SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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VENISHA GARDNER,

Plaintiff,

Index No. 153937/12

-against-

DECISION/ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LLOYD GOLDMAN, DORIAN GOLDMAN, KATJA GOLDMAN, Individually and as Executors of the Estate of IRVING GOLDMAN, Deceased, IG SECOND GENERATION PARTNERS LP, I BLDG CO., INC., LOVE 466 AVENUE OF THE AMERICAS, INC. d/b/a RICKY'S HALLOWEEN and "JOHN DOE" and "DOE, INC.," names fictitious, Intended being that of electrician and/or electrical contractors,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Affirmation in Opposition	3,4
Replying Affidavits.....	5
Exhibits.....	6

Plaintiff Venisha Gardner commenced the instant action against defendants seeking to recover for injuries she allegedly sustained while in the course of her employment. Defendants Lloyd Goldman, Dorian Goldman, Katja Goldman, Individually and as Executors of the Estate of Irving Goldman, Deceased (the "Estate") (hereinafter referred to as the "Goldman Defendants"), IG Second Generation Partners, LP ("IG Second") and I Bldg Co., Inc. ("Bldg.") (hereinafter collectively referred to as the "Owner Defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint and on their cross-claim for

common law indemnification asserted against defendant Consolidated Edison Company of New York, Inc. ("Con Ed"). Defendant Con Ed separately moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and any and all cross-claims asserted against it. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. Plaintiff was employed as a sales associate by former defendant Love 466 Avenue of the Americas, Inc. d/b/a Ricky's Halloween ("Ricky's") at the Ricky's store located at 208-210 West 125th Street, New York, New York (the "subject premises"). Plaintiff alleges that on or about September 22, 2010, while she was performing her duties at the subject premises, she suffered injuries to her right leg when it came in contact with a jagged broken fluorescent light bulb that was protruding from a white plastic trash bag (the "accident"). At her deposition, plaintiff testified that she witnessed an employee of Con Ed removing light bulbs from the ceiling of the subject premises a few hours prior to the accident and testified that the Con Ed employee told her he was replacing the light bulbs and fixing wires. Plaintiff further testified that the Con Ed employee placed the light bulbs in the trash bag and placed the trash bag in the location it was in when her accident occurred.

On the date of the accident, the subject premises was owned by defendant IG Second and non-party Theresa Annex LLC ("Theresa"). In or around July 1985, non-party David Goldman and Irving Goldman purchased the subject premises in their individual capacities. The subject premises was then leased to Woolworth and thereafter, in 1999, the Woolworth leasehold was purchased by Theresa. In 1999 and again in 2001, the subject premises was sub-leased by Theresa to 208 West 125th Street Associates LLC ("208"). Thereafter, pursuant to a lease dated December 31, 2001 (the "Lease"), 208 became the direct lessee of the subject premises, which

was then owned by the Goldman Defendants. In or around October 2002, the Goldman Defendants conveyed their interest in the subject premises to Bldg and IG Second. Ricky's occupied the subject premises pursuant to a license agreement with 208, which gave Ricky's a license to occupy the subject premises from August 17, 2010 until November 5, 2010 as a Halloween-related merchandise store.

The court first turns to the motion brought by the Owner Defendants. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, 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 he rests his claim." *Id.*

As an initial matter, that portion of the Owner Defendants' motion for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint is granted. It is well settled that "[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." *Vasquez v. The Rector*, 40 A.D.3d 265, 266 (1st Dept 2007); *see also Reyes v. Morton Williams Associated Supermarkets, Inc.*, 50 A.D.3d 496 (1st Dept 2008).

In the instant action, the Owner Defendants have established their *prima facie* right to

summary judgment dismissing the complaint as they have established that they were out of possession landlords who were not contractually obligated to maintain the condition of the subject premises, that they did not perform any such maintenance and that they did not violate any relevant statute or regulation. Indeed, the Lease between the Owner Defendants and 208 clearly establishes that 208 took control of the subject premises prior to plaintiff's accident and that 208, not the Owner Defendants, was obligated to repair and maintain the condition of the subject premises. Further, liability in this action is based on a broken light bulb which was left in a plastic trash bag, a condition which is neither a structural nor design defect contrary to a specific statutory safety provision. Moreover, Alan Starkman, the Owner Defendants' Vice President of Commercial Real Estate, has affirmed that the Owner Defendants did not create the condition nor did they have notice of the condition, which, according to plaintiff's testimony, was present for approximately three hours prior to the accident and that they did not perform any maintenance work at the subject premises or supervise or control any contractors who may have been performing maintenance work at the subject premises.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat the Owner Defendants' motion. As an initial matter, plaintiff's assertion that the motion should be denied on the ground that discovery is outstanding as the depositions of the Owner Defendants have not been conducted and/or that the Owner Defendants have failed to attach said deposition transcripts to their motion is without merit. Plaintiff is correct that the only depositions that were conducted in this action were that of plaintiff and defendant Con Ed. However, plaintiff never sought the depositions of the Owner Defendants and instead, filed the Note of Issue on June 18, 2015 certifying that all discovery was complete and "[t]hat depositions of all parties have been conducted/waived." Thus, plaintiff cannot now attempt to raise an issue of fact as to

the speculative testimony of the Owner Defendants when plaintiff never sought the testimony of the Owner Defendants in the first place.

Additionally, plaintiff's assertion that the motion should be denied on the ground that the affidavit of Mr. Starkman submitted in support of the Owner Defendants' motion, in which Mr. Starkman discusses the terms of the Lease and affirms that the Owner Defendants did not create or have notice of the dangerous condition, should be rejected because it is not in admissible form is without merit. Specifically, plaintiff asserts that Mr. Starkman's affidavit is not in admissible form because it is not properly sworn to "under the penalties of perjury." However, contrary to plaintiff's assertion, Mr. Starkman's affidavit is properly sworn to as it explicitly states: "I make this Affidavit under the penalties of perjury" and it is signed by Mr. Starkman and notarized.

Plaintiff's assertion that the motion should be denied on the ground that certain provisions in the Lease raise an issue of fact as to whether the Owner Defendants are actually out of possession landlords is also without merit. Specifically, plaintiff points to Paragraph 5(3) of the Lease, which states, in part, that the Tenant may make alterations to the subject premises but that the Landlord must approve any such plans and Paragraph 15 of the Lease, which states, in part, that "Tenant shall permit Landlord or its agents to enter the demised premises at all reasonable hours upon notice for the purpose of inspection, or of making repairs." However, neither Lease provision raises an issue of fact as to whether the Owner Defendants are actually out of possession landlords. Initially, it is well-settled that a landlord will generally not be held liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless said landlord "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." *Vasquez*, 40 A.D.3d at 266 (emphasis added). Thus, the

mere fact that the Owner Defendants had a contractual right to reenter the subject premises to inspect or make repairs is irrelevant as liability in this case is not based on a significant structural or design defect that is contrary to a specific statutory safety provision. Additionally, the fact that the Owner Defendants had to approve any of 208's plans to make alterations to the subject premises is not evidence that the Owner Defendants were not out of possession landlords.

Finally, to the extent plaintiff asserts that the motion should be denied on the ground that the Owner Defendants failed to produce a written log detailing their activities and any inspections of the subject premises and that thus, there exists an issue of fact as to whether they had notice of the dangerous condition, such assertion is without merit. The Owner Defendants have established that they are out of possession landlords pursuant to the Lease and thus, they had no responsibility to inspect the premises or create a log detailing said inspections. Thus, as the Owner Defendants have established that they are not liable for the condition which caused plaintiff's injuries and plaintiff has failed to raise an issue of fact, that portion of the Owner Defendants' motion for summary judgment dismissing the complaint is granted.

However, as this court has granted the Owner Defendants' motion for summary judgment dismissing the complaint, that portion of the Owner Defendants' motion for an Order pursuant to CPLR § 3212 granting them summary judgment on their cross-claim for common law indemnification against Con Ed is denied as moot.

The court next turns to Con Ed's motion for summary judgment dismissing the complaint and any and all cross-claims asserted against it. As an initial matter, this court finds that Con Ed has established its *prima facie* right to summary judgment dismissing the complaint and any and all cross-claims asserted against it on the ground that it was not the party responsible for creating the condition which caused plaintiff's injuries. Luke Monaghan, a project specialist in Con Ed's

Energy Services Department, affirms that Con Ed does not work on any customer equipment, including wiring or lighting fixtures, beyond the point of the electric meter. Indeed, Mr. Monaghan affirms that lighting and wiring is considered customer equipment which is repaired, replaced and maintained by the customer or by electricians or other contractors retained by the customer and not by Con Ed. Further, Meera Tandon, a Manager in Con Ed's Energy Efficiency Department of Electric Operations, affirms that she manages a program pursuant to which Con Ed pays incentives to small business owners who install various energy efficient measures such as energy efficient lighting fixtures. However, Ms. Tandon affirms that even under that program, no Con Ed employee would enter the customer's premises but that rather the work would be performed by electrical contractors. Further, Ms. Tandon affirms that she checked the program's records for the 2010 calendar year and did not find any customers located at 208, 210 or 208-210 West 125th Street, New York, NY that were participants in the program.

Plaintiff's assertion that the motion should be denied on the ground that the court should not consider the affidavits of Mr. Monaghan and Ms. Tandon because they are not in admissible form is without merit. Specifically, plaintiff asserts that the affidavits are not proper because the affiants did not swear to their contents "under the penalties of perjury." However, plaintiff has failed to put forth any evidence that such statement is required. Further, pursuant to CPLR § 2106, only a statement by an attorney, physician, osteopath or dentist, which is served in an action is required to be "affirmed...to be true under the penalties of perjury" in order to have "the same force and effect as an affidavit." However, neither Mr. Monaghan nor Ms. Tandon is an attorney or a doctor. Moreover, their submissions are not "statements" attempting to have the same force and effect as affidavits but are rather actual affidavits, the contents of which are sworn to, signed and notarized.

However, plaintiff has raised an issue of fact sufficient to defeat Con Ed's motion for summary judgment dismissing the complaint based on her testimony that it was a Con Ed employee who removed the light bulb at issue and placed it in the trash bag. Indeed, when asked at her deposition to describe the person she saw remove the light bulb, she responded that it was a man in uniform with "a white shirt on with a Con Edison tag." Based on this testimony, the court finds that it is for the trier of fact to determine whether the light bulb at issue was removed by a Con Ed employee. Thus, Con Ed's motion for summary judgment dismissing the complaint is denied.

However, as this court has determined that the Owner Defendants' cross-claim against Con Ed for common law indemnification is moot, Con Ed's motion for summary judgment dismissing the cross-claims asserted against it is granted.

Accordingly, the Owner Defendants' motion is granted only to the extent that the complaint is dismissed as against the Owner Defendants and Con Ed's motion is granted only to the extent that the cross-claims asserted against Con Ed are dismissed. This constitutes the decision and order of the court.

Dated: 11/23/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.