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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 113022/2011
FAYE, IBNOU
vs.
YSIDRO DELI & GROCERY, INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits memo No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3, 4

Replying Affidavits _____ No(s). ~~5~~

Upon the foregoing papers, it is ordered that this motion is summary judgment is decided in accordance with the attached memorandum decision

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

FILED

JAN 07 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/6/14

DORIS LING-COHAN, 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 36

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IBNOU FAYE,

Plaintiff,

- against -

YSIDRO RODRIGUEZ, individually and d/b/a YSIDRO DELI & GROCERY, INC., YSIDRO DELI AND GROCERY, INC. and ROYAL MANAGEMENT, LLC,

Defendants.

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Index No. 113022/11

Motion Seq. No.: 003



LING-COHAN, J.:

Defendant Royal Management, LLC (Royal), the owner of the premises where plaintiff fell, moves for summary judgment dismissing the complaint and cross claims, and for contractual indemnification against defendants Ysidro Rodriguez (Rodriguez), individually and d/b/a Ysidro Deli & Grocery, Inc. (the Deli).

On July 21, 2011, around 7 o'clock in the evening, plaintiff Ibnou Faye was in the Deli to buy sugar. Allegedly, while walking in an aisle with his eyes on the shelves looking for the sugar, plaintiff fell into an open door in the floor. The door in the floor or the trap door leads to the basement and cellar utilized by the Deli. The parties were deposed. Rodriguez, the Deli proprietor, testified that the landlord has never made any repairs to the Deli's interior and that the cellar door has never needed repairs. He stated that the cellar door is kept closed, except when items are being brought up from or taken down to the cellar. Rodriguez stated that the landlord comes sometimes to say hello and ask how everything is going. Rodriguez's brother, nonparty

Vincente Minier, works at the Deli. Minier testified that he was working alone at the store when plaintiff came in. Minier testified that he sees the landlord less than every three months and that he never complained to the landlord about the cellar doors. Sion Sohayegh, Royal's owner, testified that he drops by the store occasionally to say hello and have a cup of coffee. Once or twice, he walked into the interior of the Deli. He did not notice the cellar door, Royal did not install it, and no one ever complained about it. Since buying the property 10 years ago, Royal has not performed any construction or repairs within the store. Sohayegh further stated that Royal has never been issued violations about the cellar door and that he never heard of any dangerous condition regarding it.

Section 4 of the lease between Royal and Rodriguez provides that the tenant shall take good care of the demised premises and the fixtures and appurtenances therein, make all non-structural repairs to those items, and keep them in good condition. Section 13 provides that Royal "shall have the right," but not the obligation, to enter the demised premises at reasonable times to examine and to make such repairs as Royal deems necessary or which it may elect to perform following the tenant's failure to repair.

Royal argues that, as an out-of-possession owner, it had no duty to keep the premises safe for third parties, such as plaintiff. Generally, when a landlord transfers possession and control to a tenant, the landlord is not liable for negligence on the demised premises (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996]). In order for the landlord to be liable, it must have contractually promised to maintain and repair the property, or it must have a contractual right to reenter, inspect, and repair the premises and the accident must have been caused by a "significant structural or design defect that is contrary to a specific statutory safety provision"

(*id.*; *see McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept 2003]).

On a motion for summary judgment, Royal, as the property owner, must show that it did not create the defective condition or have actual or constructive notice of it (*see Garcia v City of New York*, 99 AD3d 491, 492 [1st Dept 2012]). Royal shows that control and possession of the premises were transferred to its codefendants and that Royal did not create the condition or have actual notice of it. Constructive notice exists "where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Espinal v New York City Hous. Auth.*, 215 AD2d 281, 281 [1st Dept 1995]). An out-of-possession landlord who reserves a right of entry in the lease in order to inspect the premises and make necessary repairs is deemed to have constructive notice of any existing statutory violations (*Velazquez v Tyler Graphics,* 214 AD2d 489, 489 [1st Dept 1995]).

Under the lease, Royal assumed no duty to repair. Full responsibility for maintenance and repair of the leased premises was placed upon the Deli. While Royal did assume the right to reenter and repair, there is no indication that the trap door was defective and that the defect involved a structural or design defect, contrary to a specific statutory safety provision. The complaint and the bill of particulars do not cite any statutes. Thus, Royal has shown entitlement to summary judgment dismissing the claims against it.

