Diaz v 142 Broadway Assoc. LLC.
2018 NY Slip Op 33111(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 158817/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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INDEX NO. 158817/2017

ELAINE DIAZ,

Plaintiff,

MOTION DATE December 6, 2018

- v -

MOTION SEQ. NO. 001

142 BROADWAY ASSOCIATES LLC., EMPANADAS MONUMENTAL 142, SDG MANAGEMENT CORP.

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 35

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants' 142 Broadway Associates LLC., and SDG Management Corp.'s motion for summary judgment, sequence no. 001, is granted.

In the complaint, plaintiff alleges that on October 13, 2016, she was struck by an entrance door on the back of her ankle and caused to sustain injuries, while at defendant, Monumental Gourmet, Inc.'s store, which store, Monumental occupied pursuant to a written lease agreement between Defendants 142 Broadway Associates, LLC and SDG Management Corp. and Defendant Monumental Gourmet. NYSCEF Doc. Nos. 1 and 21).

In support of its motion for summary judgment, defendants have submitted the affidavit of Noey Matos, employed by SDG since 2008 as a property manager for the building where plaintiff's accident occurred. (NYSCEF Doc. No. 22). 142 Broadway entered into a commercial lease agreement with Monumental Gourmet on November 1, 2014, for a term of ten years. It is uncontroverted that SDG was the property manager and 142 Broadway was and remains an

out-of-possession landlord relative to the lease. Pursuant to the lease, Monumental Gourmet was and remains at all relevant times herein solely responsible for maintenance and repairs of the interior space of the premises, as well as all fixtures, appurtenant sidewalks, and the entryway and door. (NYSCEF Doc. No. 21, ¶4, p. 1 of 6).

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: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (*Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141, 718 NYS2d 276 [2000], citing *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326, 642 NYS2d 897 [1996], lv denied 88 NY2d 814, 673 NE2d 1243, 651 NYS2d 16 [1996]; see *McDonald v Riverbay Corp.*, 308 AD2d 345, 764 NYS2d 185 [2003]; *Quinones v 27 Third City King Rest.*, 198 AD2d 23, 603 NYS2d 130 [1993]).

Here, the lease between the defendants 142 Broadway Associates LLC., and SDG Management Corp. and Monumental Gourmet imposes no obligation on the former to make repairs or maintain the demised premises. In the instant matter, the facts are undisputed that the property was conveyed by lease, which agreement obligated the tenant only to perform maintenance and repair to the subject door and entryway. Moreover, Monumental Gourmet inspected the premises before it took possession. Pursuant to the lease, it agreed to take the premises "as is" and in doing so, contractually confirmed that the property was in "good and satisfactory condition." Exhibit G (¶ 20, p. 3 of 6).

It is well settled that a party opposing a summary judgment motion must establish and lay bare its proof and present evidentiary facts sufficient to raise a genuine issue of triable fact.

Morgan v New York Telephone, 220 A.D. 2d 728 (2d Dep't. 1995); *Northside Savings Bank v Sokol,* 183 A.D. 2d 816 (2d Dep't. 1992); *Gus v Town of North Hampton*, 174 A.D. 2d 649 (2d Dep't. 1991); *Sikes v Catvron Companies*, 173 A.D. 2d 810 (2d Dep't 1991). The shadowy semblance of an issue is not enough to defeat a motion. *Schwartzman v Wertz*, 153 Misc. 2d 187, (N.Y. Sup. Ct. 1991), aff'd., 179 A.D. 2d 540 (1st Dep't. 1992). As moving defendants have met their burden of proof, and plaintiff has failed to present evidentiary facts to refute this proof, or identify any material issue of fact in that regard, the motion must be granted.

Moving defendants have established, through the affidavit of the property manager and the terms of the lease that they owed no duty to plaintiff. The record demonstrates that defendants never undertook to inspect, maintain or repair Monumental Gourmet's entryway. Additionally, moving defendants have established that they were never on notice of any alleged defect, which plaintiff claims caused her injury.[1]

In addition, plaintiff has failed to meet her burden of proof in raising a triable issue of fact as to whether the allegedly dangerous condition which she claimed caused her injuries, was a significant structural or design defect and statutory violation for which an out-of-possession landlord could be held liable (*Seney v Kee Assocs*., 15 AD3d 383, 384, 790 NYS2d 170 [2005]; see *Morrone v Chelnik Parking Corp*., 268 AD2d 268, 701 NYS2d 48 [2000]; *Kilimnik v Mirage Rest*., supra; cf. *Gantz v Kurz*, 203 AD2d 240, 610 NYS2d 279 [1994]).

Based on the record and the proof submitted, the court finds that the alleged defect was not structural and, therefore, not the responsibility of the moving defendants here. See, *Cucaj v Paramount Fee, L.P.,* 34 Misc. 3d 150[A], 2012 NY Slip Op 50245[U], *4 [App Term 2012]) (An improperly secured glass door, as alleged here, is not a significant structural

[1] Monumental Gourmet sued herein as Empanadas Monumental, LLC, has not appeared in this action and the record demonstrates that plaintiff has not moved for a default judgment against said defendant.

defect for which an out-of-possession landlord may be held liable) *Thomas v Fairfield Invs.*, 273 AD2d 118, 118 [1st Dep't 2000] (Generally, an out-of-possession landlord is not responsible for correcting defective conditions unless they are significant structural failures or specific statutory violations (*Quinones v 27 Third City King R*est., 198 AD2d 23).

According to the express language of the lease and contrary to plaintiff's unsupported and conclusory allegations, the moving defendants, transferred the duty to make non-structural repairs to the tenant, defendant Monumental Gourmet and further required the tenant to provide the owner with written notice if there was a need to make any structural repairs. (NYSCEF Doc. No. 21). As the court has found that the alleged defective condition is not structural in nature, the tenant was the only party obligated to inspect, maintain and repair it, as needed.

Moreover, the defect alleged in the instant matter, i.e., door with a jagged edge, has been held, as a matter of law, to be neither visible nor readily apparent, sufficient to establish constructive notice of such defect; as such, plaintiff's opposition fails to raise a triable issue of fact on this issue as well. *Samuels v Lee,* 2016 N.Y. Misc. LEXIS 20128; 2016 NY Slip Op 31023U (Sup. Ct. NY 2013). The specific defect alleged by plaintiff here, cannot impute constructive notice to moving defendants, as it was not visible or readily apparent. "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 N.Y.S.2d 573 (1st Dep't 2008).

Based on the lease provisions and well established precedent, moving defendants have demonstrated that they are entitled to summary judgment and the complaint is dismissed. Accordingly, it is hereby:

ORDERED that the motion for summary judgment, sequence no. 001, of defendants 142 Broadway Associates LLC., and SDG Management Corp.'s is granted and the complaint is dismissed against them; and it is further

ORDERED that the claims against defendant Empanadas Monumental, LLC are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants 142 Broadway Associates LLC., and SDG Management Corp.'s dismissing the complaint against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the Court.

12/6/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE