-landlord)] to repair or maintain the demised premises [(defective stairs)]."); *see also Harar Realty Corp. v Michlin & Hill, Inc.*, 86 AD2d 182, 189 [1st Dept 1982] ("the installation of the spiral stairway constituted a non-structural alteration").

Furthermore, the Court is not persuaded by plaintiff's argument that defendant failed to establish its prima facie case because it failed to prove it relinquished control over the premises. That defendant visited the premises to drop off the rent bill and to perform repairs in the basement does not amount to a course of conduct sufficient to impart liability on it, as defendant was acting in accordance with its contractual responsibilities. The Court notes that while defendant alluded to the obligations under the lease, it failed to cite to the specific portions of said contract. The Court reviewed the lease document in full and notes that it stated in relevant part that "a bill, statement notice or communication which Owner may desire or be required to give to tenant, shall be deemed

sufficiently given or rendered if, in writing, delivered to Tenant personally . . . .” Thus, defendant-landlord’s use of the stairs to deliver the rent bill – as he was entitled to do by the terms of the lease – did not defeat defendant's claim that it was an out-of-possession landlord.

The Court also reviewed the lease’s rider in full, which stated in relevant part that “Tenant represents and warrants that it shall not use . . . the electrical . . . system in such a way as to damage or interrupt such services to the remaining portion of the building.” As the drycleaner’s lease was for use of only a part of defendant’s building and the circuit breakers for the entire structure were in the drycleaner’s basement, defendant-landlord’s presence in the basement to make certain repairs to restore electricity to the entire building did not defeat defendant's claim that it was an out-of-possession landlord. Therefore, the Court finds that defendant demonstrated its prima facie entitlement to summary judgment through the submission of Kim’s affidavit, plaintiff’s and defendant’s depositions, the lease and the Rider; all of which established that tenant-WINSTAR enjoyed complete and exclusive possession of the demised premises at the time of plaintiff’s injury and that defendant was not responsible for maintenance of the basement stairs.

In opposition, plaintiff failed to provide evidence sufficient to raise an issue of fact as to whether defendants retained control of the property. Even if Tenezaca’s affidavit was admissible, her statements relate to a time period long before plaintiff’s accident and therefore are irrelevant. Plaintiff’s affidavit also fails to raise a material issue of fact. Whether Benshar visited the drycleaners once a week (as plaintiff stated in her affidavit) or two or three times a month (as she testified), plaintiff did not testify that Benshar visited the basement or the stairs for any reasons other than those specifically related to his obligations under the lease. Thus, this Court finds that defendant was an out of possession landlord and is not responsible for the plaintiff’s injury (*see Madry v Heritage Holding Corp.*, 96 AD3d 1022, 1023 [2d Dept 2012] (“An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord ‘has a duty imposed by statute or assumed by contract or a course of conduct’ ”). Accordingly, defendant’s motion for summary judgment, dismissing the complaint as asserted against it, is granted.

DATED: June 11, 2024

ROBERT I. CALORAS, J.S.C.