

Wenzel v 16302 Jamaica Ave. LLC
2011 NY Slip Op 34197(U)
December 9, 2011
Supreme Court, Queens County
Docket Number: 941/2009
Judge: Robert L. Nahman
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ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT L. NAHMAN
Justice

IAS PART 16

FILED
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5 QUEENS COUNTY CLERK

DOUGLAS WENZEL,
Plaintiffs,

- against -

16302 Jamaica Avenue LLC and
MARGHERITA PIZZA NY CORP.,

Defendants.

INDEX NO.: 941/2009

MOTION
DATE: October 11, 2011

MOTION
CAL. NO.: 23 & 24

MOT. SEQ.
NUMBER: 1 12

Upon the following papers numbered 1 through 57 submitted on the motions by the defendants for summary judgment and on the cross motion by plaintiff to amend and/or supplement his bill particulars:

	<u>PAPERS</u> <u>NUMBERED</u>
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IT IS ORDERED that the defendants motions and plaintiff's cross motion are determined as follows:

This action seeks damages for personal injuries allegedly sustained when plaintiff's heel caught on the bent metal nosing of a chipped concrete step which caused him to fall down basement stairs in the premises leased by defendant Margherita Pizza NY Corp., and owned by defendant 16302 Jamaica Avenue LLC.

The lease agreement between defendant Margherita Pizza NY Corp., and defendant 16302 Jamaica Avenue LLC provides that defendant Margherita Pizza NY Corp., is responsible for maintaining and repairing the premises and further provides that defendant Margherita Pizza NY Corp., will defend and indemnify defendant 16302 Jamaica Avenue LLC for any liability resulting from any breach of the lease or any negligence of the tenant.

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Defendant Margherita Pizza NY Corp., moves for summary judgment dismissing the plaintiff's complaint and all cross claims against it upon the grounds that the defect that allegedly caused plaintiff's accident was trivial in nature and that it did not have any actual or constructive notice of the alleged defect.

Defendant 16302 Jamaica Avenue LLC moves for summary judgment dismissing the plaintiff's complaint and all cross claims against it upon the grounds that it is an out of possession landlord and that no structural defects existed at the time of the accident which violated any statutes or regulations. Defendant 16302 Jamaica Avenue LLC also moves for summary judgment against defendant Margherita Pizza NY Corp., on its claims for contractual and common law indemnification upon the grounds that the lease obligates the defendant Margherita Pizza NY Corp., to make all necessary repairs and obligates it to indemnify the owner.

Plaintiff on his cross motion, moves for leave to supplement and/or amend his bill of particulars to include additional statutory violations. Plaintiff previously served a supplemental verified bill of particulars on November 2, 2010 in which he alleged that the defendants violated the safety regulations of Section 27-375 of the Administrative Code of the City of New York. Plaintiff now seeks to allege violations of The Building Code of the City of New York which pertain to inadequate head room, non-constant riser height and tread width, and the lack of an appropriate handrail.

Defendant 16302 Jamaica Avenue LLC opposes plaintiff's proposed amendment upon the grounds that the case has long been on the trial calendar and it would be prejudiced by having to face allegations of statutory violations on the eve of trial.

Defendant Margherita Pizza NY Corp., opposes the motion upon the grounds that it would be prejudiced by the untimely amendment and upon the grounds that the plaintiff is changing his theory of liability.

The note of issue in this matter was filed February 3, 2011. This matter has already appeared on the calendar in the trial scheduling part and has a trial date of January 23, 2012.

The court finds plaintiff's cross motion for leave to amend and/or supplement his bill of particulars to allege violations of The Building Code of the City of New York is untimely and would unduly prejudice the defendants in this action.

Accordingly, plaintiff's cross motion is denied.

Defendant 16302 Jamaica Avenue LLC has made a prima facie showing of its entitlement to summary judgment dismissing the plaintiff's complaint and all cross claims against it upon the grounds that it is an out of possession landlord and that no structural defects existed at the time of the accident which

violated any statutes or regulations.

The safety regulations of Section 27-375 of the Administrative Code of the City of New York alleged by the plaintiff have been held to be inapplicable to a staircase from the first floor under a trap door leading to the basement level, because Section 27-375 of the Administrative Code of the City of New York specifically refers to stairs within a building that serve as a required exit from the interior of the building to an open exterior space, *Maksuti v Best Italian Pizza*, 27 AD3d 300 [2nd Dept., 2006].

