Salhi v 190 Mgt. LLC
2016 NY Slip Op 32467(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 159774/13
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 42

SAMI SALHI,

Plaintiff,

- against -

190 MANAGEMENT LLC,

Defendant.

Index No.: 159774/13

DECISION & ORDER

190 MANAGEMENT LLC,

Third-Party Plaintiff,

- against -

122 FIRST PIZZA, INC., d/b/a
SOUTH BROOKLYN PIZZA and d/b/a
PERCY'S PIZZA,

Third-Party Defendant.

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff in this action, Sami Salhi, seeks to recover damages for personal injuries he allegedly sustained at premises owned by defendant 190 Management, LLC, in Greenwich Village, on July 10, 2013. The defendant property owner moves for summary judgment dismissing the complaint and on its third-party cause of action for indemnification against the tenant of the premises, 122 First Pizza Inc., doing business as South Brooklyn Pizza and Percy's Pizza.

II. BACKGROUND

The subject property, located at 190 Bleecker Street in Manhattan, consists of a seven-story, mixed-use building with two ground floor commercial spaces. Adam Nagin manages the subject property on behalf of Superior Management, Incorporated (Superior), the owner's managing agent. Pursuant to a lease dated January 20, 2011, the owner leased the tenant a portion of the ground floor commercial space, along with the basement area below it, to operate a pizzeria. The portion of the basement leased by the tenant was used for food storage and preparation, and was separated from the remainder of the basement by a wall or door. The plaintiff was employed by the tenant as a counterman and sometime pizza maker for approximately 16 months, beginning in early 2012 and continuing until July 10, 2013, the date of his accident. The plaintiff's duties included going to the basement to prepare, retrieve, and deliver food to the pizzeria.

The basement of the subject property is accessible through metal doors installed in the sidewalk outside of and immediately adjacent to the restaurant, which open onto a staircase installed under the doors. There is another entrance to the basement through a door located inside the building near what has been designated as the trash area. Although Nagin testified at his deposition that the tenant was entitled to use both entrances, the tenant apparently had walled off its area of the basement,

and thus could not gain access thereto from the interior door. Plaintiff testified at his deposition that the interior door leading to the basement was locked in any event, and that the tenant did not have a key to it, so that the sidewalk cellar doors provided the tenant's only access to the basement. The sidewalk cellar doors were also equipped with a lock, to which the tenant had keys.

Shortly after the tenant leased the pizzeria from the owner in July 2011, the owner replaced the existing sidewalk cellar doors at its own expense. The two replacement sidewalk cellar doors are composed of solid metal and, when closed, are flush with the sidewalk. These doors open outward from the middle, and are equipped with a metal rod which, when placed between them, enables them to remain open. When the plaintiff began working at the pizzeria in 2012, these replacement sidewalk cellar doors were the only exterior sidewalk doors extant at the subject property. Approximately one or two months before the plaintiff's accident, a second set of metal, grate-like doors (the grated security doors) were installed immediately underneath the replacement sidewalk cellar doors. The grated security doors also opened out from the middle, but were not held open by any device, and did not lock. According to the report of the plaintiff's safety expert, both sets of doors opened up to a maximum angle slightly greater than 90 degrees.

The parties dispute who installed the grated security doors. At his deposition, Nagin testified that, to his knowledge, the grated security doors were installed by the tenant, but that he did not know that for certain. He also asserted that the owner did not pay for or approve of them. According to Nagin, the installation of grated security doors was not encompassed within the scope of Superior's agreement with the contractor retained by Superior to install the replacement sidewalk cellar doors.

The plaintiff, conversely, testified at his deposition that the owner directed or supervised the installation of the grated security doors. According to the plaintiff, a representative of the owner came to the pizzeria and told the pizzeria's manager that the owner wanted to install a second set of doors underneath the replacement sidewalk cellar doors because a customer had previously been injured when there was only one set of doors. The plaintiff conceded, however, that he did not witness and had no knowledge of the prior accident. The plaintiff also testified that, on another occasion, a representative of the owner came to the pizzeria with the pizzeria's principal, who also performs construction work, requesting the principal to install the second set of doors, and that the pizzeria's principal in turn told the plaintiff that the owner wanted the principal to install the doors. The plaintiff was present at the pizzeria on a later date when workers, who told him they were sent by the pizzeria's

principal, came to install the grated security doors.

The plaintiff testified that, on July 10, 2013, he was working the night shift as a counterman, and that, at some time after 8:30 p.m., the pizza maker on duty asked him to go to the basement to retrieve some cheese. As the plaintiff recounted it, he unlocked and opened the outer sidewalk cellar doors and placed a metal bar between them to keep them open, and then pulled the right grated security door open to the right. He testified that, after he had descended one or two steps into the cellar, that grated security door hit his neck and shoulder before falling onto one of his fingers. The plaintiff further asserted that his finger became stuck between the two grated security doors, he thereupon lost his balance, and fell onto the metal stairs. The plaintiff testified that he sustained injuries to fingers on one of his hands, as well as to his neck, back, and shoulders.

The owner now moves for summary judgment dismissing the complaint and on its third-party cause of action for indemnification against the tenant. In support of its motion, it submits an attorney's affirmation, transcripts of the parties' depositions, the pleadings, the bill of particulars, the lease, photographs, and a memorandum of law. In opposition, the plaintiff submits his own affidavit, the affidavit of his retained licensed professional engineer, and an attorney's affirmation, and also relies on documents submitted by the owner.

[* 6]

The motion is denied.

III. DISCUSSION

A. STANDARDS APPLICABLE TO SUMMARY JUDGMENT MOTIONS

On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (see Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 [2007]), and the motion must be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable." Asabor v Archdiocese of N.Y., 102 AD3d 524, 527 (1st Dept 2013), citing Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 (1968). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of

fact." Vega v Restani Constr. Corp., 18 NY3d 499, 505 (2012) (citation omitted); see Ferrante v American Lung Assn., 90 NY2d 623, 631 (1997). The court's role "is solely to determine if any triable issues exist, not to determine the merits of any such issues." Sheehan v Gong, 2 AD3d 166, 168 (1st Dept 2003); see Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp., 70 AD3d 508, 510-511 (1st Dept 2010).

B. PREMISES LIABILITY

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." Gronski v County of Monroe, 18 NY3d 374, 379 (2011) (citations omitted); see Peralta v Henriquez, 100 NY2d 139, 144 (2003); Basso v Miller, 40 NY2d 233, 241 (1976). In premises liability cases, "[a] landowner's duty may arise under the common law, by statute, or by regulation, or it may be assumed by agreement or by a course of conduct." Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 14 (2nd Dept 2011)(some citations omitted). See Chapman v Silber, 97 NY2d 9, 19, (2001); Ritto v Goldberg, 27 NY2d 887, 889 (1970). "That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others'. . . . Thus, a landowner who has transferred possession and control is generally not liable for

injuries caused by dangerous conditions on the property." Gronski, supra, at 379, quoting Butler v Rafferty, 100 NY2d 265, 270 (2003) (some citations omitted).

1. DUTIES OF OUT-OF-POSSESSION LANDLORDS

An out-of-possession landlord, that is, one who "has surrendered possession and control over premises leased to a tenant" (Mehl v Fleisher, 234 AD2d 274, 274 [2nd Dept 1996]), generally is not liable for the condition of leased premises unless it is statutorily obligated to maintain the premises or "'contractually obligated to make repairs or maintain the premises or . . . 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.'" DeJesus v Tavares, 140 AD3d 433, 433 (1st Dept 2016), quoting Vasquez v The Rector, 40 AD3d 265, 266 (1st Dept 2007); see Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (1st Dept 2012).

An out-of-possession landlord also can be liable for defective conditions on its property where it has "through a course of conduct . . . become obligated to maintain or repair the property or a portion of the property which contains the defective condition." Melendez v American Airlines, Inc., 290 AD2d 241, 242 (1st Dept 2002); see Ritto, supra at 889; Colicchio

v Port Auth. of N.Y. & N.J., 246 AD2d 464, 465 (1st Dept 1998). Thus, where a lease exists, "the court looks not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law." Gronski, supra at 380-381; see Mendoza v Manila Bar & Rest. Corp., 140 AD3d 934, 935 (2nd Dept 2016); Davidson v Steel Equities, 138 AD3d 911, 912 (2nd Dept 2016).

Liability may only be imposed upon an out-of-possession landlord where it had both a duty to maintain the premises and either had actual or constructive notice of the allegedly dangerous condition (see Barbuto v Club Ventures Invs., LLC, 143 AD3d 606, 607 [1st Dept 2016]), or created or exacerbated the condition by its own affirmative acts. See Bleiberg v City of New York, 43 AD3d 969, 971 (1st Dept 2007); Torres v West St. Realty Co., 21 AD3d 718, 721 (1st Dept 2005); Delguidice v Papanicolaou, 5 AD3d 236, 237 (1st Dept 2004). Where the alleged defect was visible and apparent for a sufficient period of time to permit the owner to discover and remedy it (see Harrison v New York City Tr. Auth., 113 AD3d 472, 473 [1st Dept 2014]), a finding of constructive notice may be permitted where an owner retains the right to enter upon premises for the purpose of inspecting and making repairs, so as to constitute sufficient retention of control. See Gantz v Kurz, 203 AD2d 240 (2nd Dept 1994).

