Lasane v Eastern Indus. Dev. Corp.
2017 NY Slip Op 30762(U)
March 8, 2017
Supreme Court, Bronx County
Docket Number: 303890/14
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 303890/14**

Maurice Lasane,

Plaintiff,

-against- **DECISION and ORDER**

Eastern Industrial Development Corp.,

Present:

Defendants. Hon. Julia I. Rodriguez

----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint.

Papers Submitted	Numbered
Notice of Motion & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation	**3**

This is an action to recover damages for personal injuries sustained by plaintiff, a painting supervisor, while descending stairs to the basement of premises owned by the defendant in the course of performing work at the premises on July 21, 2011.

Defendant Eastern Industrial Development Corp. ("Eastern") now moves for summary judgment, dismissing the complaint, on the grounds that it is an out-of-possession landlord that was not in control of the subject property, that did not create the allegedly dangerous condition and that had no actual or constructive notice of the alleged condition.

In support of the motion, Eastern submitted, *inter alia,* plaintiff's deposition testimony and the deposition testimony of Scott Milchman, and a copy of a lease between Eastern and Institute for Community Living concerning the subject premises.

At his deposition, plaintiff testified, *inter alia,* as follows: At the time of the accident, he was employed by the Institute for Community Living as a painter and a painting supervisor. He had been to the premises and had taken the stairs to the basement of the premises "numerous times" during the course of his normal work duties. He stored equipment that he needed for painting in the basement. At the time of the accident, he was carrying a five gallon jug of either paint or compound with both hands while descending the stairs to the basement. He was going

forward facing the basement. There was a wall on one side and a handrail on the other side of the steps. He doesn't think that there was a handrail on the wall. When he stepped on "maybe the third or fourth stair," the step starting "shaking." It was loose. He was pushed in the direction of the handrail but was unable to grab it because "it happened very suddenly." His knee twisted, then he fell and landed on his right shoulder one or two steps below.

The lease provides, in pertinent part:

> 1. Leasehold.
>
> . . .
>
> B. The Tenant acknowledges that it has examined the demised premises and is fully familiar with the condition thereof. The Tenant accepts the demised premises in its existing condition, it being expressly understood and agreed that the Landlord shall not be required to perform any work or make any repair, change, improvement, renovation, addition or alteration at or to the demised premises or adjoining areas [except for (1) repairs to the exterior of the building and the roof, (2) maintenance of the elevator and (3) replacement of the furnace and oil tank in the event it ceases to function and cannot be repaired (maintenance and repair of the furnace and oil tank remain the responsibility of the Tenant), which remains the Landlord's responsibility, all of which the Tenant agrees that it will do or perform throughout the entire term of this lease, all at its own cost and expense). . . .
>
> C. Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, improvement, replacement, maintenance and management of the demised premises and adjoining areas, except as provided for in Paragraph 1B above. Tenant acknowledges that no representation, statement or warranty, express or implied, has been made by or on behalf of Landlord as to the condition of or as to the use that may be made of the demises premises. In no event shall the Landlord be liable for any defect in the demises premises or for any limitation on its use.
>
> . . .
>
> 7. Repairs. Throughout the term of this lease:
>
> A. The Tenant, at its sole expense, will take good care of the demised premises . . . and will make all necessary repairs and improvements thereto . . . interior and exterior, structural and nonstructural, except as set forth in Paragraph 1B. When used in this Paragraph 7, the term "repairs" shall include all necessary

replacements, renewals, alterations, additions, and betterments. All repairs made by the Tenant shall be made promptly, as and when necessary . . .

C. Tenant shall keep the demised premises and adjoining areas in good order and repair and shall make all repairs necessary to avoid structural damage or injury to the building. On default of the Tenant in making such repairs or replacements, Landlord may, but shall not be required to, make such repairs and replacements for the Tenant's accounts. The expense of any repair and replacement made by Landlord for Tenant's account shall constitute and be collectible as "additional rent."

D. The Landlord shall not be required to furnish any services or facilities or to make any repair or alteration in or to the demises premises or adjoining areas, except as provided for in Paragraph 1B of this lease. The Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, improvement, replacement, maintenance and management of the demised premises and adjoining areas.

. . .