In the case at bar, the entrance to the staircase is located beneath a trap door in the floor behind the pizza counter. The court finds Section 27-375 of the Administrative Code of the City of New York to be inapplicable to the case at bar. An out of possession landlord who has contracted the maintenance of the premises to the tenant will only be liable for injuries sustained on the property if the injury resulted from a significant structural defect which was a violation of the New York City Administrative Code, *Guzman v Haven Plaza*, 69 NY2d 559 (1987).

Accordingly, the branch of defendant 16302 Jamaica Avenue LLC's motion for summary judgment dismissing the plaintiff's complaint and all cross claims against it is granted.

Defendant 16302 Jamaica Avenue LLC has also made a prima facie showing of its entitlement to summary judgment on its contractual and common law indemnification claims against defendant Margherita Pizza NY Corp.

Defendant Margherita Pizza NY Corp.'s contention that the owner was responsible for maintaining the basement stairs is belied by the explicit terms of the lease and the testimony of defendant Margherita Pizza NY Corp.'s own witness Stephano DeBenedetto.

The lease provides: "[t]enant shall...take good care of the demised premises and the fixtures and appurtenances therein...and at its sole cost and expense, make all non-structural repairs thereto, as when needed...."

Structural repairs are defined in the lease as building foundations, separating walls enclosing the leased premises, vertical supporting beams, and horizontal supporting beams of the floor and roof.

Furthermore, defendant Margherita Pizza NY Corp.'s witness Stephano DeBenedetto testified that sometime after the accident, the pizzeria had the stairs repaired. Evidence of a subsequent remedial measure is admissible when there is an issue as to maintenance and control, (See, *Watson v. FHE Services*, 257 AD2d 618 [2nd Dept., 1999]).

The lease between the defendants also obligated the defendant Margherita Pizza NY Corp., to defend and indemnify defendant 16302

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Jamaica Avenue LLC for any liability resulting from any breach of the lease or any negligence of the tenant and further obligated the defendant Margherita Pizza NY Corp., to secure comprehensive liability insurance protecting both the landlord and the tenant from claims such as this. A landlord may be indemnified for its own negligence or that of its tenant where a broad indemnification clause is coupled with an insurance clause, (See, *Great Northern v Interior Construction Corp.*, 7 NY3d 412 [2006]; *Menorah Nursing Home v Zuchov*, 153 AD2d 13 [2nd Dept., 1989]).

Accordingly, the branch of defendant 16302 Jamaica Avenue LLC's motion for summary judgment against defendant Margherita Pizza NY Corp., for contractual and common law indemnification is granted.

Defendant Margherita Pizza NY Corp.'s motion for summary judgment dismissing the plaintiff's complaint and all cross claims against it upon the grounds that the defect that allegedly caused plaintiff's accident was trivial in nature and that it did not have any actual or constructive notice of the alleged defect is denied.

Defendant Margherita Pizza NY Corp., in support of its contention that the defect was trivial submits plaintiff's testimony that since the heel of his shoe measured approximately one half inch and that since the heel is what got caught in the step, the defect was trivial. The evidence submitted by the defendant Margherita Pizza NY Corp., is insufficient to demonstrate as a matter of law that the alleged defect was trivial, especially since plaintiff in his affidavit states that the metal nosing was separated from the concrete step by almost two inches.

Furthermore, the defendant Margherita Pizza NY Corp., has failed to demonstrate as a matter of law that the alleged defect was not visible and apparent and that it did not exist for a sufficient length of time to permit the defendant to remedy it, (See, *Perez v 655 Montauk*, 81 AD3d 619 [2nd Dept., 2011]).

The court finds that questions of fact exists as to whether the defect was trivial in nature and whether the defendant Margherita Pizza NY Corp., had actual or constructive knowledge of it.

Accordingly, defendant Margherita Pizza NY Corp.'s motion for summary judgment dismissing the plaintiff's complaint against it is denied.

Dated: December 9, 2011 4Z 6 V SI 330 110Z I

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CLERK OF COURT
Robert L. Nahman, J.S.C.