

Maldonado v Tip Top Mgt., Inc.

2013 NY Slip Op 32220(U)

September 18, 2013

Supreme Court, New York County

Docket Number: 106646/11

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8
INDEX NO. 106646/11
MOTION DATE _____
MOTION SEQ. NO. 002

Index Number : 106646/2011
MALDONADO, NANCY
vs.
TIP TOP MANAGEMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

The following papers, numbered 1 to 26, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1-13
Answering Affidavits — Exhibits Notice of cross + opp No(s) 14-19
Replying Affidavits opp to cross + Reply No(s) 20-25
Reply to cross **FILED** 26

Upon the foregoing papers, it is ordered that this motion is

SEP 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/18/13

[Signature], J.S.C.
JOAN M. KENNEY
~~J.S.C.~~

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X

Nancy Maldonado,

Plaintiff,

-against-

DECISION AND ORDER

Index Number: 106646/11

Motion Seq. No.: 002

Tip Top Management, Inc., and
Rey Food Corp. D/B/A Rey's
Deli Grocery,

Defendants.

-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

FILED

SEP 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

Numbered

1-13

14-19

20-25

26

Papers

Notice of Motion, Affirmation, and Exhibits

Notice of Cross-Motion, Affirmation/Opposition, Exhibits

Opposition to Cross/Reply Affirmation and Exhibits

Reply to Cross

In this personal injury action, defendant, Rey Food Corp. D/B/A Rey's Deli Grocery (Rey's), moves for an Order, pursuant to CPLR 3212, dismissing plaintiff's complaint. Plaintiff, Nancy Maldonado, moves for an Order, pursuant to CPLR 3212, granting summary judgment against Rey.

Factual Background

On or about March 8, 2011, plaintiff was exiting Rey's Deli Grocery, located at 740 10th Ave., New York, NY, when she was caused to trip and fall on the steps located on the outside of the store (the accident).

At her deposition, plaintiff claimed her fall was caused by a cracked and/or damaged step on the outside of Rey's. The owner of the property where Rey's was located is Tip Top

Management, Inc. (Tip Top). Both Rey's and plaintiff have received default judgments against Tip Top.

Rey's stated in their moving papers that there has not been a written lease between them and Tip Top since 2006, but that the exterior of the property was the responsibility of Tip Top to maintain.

Arguments

Defendant Rey's claims that they owed no duty of care with respect to the step where the accident happened, as that is the statutory responsibility of Tip Top.

Plaintiff maintains that Rey's did owe them a duty of care, and that Rey's had actual and constructive notice of the alleged defective/dangerous condition.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary

judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]).

New York City Administrative Code Article 301 § 28-301.1, which states, in pertinent part:

Owner's Responsibilities

All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition...The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

Tip Top is designated as the owner on the deed. (Moving papers, Ex. K). Without a lease specifying that Rey's is responsible for the maintenance of the egress, the Administrative Code is controlling and therefore Tip Top is responsible for maintaining the means of egress (ie. the alleged damaged steps). Moreover, the case law provided by plaintiff (*Howard v Alexandra Rest.*, 84 AD3d 498 [1st Dept. 2011]) is not applicable here because plaintiff cannot dispute that there was no lease between Rey's and the owner of the premises, Tip Top. Accordingly, it is hereby

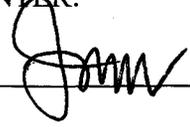
ORDERED, that defendant Rey Food Corp. D/B/A Rey's Deli Grocery's motion, is granted, in its entirety; and it is further

ORDERED, that plaintiff's cross-motion, is denied, as moot; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Rey Food Corp. D/B/A Rey's Deli Grocery and against plaintiff; and it is further

ORDERED, that plaintiff proceed with an assessment of damages hearing against Tip Top Management, Inc., in accordance with this Court's Order dated February 17, 2012.

Dated: 9/18/13

ENTER:


Joan M. Kenney, J.S.C.