Vargas v 1955 Central Ave. Realty Corp.
2014 NY Slip Op 32924(U)
April 7, 2014
Supreme Court, Westchester County
Docket Number: 59054/2011
Judge: James W. Hubert
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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

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WILFREDO VARGAS,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 59054/2011

1955 CENTRAL AVENUE REALTY CORP.,
TRIFONT REALTY,
TRIFONT HOLDING, LLC and
TRIFONT HOLDINGS, LLC,

Defendants.

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Hubert, A.J.S.C.

Before the Court is a Motion for Summary Judgment (with attorney affirmation/memorandum of law and annexed exhibits) filed on behalf of each of the above captioned four defendants (collectively, the defendants). The plaintiff has responded by Affirmation in Opposition (with memorandum of law and annexed exhibits). The defendants served a Reply Affirmation with an additional memorandum of law.

The complaint seeks damages for injuries allegedly sustained by the plaintiff Vargas on or about December 9, 2009, when in the course of performing certain duties for his employer, Frank Pepe's Pizza (the tenant), he slipped and fell on a wet surface located in the entrance to a walk in refrigerator. The refrigerator is alleged to have been defectively installed by the defendants in a manner that permits water to accumulate at its entrance when it rains, thereby creating a dangerous condition.

The motion by the defendants seeks dismissal of the complaint on the theory that the

defendants are, individually and collectively, out of possession landlords. As such, they may not be held liable for a condition in the leased premises that allegedly caused plaintiff's injury but which is under the exclusive possession and control of the plaintiff's employer (the tenant), and for which the defendants are not actually, constructively, or contractually responsible.

The Court has reviewed the submissions of the parties, including the purported lease, the deposition testimony of the plaintiff, the deposition testimony of Mark Fonte, President of defendant Trifont Realty, and the affidavit of Anthony Mellusi, plaintiff's consulting engineer. Upon review of the submissions of the parties, the motion of the defendants is granted and the complaint is dismissed.

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" on which the party rests his or her claim, or must demonstrate an "acceptable excuse" for failing to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981). See, also, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324 (citations omitted).

Generally, an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair (*Manning v. New York Tel. Co.*, 157 A.D.2d 264, 266-269 [citations omitted]; see also, *Worth Distribs. v. Latham*, 59 NY2d 231, 238 [citations omitted]). However,

constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection, maintenance or repair, and where a specific statutory violation exists (*Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559 [citations omitted], 566; *Worth Distribs. v. Latham, supra*; see also, *Santiago v. Port Auth.*, 203 A.D.2d 217 [citations omitted], *lv denied* 84 N.Y.2d 807; *Levy v. Daitz*, 196 A.D.2d 454 [citations omitted]). In such case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord (*Quinones v 27 Third City King Rest.*, 198 A.D.2d 23, 24 [citations omitted]; *Levy v Daitz, supra*).

Here, the defendants have made a prima facie showing that they are out of possession landlords. The leased space contains a restaurant operated by the tenant. The defendants occupy no portion of the leased premises. Article six of the lease places all responsibility for repairs and maintenance of the leased premises on the tenant restaurant, including correction of building code violations that come into existence after the tenant takes occupancy and/or were caused by the tenant (exhibit E annexed to the motion). The defendants' rights to enter are very limited. The defendants rights of entry extend only to emergencies, and inspection "at reasonable times with prior notice . . . to examine the premises."

The plaintiff contests this conclusion, but avers no evidentiary proof in admissible form which would raise material issues of fact on this question (which is plaintiff's burden). Instead, the plaintiff pleads that the defendants, in the course of constructing and installing the walk in refrigerator, affirmatively created a defective condition, which in turn caused injury to the plaintiff.

The restaurant space was built out to the specifications provided by the tenant restaurant lessee using contractors hired and paid by the defendants. As part of the build out, the walk-in refrigerator in question was installed by the defendants at the rear of the structure. The refrigerator box itself, basically a large metal cube, was physically situated outside of the walls of the restaurant structure.[1] However, it was attached, or affixed, to a rear wall of the restaurant so that it could be entered from inside the restaurant structure through the refrigerator's door (as one might enter a walk-in closet). From the inside of the restaurant structure, the refrigerator door appears nearly flush to the rear wall.[2] One accesses the inside of the refrigerator by opening its door and stepping inside the refrigerator box which, as previously stated, was wholly outside of the restaurant, although partially enclosed, above and to the left and right. The door of the refrigerator box was the only way in or out of the refrigerator.