Although the owner demonstrated, prima facie, that it lacked constructive notice of and did not create the alleged dangerous condition, the plaintiff raised triable issues of facts in opposition to that showing. Moreover, the owner failed to demonstrate, prima facie, that it had no contractual or statutory obligation to safely maintain the grated security doors, failed to make a showing that the grated security doors were nonstructural elements of the subject property, and failed to adduce evidence that the grated security doors were installed and maintained in a safe condition. Accordingly, that branch of its motion which is for summary judgment dismissing the complaint must be denied.

2. <u>CONTRACTUAL OBLIGATION TO MAINTAIN PREMISES</u>

The owner contends that it did not have a contractual obligation to maintain the grated security doors in a safe condition, since the condition of those doors did not constitute a significant structural or design defect that was contrary to a specific statutory safety provision. It relies upon the lease, an affirmation of counsel, and a memorandum of law to support these contentions.

Contrary to the owner's contention, the subject lease explicitly imposes upon it the responsibility not only for all structural repairs, but requires it to "maintain and repair the

public portions of the building, both exterior and interior." Moreover, the lease furnishes the owner with a right of re-entry for the purpose of "examin[ing] the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform." The lease also provides that the owner retained access to the basement "for meters in the building known as 190 Bleecker Street." By submitting only an attorney's affirmation and memorandum of law, which have no probative value (see Williams v Citibank, N.A., 247 AD2d 49, 52 [1st Dept 1998]), the owner failed to satisfy its prima facie burden of showing that the existence of grated security doors lacking a mechanism to secure them in an open position presented a nonstructural problem. See Smith v Szpilewski, 139 AD3d 1342, 1342 (4th Dept 2016); Mayo v Metropolitan Opera Assn., Inc., 108 AD3d 422, 424 (1st Dept 2013); Healy v Carmel Bowl, Inc., 65 AD3d 665, 667-668 (2nd Dept 2009); see generally Guzman, supra; Gantz v Kurz, supra; cf. Raffa v Verni, 139 AD3d 441 (1st Dept 2016) (properly functioning cellar door that was merely left open does not present a structural defect). Even had the owner made the requisite prima facie showing in this regard, the plaintiff raised a triable issue of fact as to whether the grated security doors constituted a structural element of the subject property by submitting the affidavit of his retained professional engineer,

who opined that the grated doors were indeed structural in nature, and that the inability to secure them in the open position when necessary presented a structural problem.

In addition, section 19-152(a)(6)(ii) of the Administrative Code of the City of New York (Administrative Code) defines a "substantial defect" in a sidewalk flag to include "cellar doors that . . . are . . . in a dangerous or unsafe condition," and imposes a duty upon a property owner to maintain such doors in a safe condition. That section constitutes a "specific statutory safety provision" that was contravened by the structural defect arising from the absence of a mechanism necessary to prop open the grated security doors.

For these reasons, the owner failed to establish, prima facie, that it did not have a contractual obligation to maintain the grated security doors in a safe condition.

3. <u>STATUTORY DUTY TO MAINTAIN SAFETY</u>

Although the plaintiff does not specifically contest the issue, the owner also failed to demonstrate the absence of a statutory obligation to safely maintain the subject property. In <u>Guzman v Haven Plaza Housing Dev. Fund Co</u>. (69 NY2d 559, 564-566 [1987]), the Court of Appeals' seminal decision respecting the liability of out-of-possession landlords, the Court held that the violation of Administrative Code §§ 27-127 and 27-128, which

respectively require a building's owner to keep means of egress in good working order and to bear the responsibility "at all times for the safe maintenance of the building and its facilities," constituted sufficient statutory authority for the imposition of liability upon an out-of-possession landlord with a right of re-entry. In that case, the Court imposed liability on an out-of-possession landlord for its failure to safely maintain an interior staircase and keep it in good repair, since the staircase provided less than adequate handrail clearance. Guzman reiterated that Multiple Dwelling Law § 78, which provides that "[e]very multiple dwelling . . . and every part thereof and the lot upon which it is situated, shall be kept in good repair," provides an additional statutory predicate for imposition of liability upon an out-of-possession landlord.

