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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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PETER KUNZ,

Plaintiff,

- against -

50 EAST 96TH STREET, LLC, SAL'S PIZZA, individually and doing business as TOMMY'S PIZZA, SALS PITZZA, individually and doing business as SAL'S PIZZA, SALS PITZZA, individually and doing business as TOMMY'S PIZZA and TOMMY'S PIZZA,

Defendants.

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DECISION AND ORDER

Index No. 155192/2012

Mot. Seq. 003

KELLY O'NEILL LEVY, J.:

Defendant 60 East 96th Street, LLC moves pursuant to CPLR 3212 for summary judgment in this premises liability personal injury matter seeking dismissal of all claims and cross-claims against it. The motion is granted for the reasons set forth below.

Facts

The following facts are undisputed. On March 30, 2010, plaintiff Peter Kunz walked into Tommy's Pizza, a restaurant located at 1375 Madison Avenue in a retail space of a building owned by 50th East 96th St LLC ("50 East 96th"). Tommy's Pizza was formerly known as Sal's Pizza, and underwent an extensive renovation when it changed owners.

Kunz testified at his examination before trial that he had been a regular customer prior to the renovation, and March 30, 2010 was his first time visiting since the construction. After he entered the restaurant, he briefly spoke with the new owner to compliment him on the changes before ordering a slice of pizza. After making his purchase, Kunz walked a few steps to the left of the counter and fell through a trap door that had been opened by a restaurant employee at some point after Kunz first entered the pizzeria. Kunz had never seen the trap door before as prior to the renovation as it was hidden from view by a counter. He

also did not see the employee who opened the trap door because the employee was standing on the stairs leading to the basement under the trap door, below his eye level.

Under the terms of the March 21, 2005 lease agreement between 50 East 96th and the tenant restaurant, the tenant had the duty to install and maintain fixtures in the retail space. The landlord knew of the trap door but did not install or alter it or any other structure inside the restaurant. Phillip F. Ruth, the managing member of 50th East 96th, visited the restaurant every few months but did not inspect it. After the accident, Kunz visited the restaurant one more time before it went out of business. Kunz filed a claim against 50 East 96th, arguing that as the landlord of the building, it breached its duty to Kunz to keep and maintain the premises in a reasonably safe manner.

Discussion

"[T]he '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.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

It is well settled that out-of-possession landlords, such as the one here, can typically only be held liable for a third-party accident on their premises if the accident is caused by a condition that is both a structural defect and a statutory violation. *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326 (1st Dep't 1996); *Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d

489, 489 (1st Dep't 1995). To establish a landlord's liability for an accident resulting from a condition that is not a structural defect and statutory violation, plaintiff must show that the landlord either created the condition or had actual or constructive prior notice of the condition and agreed to be held responsible for maintenance and repairs. *Acevedo v. York Intl. Corp.*, 31 A.D.3d 255, 256 (1st Dep't 2006); *Thomas v. Our Lady of Mercy Med Ctr.*, 289 A.D.2d 37, 38 (1st Dep't 2001). Constructive notice is generally only imputed when the defective condition is obvious and has existed for an amount of time sufficient to allow for discovery and correction. *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837 (1986). Additionally, landlords are typically not liable for negligence after the transfer of possession and control of the premises to a tenant, unless the landlord is contractually required to maintain the premises or has a contractual right to inspect and make necessary repairs. *Johnson*, 227 A.D.2d at 326. Constructive notice can therefore only be inferred when a landlord reserves the contractual right to inspect and make repairs, and a structural defect that is also a statutory violation exists. *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 566 (1987).

When a defendant landlord moves for summary judgment on the issue of liability meets its prima facie burden, the plaintiff must then raise a triable issue of fact regarding the existence of a dangerous structural defect that is a statutory violation. *See* Johnson, 227 A.D.2d at 326, *Mazurek v. Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). An exception to this general rule exists where landlords have notice of a design or configuration defect that has created a dangerous condition. *Koullias v. Farm*, 798 N.Y.S.2d 877, 878 (Sup. Ct. Kings County 2005). In *Koullias,* the landlord approved a design change to a store's cellar trap door that resulted in a curtain being placed over the door, concealing it from view. *Id.* at 879. The court held that a design configuration there was the equivalent of a structural defect in that it created a hazardous condition for which the landlord had

constructive notice. *Id.* The court denied summary judgment for the defendant, holding that whether the defendant was negligent in not foreseeing danger was a question for a jury. *Id.* *Koullias* represents an exception in that the design defect directly approved by the landlord rose to the level of a structural defect. *Id.* In the majority of cases, landlords are not held liable for the negligent use of a trap door as long as said door is not structurally defective. *Brown v. Weinreb,* 183 A.D.2d 562, 563 (1st Dep't 1992). Courts have held that landlords are not liable for trap doors that are structurally sound and only rendered dangerous through negligent or improper use. *Id.* Since a properly functioning trap door is not a structural defect in and of itself, landlords are typically not liable for accidents arising out of trap doors that are negligently controlled by tenants. *Yuying Qiu v J&J Grocery & Deli Corp.*, 115 A.D.3d 627, 627 (1st Dep't 2014).

Case law overwhelmingly supports 50 East 96th's motion for summary judgment, as courts have repeatedly held that a properly-functioning open trap door is not a structural defect. In *Baez v Barnard Coll.*, the First Department set aside a jury verdict that found an out-of-possession landlord negligent for permitting a trap door to be located behind a service counter. 71 A.D.3d 585 (1st Dep't 2010). The court held that even if the landlord knew of the location of the trap door, the door was considered neither structurally defective nor a statutory building code violation. *Id.* Since landlord exercised no control over creating the dangerous condition by leaving the trap door open, the landlord cannot be held liable. *Qiu,* 115 A.D.3d at 627-28. The duty was legally transferred by the lease agreement, which explicitly stated that the tenant would maintain the conditions of the premises.

Kunz argues that the open trap door constituted a statutory violation as it does not comport with the NYC Building Code guidelines for stairs and handrails. The stairs under the trap door were not equipped with handrails, and Kunz argues that handrails are required by the code and the lack thereof contributed to his injuries. However, as 50 East 96th points

out, the guidelines are for interior stairs specifically, which are defined as ones within a building that serve as a required exit or entrance. New York City Building Code Section 27-232. The stairs under the trap door here do not fall into that category. Additionally, "non-specific safety provisions" such as the NYC Administrative Code are not "statutes" for the purposes of out-of-possession landlord liability. *Yuying Qiu v. J & J Grocery & Deli Corp.*, 115 A.D.3d 627, 627-28 (1st Dep't 2014). The placement of the trap door can also not be deemed a design defect that rises to the level of a statutory defect, as with the curtain over the trap door in *Koullias*, because there "a trap for the unwary [was created] each and every time there was a delivery through the cellar door." *Koullias*, 798 N.Y.S.2d at 879. Furthermore, in that case the landlord directly approved of the design, while here 50 East 96th had no involvement or constructive notice.

Accordingly, it is hereby ORDERED that the motion of 50 East 96th Street, LLC for summary judgment dismissing the claims and cross-claims against it is granted and the complaint is dismissed as to 50 East 96th Street, LLC only, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued as against the remaining parties.

As the note of issue has been filed and the deadline by which to file summary judgment motions has passed, there shall be no further conference dates scheduled in Part 19 at this time.

This constitutes the decision and order of the court.

Date: August 23, 2016

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY