

Calderon v Yonkers Assoc., LLC
2024 NY Slip Op 35504(U)
October 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 62049/2020
Judge: William J. Giacomo
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To commence the 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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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VICTOR CALDERON,

Plaintiff,

Index No. 62049/2020

– against –

**Motion Seq. Nos. 002 &
003**

YONKERS ASSOCIATES, LLC, QIC US INVESTMENT
SERVICES INC. 1 RIDGE HILL LLC and FOREST CITY
ENTERPRISES, L.P.,

DECISION & ORDER

Defendants.

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YONKERS ASSOCIATES, LLC and QIC US INVESTMENT
SERVICES INC.,

Third-Party Plaintiffs,

– against –

WHOLE FOODS MARKET GROUP, INC.,

Third-Party Defendant.

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Plaintiff Victor Calderon commenced this personal injury action after sustaining injuries when he slipped and fell on the premises located at the rear of Whole Foods Market located at the Ridge Hill Mall, One Ridge Hill Boulevard, Yonkers, NY. In motion sequence 002, defendant/third-party plaintiff QIC US Investment Services Inc. (QIC) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint. In motion sequence 003, defendant/third-party plaintiff Yonkers Associates, LLC and third-party defendant Whole Foods Market Group, Inc. (Whole Foods or Whole Foods Market) collectively move, pursuant to CPLR 3212, an order granting summary judgment dismissing plaintiff's complaint as against Yonkers Associates and also for an order dismissing QIC's third-party complaint as against Whole Foods. Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

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Papers Considered in Motion Seq. 02 NYSCEF DOC NO. 72-98; 119-121

1. Notice of Motion/Affirmation in support by Nick Migliaccio, Esq./ Memorandum of Law in Support/Exhibits A-S/ Affidavit of Service/ Letter with surveillance video

Papers Considered in Motion Sequence 003 NYSCEF DOC NO. 99-118

1. Notice of Motion/Statement of Material Facts/Affirmation in support by Caroline Papadatos, Esq./Exhibits A-P/Affidavit of Service

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff commenced this action on or about October 7, 2020 by filing a summons and complaint. Plaintiff alleges that he sustained personal injuries as a result of a slip and fall accident that occurred on December 4, 2019 at approximately 6:00 a.m. in the rear loading dock/receiving area for Whole Foods Market. QIC is the managing agent and retained property managers to manage the Ridge Hill Shopping Center. Whole Foods is a tenant of the Ridge Hill Shopping Center and entered into a lease on May 9, 2007 with Yonkers Associates, the landlord. The bill of particulars sets forth that at the time of the accident, plaintiff was employed as a “Team Leader” at Whole Foods. It further states that plaintiff was injured due to defendants’ negligence in maintaining the premises. Specifically, defendants purportedly allowed a large accumulation of ice to remain on the premises, causing plaintiff to slip and fall and sustain injuries.

Defendants Yonkers Associates and QIC joined issue by the filing of their answer with cross claims on December 30, 2020. Defendant Forest City Enterprises, L.P. has never appeared in this action. The record indicates that QIC is an asset manager that purchased the joint venture interest in the Ridge Hill Shopping Center in 2019 from Forest City Enterprises, L.P. Defendant 1 Ridge Hill LLC joined issue by filing an answer on August 13, 2021. On November 16, 2021 a partial stipulation of discontinuance was filed as to 1 Ridge Hill LLC. On December 6, 2021 defendants Yonkers Associates and QIC filed a third-party summons and complaint against Whole Foods. Whole Foods joined issue by the filing of its answer on February 16, 2020. A partial stipulation discontinuing Yonkers Associates’ third-party action was filed on May 29, 2024.

The relevant facts and testimony are as follows:

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Plaintiff testified that he had been employed as a Lead Receiver at the time of the accident and that the accident occurred in the receiving area at Whole Foods, specifically by the receiving bays where he would receive the trucks arriving with products for the store. The receiving bays are located outside of the store. On the date of the accident plaintiff started working around 6:00 a.m. The assistant manager then asked plaintiff to go outside and remove debris from underneath the dumpsters. Plaintiff went to the receiving dock to remove debris and slipped and fell on a mixture of snow and ice. There was no truck in the receiving bay and he was able to see the snow on the ground.

Pursuant to the terms of the lease, the demised premises included the store, unenclosed loading dock, unenclosed receiving area and a parking area. Further, Whole Foods has exclusive rights to use the loading facility 24 hours a day, 365 days a year. The lease provided that the tenant, at its sole cost and expense, shall keep certain areas of the demised premises in good condition and repair. These areas included, in relevant part, the parking area and the loading dock and receiving area (including dock levelers, elevators and inclined walkways). The landlord was obligated to provide adequate plowing of snow and ice and removal of garbage, among other responsibilities, within all Common Areas. However, Commons Areas, as defined under the lease, included loading facilities and docks not exclusively serving any tenant of the Shopping Center.

QIC's witness testified that the property manager retained a contractor to perform snow removal for the common areas in the shopping center. However, Whole Foods store would be responsible for removing snow from the loading/dock receiving area. Whole Food's witness testified that Whole Foods was responsible for removing the snow in the truck bays, which were exclusively used for the benefit of Whole Foods.