4. EXISTENCE OF A DANGEROUS CONDITION

The owner "failed to meet [its] initial burden of establishing as a matter of law that the door did not constitute a dangerous condition in view of the absence of a latch or other mechanism to secure it in the open position." Smith v Szpilewski, supra, at 1342 (4th Dept 2016); see Ortiz v New York City Hous. Auth., 85 AD3d 573, 574 (1st Dept 2011); Wolff v New York City Tr. Auth., 21 AD3d 956, 956-957 (2nd Dept 2005); Torres v New York City Hous. Auth., 270 AD2d 100, 100-101 (1st Dept 2000).

Indeed, the deposition transcripts and photographs relied upon by the owner reveal that the grated security doors were unable to be secured or latched in the open position. In any event, even had the owner shown that the grated security doors did not constitute a dangerous condition, the plaintiff raised a triable issue of fact in this regard with the affidavit of his expert, who opined that the grated security doors presented a dangerous condition precisely because they lacked a latch or other mechanism to prop them open.

5. CONSTRUCTIVE NOTICE AND CREATION OF THE CONDITION

By submitting the transcript of Nagin's deposition, the owner made a prima facie showing that it lacked constructive notice of any danger that might be posed by the absence of a device to prop open the grated security doors, and that it did not create any such danger because it did not install those doors. The plaintiff raised a triable issue of fact as to whether the owner had constructive notice of the condition with his testimony that the owner had previously replaced the outer sidewalk cellar doors (see Colon v Mandelbaum, 244 AD2d 292, 293 [1st Dept 1997]; Dimas v 160 Water St. Assoc., 191 AD2d 290, 290 [1st Dept 1993]). He also raised a triable issue of fact as to whether the owner created the condition with evidence that the owner directed and supervised the installation of the grated

security doors. See Ohanessian v. Chase Manhattan Realty Leasing Corp., 193 AD2d 567, 567 (1st Dept 1993); see also Daries v Haym Solomon Home for Aged, 4 AD3d 447, 448 (2nd Dept 2004). Contrary to the owner's contention, the fact that some of the evidence upon which plaintiff relies was in the form of hearsay does not require the conclusion that plaintiff's evidence was insufficient to defeat summary judgment. The hearsay statements of the pizzeria's manager were not too vague or speculative to support an inference that the owner directed or supervised the installation of the grated security doors, and there exists other competent evidence supporting plaintiff's theory of liability (see Boynton v Haru Sake Bar, 107 AD3d 445, 445 [1st Dept 2013]; Zimbler v Resnick 72nd St Assoc., 79 AD3d 620, 621 [1st Dept 2010]), including the owner's admissions and declarations against pecuniary interest, which are admissible as exceptions to the rule against hearsay.

C. THIRD-PARTY CAUSE OF ACTION FOR INDEMNIFICATION

In the second branch of the motion, the owner seeks summary judgment on its third-party cause of action against the tenant for indemnification. However, there is no indication in the record that the tenant has answered or otherwise appeared in this action, and it has submitted no opposition to this motion. The owner has not submitted proof of service of the third-party

complaint upon the tenant, or otherwise addressed the tenant's status in this action. Rather than move for leave to enter a default judgment against the tenant (CPLR 3215), the owner seeks relief under CPLR 3212. This is improper since CPLR 3212(a) provides that "[a]ny party may move for summary judgment . . . after issue has been joined." That is, a motion for summary judgment on a complaint presupposes the joinder of issue. See Wittlin v Schapiro's Wine Co., 178 AD2d 160 (1st Dept 1991); see also Spagnoletti v Chalfin, 131 AD3d 901, 901-902 (1st Dept 2015). The owner's motion as against the tenant must, therefore, be denied as premature, albeit without prejudice to the submission of a proper motion for leave to enter a default judgment against the tenant pursuant to CPLR 3215.

IV. CONCLUSION

For the reasons set forth herein, it is

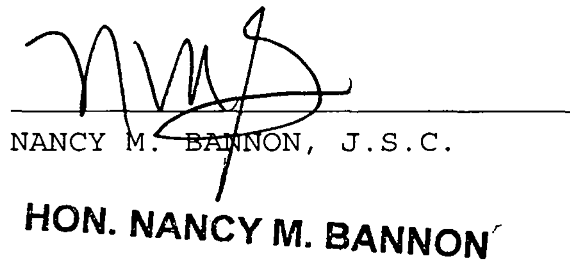
ORDERED that the branch of the defendant's motion which is for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that the branch of the defendant's motion which is for summary judgment on its third-party cause of action for indemnification against the third-party defendant is denied as premature, without prejudice to the submission of a proper motion for leave to enter a default judgment on that cause of action.

[* 17]

This constitutes the Decision and Order of the court.

Dated: December 13, 2016



NANCY M. BANNON, J.S.C.