

Roger v Pelham Parking LLC

2024 NY Slip Op 34835(U)

March 21, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31822/2019E

Judge: Paul L. Alpert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

C

Jean Roger

Index No. 31822/2019E

-against-

Hon. Paul L. Alpert

Pelham Parking LLC and Mikal Management Co.
Inc.,

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

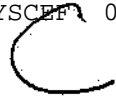
The defendants motion is decided in accordance with the annexed decision and order of the court.

Motion is Respectfully Referred to Justice:
Dated: _____

Dated: 3/21/24

Hon. 
HON. PAUL ALPERT J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

-----X
Jean Roger,

Index No.: 31822/2019E

Plaintiff,

DECISION/ORDER

-against-

Pelham Parking LLC and Mikal Management Co., Inc.,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

Papers	Numbered
Notice of Motion and Affirmation in Support & Exhibits.....	1
Memorandum of Law in Support.....	2
Affirmation in Opposition & Exhibits.....	3
Memorandum of Law in Opposition.....	4
Affirmation in Reply & Exhibits.....	5

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action for personal injuries following a slip and fall accident that occurred on December 4, 2018. The plaintiff, Jean Roger, was a school bus driver employed by Pioneer Transportation Corp (hereinafter "Pioneer"). On the day of his accident, Mr. Roger was within a bus parking lot when he slipped and fell as he was stepping off the bus that he was assigned to drive. The defendants Pelham Parking LLC (hereinafter "Pelham") and Mikal Management Co. (hereinafter "Mikal") move for summary judgment to dismiss the plaintiff's complaint pursuant to CPLR § 3212. The plaintiff opposes the motion.

Mr. Roger worked for Pioneer from 2005 to 2018 (Defendants Motion, Exhibit J, page 12 line 25- page 13 line 6). Mr. Roger would typically report to the Pioneer bus yard at 5:00 a.m. (page 42, lines 15-18). Mr. Roger's accident occurred at 5:15 a.m. within the parking lot (page 40 lines 12-17). When he got on the bus that morning, he was trying to start the bus but it would not start (page 53 lines 9-12). Afterwards, he was stepping off the bus to go to the office so that

they could provide him with a different bus (page 53 lines 15-19). There were four steps leading out of the bus (page 54 lines 17-19). Mr. Roger was on the second step, approaching the third step when he slipped and fell (page 56 lines 2-4). Mr. Roger's head hit the bus that was in front of him, and he fell down on the ground (page 56 line 24-page 57 line 2). There was no artificial lighting in the lot (page 44 lines 22-24). He got up and he walked to the office, and he was bleeding from his mouth, his nose, his ear, and he had a swollen eye (page 61 lines 2-7).

Neil Strahl is the President and CEO of Pioneer (Defendants motion, Exhibit M, Page 9, lines 8-10). Pioneer is a school bus transportation company (page 9 lines 22-23). Pioneer leases all the locations that it operates in (page 10 lines 11-19). Pioneer began leasing the premises in Pelham Manor in September of 2018 (page 15 lines 15-19). The purpose of getting this property under this sublease was to park school buses that service school bus transportation in the Bronx (page 15 lines 20-25).

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320). Once the proponent of a motion for summary judgment meets this burden it is incumbent upon the party opposing the motion to submit proof in admissible form that an issue of fact exists which necessitates a trial (*Zuckerman v. City of New York*, 49 NY2d 557). The courts function on a motion for summary judgment is issue finding and not issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395). Summary judgment is a drastic remedy that deprives the litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab*

Corp., 153 AD2d 520). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman supra*). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition (*Winegrad v. New York Univ. Med Center*, 64 NY2d 851).

The defendants maintain that they cannot be held liable for the plaintiff's accident because defendants were out-of-possession landlords. 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 tenants expense and liability is based on significant structural or design defect that is contrary to a specific statutory safety provision” (*Sapp v. S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, quoting, *Johnson v. Urena Serv. Ctr.*, 227 AD2d 325, 326).

The defendants demonstrated that they were out of possession landlords with no duty to maintain the area where the accident occurred or remedy the defect alleged through submission of the leases (*Kopetic v. Port Auth. Of N.Y. & N.J.*, 176 AD3d 530, citing *Kittay v. Moskowitz*, 95 AD3d 451). Pelham Parking leased the premises from Mikal. On September 1, 2018, Pioneer subleased a portion the premises from Pelham Parking.