QIC and Yonkers separately move for summary judgment dismissing the complaint. According to all defendants, the testimony and photographs establish that the accident occurred in the rear loading dock/receiving area, which was in the exclusive possession of Whole Foods and not used by any other tenant. Pursuant to the terms of the lease, Whole Foods was contractually responsible for any snow, ice or garbage/debris removal in that area of the premises. As a result, as managing agent and out of possession landlord, defendants allegedly owed no duty to plaintiff to keep the premises in a reasonably safe condition. QIC also argues

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that it did not have actual or constructive notice of the dangerous condition, nor did it create the condition.

Yonkers Associates together with Whole Foods also argues that, as the direct action should be dismissed since the direct defendants are out of possession landlords, the third-party action against Whole Foods should also be dismissed.

Plaintiff did not oppose either motion.

DISCUSSION

I. Summary Judgment

A party seeking summary judgment has the burden of tendering evidentiary proof in admissible form to demonstrate the absence of material issues of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Boulos v Lerner-Harrington*, 124 AD3d 709, 709 (2d Dept 2015). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1986).

“Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Alvarez v Prospect Hosp.*, 68 NY2d at 342; *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.” *Kolivas v Kirchoff*, 14 AD3d 493, 493 (2d Dept 2005).

“An out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition.” *Yadegar v International Food Mkt.*, 37 AD3d 595, 597 (2d Dept 2007) (internal quotation marks omitted); *see also Negri-Riglos v First N. Star, LLC*, 187 AD3d 1200, 1201 (2d Dept 2020) (internal quotation marks omitted) (“An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct”). Here, in

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support of the motions for summary judgment, QIC and Yonkers Associates have established, prima facie, that they relinquished control over the premises and did not have a contractual duty to remedy the allegedly dangerous condition where plaintiff's accident occurred. As set forth above, plaintiff's accident occurred in the rear/loading dock area of Whole Foods, in one of the truck bays where Whole Foods would receive deliveries. Pursuant to the terms of the lease, Whole Foods, as tenant, had exclusive control over this loading dock area and was solely responsible for maintaining/cleaning this area. The lease also specifically excluded this area from one of the common areas entitled to snow removal by the managing agent's snow removal contractor. The testimony indicates that Whole Foods did assume responsibility to remove snow and debris from the loading dock area. Accordingly, Yonkers Associates and QIC established their "prima facie entitlement to judgment as a matter of law by submitting proof that it was an out-of-possession landlord and, thus, had no duty to perform repairs or remove snow and ice from the [rear/loading dock area]." *Keum Ok Han v Kemp, Pin & Ski, LLC*, 142 AD3d 688, 689 (2d Dept 2016).

Plaintiff did not oppose either motion and thus, "failed to raise a triable issue of fact as to whether the defendant had a duty to remove snow or ice under statute or regulation, the terms of the lease, or a course of conduct." *Id.*

QIC argues, in the alternative, that it did not create or have actual/constructive notice of the condition. However, Courts have held that where, like here, QIC established that it "relinquished control over the premises and, thus, had no duty to maintain or repair the premises," there is no need to address "the question of notice." *Lowe-Barnett v City of New York*, 28 AD3d 721, 723 (2d Dept 2006).

Although plaintiff did not commence an action directly against Whole Foods, Whole Foods moves for summary judgment dismissing the complaint as against Yonkers Associates and also moves for summary judgment dismissing the third-party action. *See JP Morgan Chase Bank, N.A. v Strands Hair Studio, LLC*, 84 AD3d 1173, 1173 (2d Dept 2011) ("a third-party defendant has the right to assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim . . ."); *see also* CPLR 1008. As a result of this decision, the complaint is dismissed as against Yonkers Associates and QIC. Therefore, their third-party complaint against Whole Foods is also dismissed. It is well settled that the third-party complaint will be rendered moot if the complaint is dismissed in its entirety. *See e.g. Roberson v Wyckoff*

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Hgts. Med. Ctr., 123 AD3d 791, 792 (2d Dept 2014) (“In light of our determination that the complaint should be dismissed, the question of whether the Supreme Court properly granted the motion of the third-party defendant Ludis Williams for summary judgment dismissing the third-party complaint insofar as asserted against her has been rendered academic”); *see also Turchioe v AT&T Communications*, 256 AD2d 245, 246 (1st Dept 1998) (“The third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety”).

Accordingly, Whole Foods is granted summary judgment dismissing the third-party complaint as against it.

Defendant Forest City Enterprises, L.P.

The associate general counsel for QIC testified that in 2019, QIC bought out the “JV interest in the property and took it over 100 percent” from defendant Forest City Enterprises, L.P. As defendant Forest City Enterprises, L.P. did not own the Ridge Hill Shopping Center on December 4, 2019, the date of plaintiff’s accident, this Court is also dismissing plaintiff’s complaint as against Forest City Enterprises, L.P.

(continued on next page)

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant/third-party plaintiff QIC US Investment Services Inc.'s motion for summary judgment dismissing the complaint (motion sequence 002), is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant/third-party plaintiff Yonkers Associates, LLC and third-party defendant Whole Foods Market Group, Inc.'s motion for an order granting summary judgment dismissing plaintiff's complaint and the third-party complaint (motion sequence 003), is granted, and the complaint and third-party complaint are dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the complaint is dismissed as against defendant Forest City Enterprises, L.P.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly. Case dismissed.

Dated: White Plains, New York
October 8, 2024


HON. WILLIAM J. GIACOMO, J.S.C.