14. No Services. A. Tenant acknowledges that Landlord shall not be required to furnish any services, utilities or facilities to Tenant or to make any repairs or alterations in and to the demised premises, except as provided in Paragraph 1B of this lease. Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the demised premises . . . In the event Tenant fails to so maintain, repair, clean, etc. any of the foregoing, Landlord, at its option, may cause such maintenance, repair, cleaning, etc. to be performed at Tenant's cost and expense . . .

30. Inspection.

. . .

B. Tenant agrees to permit Landlord and the authorized representatives of Landlord to enter the demised premises upon reasonable notice . . . at all reasonable times during usual business hours for the purpose of making any repairs . . . [that] Tenant is required but has failed to perform, or that Landlord may deem reasonably necessary to prevent waster or deterioration in connection with the demised premises. . .

At his deposition, Scott Milchman, Eastern's President, states, *inter alia,* as follows:

Eastern owns the subject premises. The Institute for Community Living has been a tenant in the

premises since 1994. The last time he was on the premises was over ten years ago. At the time of the accident, Eastern did not have any employees onsite at the premises nor did it have any employees, officers or anyone else from Eastern go to the building on a daily, weekly, or monthly basis. He was the last person from Eastern to go to the premises. All check payments from the Institute for Community Living were made by mail. Prior to the accident date, he was not aware of any complaints with regard to a staircase that went from the first level of the building to the basement. He is not an affiliated owner, principal, officer or partner of the Institute for Community Living. He does not know any of the employees of the Institute for Community Living nor who managed the building on behalf of the Institute for Community Living.

In opposition to summary judgment, plaintiff refers to his deposition testimony, discussed *supra*, and the lease between Eastern and the Institute for Community Living.

* * * * * * * * *

It is well settled that absent evidence that an owner or possessor of a premises created a dangerous condition or that said owner had prior notice of a defective condition, actual or constructive, said owner cannot be held liable for an accident resulting from said dangerous condition. *See Acevedo v. York Intern. Corp.*, 31 A.D.3d 255, 818 N.Y.S.2d 83 (1st Dept. 2006); *Thomas v. Our Lady of Mercy Med. Ctr.*, 289 A.D.2d 37, 734 N.Y.S.2d 33 (1st Dept. 2001). Constructive notice will be imputed only if the defect is visible and apparent and has existed for a sufficient period of time to allow for discovery and correction. *See Gordon v. American Museum of Natural History,* 67 N.Y.2d 8356, 501 N.Y.S.2d 646 (1986). Further, a landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord 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 tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. *See Quing Sui Li v. 37-65 LLC,* 114 A.D.3d 538, 539; 981 N.Y.S.2d 14, 15 (1st Dept. 2014); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326; 642 N.Y.S.2d 897, 898 (1st Dept. 1996).

Here, it is undisputed that Eastern did not create or have actual notice of the alleged dangerous condition. Also, since the lease provided that the tenant take the property "as is" and that the tenant was required to make all repairs; Mulchin testified that he was unaware of any complaints regarding the staircase; plaintiff had worked at the property many times yet made no complaint regarding the condition of the staircase; and no one from Eastern had been to the property in years, there is no basis upon which to impose constructive notice on the part of Eastern. Also, while Eastern reserved the right to re-enter to inspect and make repairs at its option, there is no evidence that the alleged condition of the staircase constitutes a significant structural or design defect that is contrary to a specific statutory safety provision. While, in his affirmation, plaintiff's counsel alleges that "Defendant violated multiple New York Building Codes," no evidence was proffered to support this allegation, i.e., photos, expert opinion. Specifically, counsel alleges that issues of fact exist as to whether sections of the Building Code pertaining to uniformity in the size and shape of stair treads and risers and specified depth variation of steps were violated. However, no evidence was submitted as to the size, shape or depth variation of the subject steps. Without any evidentiary support, counsel's conclusory allegations are speculative and lack probative value. *Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980); *Rue v. Stokes,* 191 A.D.2d 245, 594 N.Y.S.2d 749 (1st Dept. 1993). Counsel also alleges that the fact that there was no handrail on the side of the steps "with the wall was certainly a violation of the code." Notably, plaintiff testified that he was pushed to the side of the staircase with the handrail but he was unable to grab the handrail because it happened so suddenly. As such, the lack of a handrail on the other side of the staircase had nothing to do with plaintiff's injuries.

Based on the foregoing, Eastern's motion for summary judgment, dismissing the complaint, is **granted,** and the complaint is hereby dismissed.

Dated: Bronx, New York
March 8, 2017

Hon. Julia I. Rodriguez, J.S.C.