The over lease provided for a right of entry by the landlord and it was incorporated by reference into the sublease. The over lease states “if this lease shall terminate as provided in Section 10.1 or 10.2 hereof, Landlord or Landlord’s agents or employees may immediately or at any time thereafter re-enter the Premises, or any part thereof, either by summary dispossession proceedings or by any suitable action or proceedings at law, or by any other lawful means...” (Exhibit F page 21). The over lease also states “except in the case of an emergency (as

determined by Landlord in its sole discretion) whereby Landlord shall be entitled to immediate access, Landlord and Landlord's agents shall have the right to enter the Premises at reasonable times for the purpose of inspecting the same, showing the same to prospective purchasers, or lenders, and making such alterations, repairs, improvements, or additions to the Premises or any portion thereof as Landlord may deem necessary or desirable" (Page 28).

The defendants established that they have no contractual right to maintain the premises. The over lease states, "At tenants sole cost and expense, tenant shall during the term of this Lease keep and maintain in good order and condition, and repair and replace the Premises and every part thereof and all Adjacent areas, whether structural or non-structural, ordinary or extraordinary, foreseen or unforeseen. At Tenant's sole cost and expense, Tenant shall maintain, repair, replace and keep all adjacent areas clear of snow, ice, rubbish, debris weeds, shrubbery, and any other obstructions." Pursuant to the sublease, Pelham "shall not be required to furnish any services, maintenance, repairs, or facilities whatsoever as to the Demised Premises." (Exhibit H, Article 2, page 4). The sublease further states that the tenant is responsible for lighting (Article 2, page 3).

Although the defendants maintained a right of entry, the defendants established that they owed no duty to the plaintiff because the First Department has consistently held that inadequate lighting is not a structural or design defect (*Bethea v. Weston House Dev. Fund. Co., Inc.*, 70 AD3d 470). In *Peck v. 2-J, LLC*, 56 AD3d 277, the First Department held that an out of possession owner could not be held liable for inadequate lighting despite its right to reenter under the lease because the tenant controlled the lighting, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision.

In opposition, the plaintiff fails to raise an issue of fact. The plaintiff maintains that the defendants have a nondelegable duty to keep the premises safe where its premises are open to the public. However, the plaintiff cannot succeed on this claim as Mr. Roger was injured in an area of the premises that was not open to the general public (*Pulliam v. Deans Management of N.Y., Inc.*, 61 AD3d 519). Additionally, Plaintiff failed to demonstrate evidence that the alleged defect was a significant structural defect in violation of an applicable statutory provision (*Kopetic supra*).

The plaintiff failed to raise an issue of fact through the affidavit of Harold Krongelb. Mr. Krongelb is a Professional Engineer. Mr. Krongelb inspected the school bus yard where the plaintiffs accident occurred. In his affidavit, Mr. Krongelb concludes that the lack of sufficient artificial illumination of the school bus parking lot violated accepted practices for parking lot and site maintenance (Krongelb Affidavit). However, as demonstrated above, an out of possession landlord can only be found liable if the defect was a significant structural or design defect that is contrary to a specific statutory safety provision and inadequate lighting does not constitute a significant structural or design defect.

The plaintiff also argues that discovery is outstanding. The plaintiff states that Mikal retained control over a shared driveway adjacent to the location of Roger's accident. The plaintiff maintains that photographic exhibits demonstrate that the light fixture adjacent to the shared driveway could have satisfied the requirement for artificial lighting at the accident site. The plaintiff argues that discovery is needed to identify which entity installed a light fixture adjacent to the shared driveway. However, "a grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v. New York City Transit Authority*, 270 AD2d 156).

Moreover, as the defendants argue in reply, the sublease states that Pioneer is responsible for lighting within the parking lot.

Given the fact that Pioneer had control of the lighting within the parking lot and that inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision, both Pelham and Mikal, as out of possession landlords, cannot be held liable for Mr. Roger's accident. Lastly, the over lease and the sublease provide that the tenant is responsible for the maintenance and repair of the premises. In this matter, Pioneer is the subtenant and Pioneer's sublease demonstrates that the sublessor, Pelham, is not responsible for maintenance or repair of the premises. Accordingly, the defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

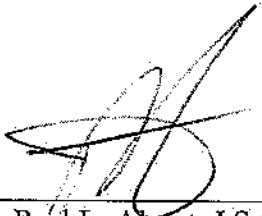
Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that Pelham Parking LLC and Mikal Management Co. Inc.'s motion for summary judgment pursuant to CPLR § 3212 to dismiss the plaintiff's complaint is granted, and it is further,

ORDERED AND ADJUDGED, that the defendants shall serve a copy of this decision and order upon the plaintiff within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: March 21, 2024



Hon. Paul L. Alpert, J.S.C.