In opposition, plaintiff cites to the Administrative Code of the City of New York (Administrative Code) § 27-128 and § 507.1. Plaintiff did not give prior notice that it planned to use these statutes as predicates for liability against Royal; nor does plaintiff seek leave to amend the pleadings to include them. Such omissions are enough for the court to decline to consider the statutes (*see Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]; *Miki v 335*

*Madison Ave., LLC*, 93 AD3d 407, 408 [1st Dept 2012]).

In any case, the statutes are not applicable. As section 27-128 was repealed effective July 1, 2008, it does not apply to plaintiff's accident. Moreover, it is a general, rather than a specific safety provision, which requires owners to maintain their premises, and it does not implicate specific defects (*Miki,* 93 AD3d at 408; *Ram v 64th St.–Third Ave. Assoc., LLC*, 61 AD3d 596, 597 [1st Dept 2009]; *Boateng v Four Plus Corp.,* 22 AD3d 323, 324 [1st Dept 2005]). Section 27-128 was re-codified at Administrative Code § 28-301.1, which has also been deemed to address the owner's general responsibility and not specific defects (*Miki,* 93 AD3d at 408).

The second statute raised by plaintiff is in the New York City Fire Code (Administrative Code Title 29), and provides the following:

> "Chapter 2, New York City Fire Code
> Chapter 5, Fire Operations Features
> Section FC 507 Hazards to Emergency Responders
> 507.1 Hoistway and shaftway protection.
> The doors and/or gates to hoistways, freight elevator shafts, trap doors and other means used to provide access to vertical openings, shall be kept closed and secured, or otherwise protected, except when being used to provide access, and shall be closed, secured or protected, as applicable, at the end of each work day"

(Administrative Code § 507.1).

Section 507.1 does not involve a structural defect. However, assuming that an owner could be found liable towards a person in plaintiff's situation under this section, it does not apply to Royal, which has shown that it had no notice of the trap door being left open. Royal's motion dismissing the complaint and the cross claims is therefore granted.

Turning to Royal's motion for contractual indemnification, section 8 of the lease provides that the tenant agrees to procure insurance in favor of both owner and tenant, and will pay for any

claims, incurred as result of the tenant's conduct, for which the owner shall not be reimbursed by insurance. This provision, which is enforceable, means that the tenant must "reimburse the owner only for damages not covered by any insurance policy, including insurance obtained by the owner" (*Collado v Cruz,* 81 AD3d 542, 542 [1st Dept 2011], citing *Diaz v Lexington Exclusive Corp.*, 59 AD3d 341, 342-343 [1st Dept 2009]). Section 41 (a) of the rider to the lease provides that the tenant shall indemnify the owner against all claims against the owner as a result of the tenant's negligence or use of the premises. This part does not limit the owner's reimbursement to damages not covered by insurance.

It is a fundamental principle of contract interpretation that when a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former takes precedence, "as it is presumed to express the latest intention of the parties" (*Dazzo v Kilcullen,* 56 AD3d 415, 416 [2d Dept 2008]; *Ruiz v Chwatt Assoc.,* 247 AD2d 308, 308 [1st Dept 1998]). Along the same principle, where two documents contradict each other, and one is specifically prepared for the transaction at issue and the other is a general form, the former controls (*Trade Bank & Trust Co. v Goldberg,* 38 AD2d 405, 406-407 [1st Dept 1972]).

In this instance, the lease is a preprinted form and the rider was added to the lease by the parties. The presence of the rider is presumed to reflect that the original lease did not express all of the parties' intentions and that they, thus, added the rider to include particular provisions and realize and complete their agreement. The rider controls, which means that the tenant's duty to indemnify the owner is not limited to liability that is not covered by insurance. Thus, Royal is entitled to a conditional order of indemnification.

In conclusion, it is

ORDERED that the motion by defendant Royal Management, Inc. for summary judgment is granted as follows:

1. The part of the motion to dismiss the complaint and cross claims as against it is granted, and the complaint and cross claims are hereby dismissed as against said defendant;

2. The part of the motion which seeks contractual indemnification is granted conditionally to the extent that defendant is entitled to indemnification in the event that defendants Ysidro Rodriguez d/b/a Ysidro Deli and Grocery, Inc. are found negligent; and it is further

ORDERED that Royal Management, Inc. is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment of dismissal as to defendant Royal Management, Inc., in accordance with this decision, with costs and disbursements.

Dated: 1/6/14

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Faye.suzanne haile.wpd