Upon a close reading of the submitted proofs, it is not the design of the refrigerator that is alleged to be defective. The defect alleged by the plaintiff refers to the manner in which the refrigerator was affixed to the abutting wall of the restaurant, i.e. its installation. According to the deposition testimony of the plaintiff, and the affidavit of the consulting engineer hired by the plaintiff:

> The installers failed to properly seal the joint between the face of the perimeter of the refrigerator box where it come into contact with the rear wall of the restaurant. In failing to do so, water would enter directly into the refrigerator in the vicinity of the entry way door.

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[1] On the exterior, the refrigerator was enclosed on three sides. A walkway structure ostensibly protected the top of the refrigerator from rain and snow, and brick walls protected the sides. The back was open. See Exhibit H photographs annexed to Affirm. in Opp.

[2] The entry door was recessed into a small alcove. See Exhibit H photographs annexed to Affirm. in Opp.

> Water ponding on the floor created a chronic, slippery and dangerous condition for employees of the restaurant who would enter the refrigerator . . . (Exhibit H annexed to Affirm. in Opp.).

In other words, a "tiny gap" existed between a portion of the refrigerator and the wall. This allegedly would allow rainwater to seep into the floor area in front of the refrigerator and, apparently, inside the refrigerator itself. Exhibit E, p. 21, annexed to Affirm. in Opp. The plaintiff's engineer, who inspected the area at issue in 2013, does not state whether the gap existed at the time of the refrigerator's installation in 2009 or developed later, over time, after transfer of possession. There is no evidence in the record (in admissible form) that the condition was ever reported to the defendants, although the plaintiff stated, in hearsay, that he believed a manager (LaDolce) made a "formal" complaint to Mr. Fonte. Exhibit E, p. 27, annexed to Affirm. in Opp. No admissible proof of this alleged complaint appears in the record

As previously stated, an out-of-possession landlord is not liable for injuries that occur on the premises after the transfer of possession and control to a tenant unless the landlord (1) is contractually obligated to repair the premises or (2) has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision (see *Sangiorgio v. Ace Towing & Recovery*, 13 A.D.3d 433, 433-434 [2004][citations omitted]; *Richardson v. Yasuda Bank & Trust Co. (USA)*, 5 A.D.3d 458, 459 [2004 [citations omitted]]; *Nunez v Alfred Bleyer & Co.*, 304 A.D.2d 734 [2003][citations omitted]). In the context of the instant case, it is also well established that the claims of an expert do not create an issue of fact where the expert fails to indicate what engineering protocols and methods were used to arrive at his conclusion. Failure to cite to a building code violation, and relying purely on the experts opinion is insufficient to raise material

questions of fact as to negligent design or construction. *See, Torres v. West St. Realty Co.*, 21 A.D.3d 718, 721, 800 N.Y.S.2d 683, (1st Dep't 2005) citing *Bullock v. Anthony Equities, Ltd.*, 12 A.D.3d 326 (2004). The expert avers, generally, that the "defects violated generally accepted customs and practices, safety standards, customary practice and usage, and good engineering practice" (Exhibit H annexed to Affirm. in Opp.). As set forth, these are conclusory averments which do not meet the standard of "a significant structural or design defect that violates a specific statutory safety provision." *Sangiorgio v. Ace Towing & Recovery, supra.*

Thus, it is the conclusion of the Court that the defendants have raised prima facie evidence of entitlement to judgment as a matter of law. The plaintiff has failed to meet his burden of presenting sufficient proof in admissible form sufficient to require a trial of material questions of fact. Accordingly, the motion of the defendants for summary judgment is granted. The complaint is dismissed. The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 7, 2014

James W. Hubert
Acting Supreme Court Justice

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