SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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MILAGROS TAVERES

Plaintiff,

v

129 ANDY SUPERMARKET, INC., 1588-98 LLC, 325 WADSWORTH REALTY LLC and ATAKOY REALTY LLC

Defendants.
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Index No. 156554/14

DECISION AND ORDER

MOT SEQ. 003, 004

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries, the defendant 129 Andy Supermarket, Inc. (Andy), moves for summary judgment dismissing the complaint and all cross claims against it, and on its cross claim for common-law indemnification (SEQ 003), and the defendants 1588-98, LLC, 325 Wadsworth Realty, LLC, and Atakoy Realty, LLC (collectively the landlord defendants), separately move for summary judgment dismissing the complaint and all cross claims against them, and on their cross claim against for common-law indemnification (SEQ 004).

The cross-claims for common-law indemnification are dismissed, and the motions are otherwise denied.

II. BACKGROUND

By order dated July 28, 2017, this court recalled and vacated a prior order dated July 20, 2017, and stayed all proceedings herein until December 26, 2017. The stay is thus now dissolved.

In support of its motion, Andy submits the pleadings, the plaintiff's bill of particulars, the transcripts of the parties' depositions, photographs of the subject staircase, and its lease with the owners of the premises. In support of their motion, the landlord defendants submit the same documents and photos, as well as an affidavit from their retained professional engineer, Stan A. Pitera.

The plaintiff, Milagros Taveras, testified at her deposition that, on December 15, 2012, she was a customer at Andy's supermarket in Manhattan, and asked an employee if she could use a restroom. She was directed to climb up a staircase at the back of the store to the second floor. Upon ascending the staircase, she did not observe any bathroom, at which point she began to descend the stairs. As she described it, it was "a little dark" in the stairwell. She asserted that, while descending, she held onto a handrail to her left, and that there was no handrail on her right. Tavares claimed that, after she had descended seven steps, she attempted to place her right foot on the eighth step, but that step was smaller than the other steps, and wasn't level.

Since she could not place the entirety of her foot on the eighth step, her right foot buckled, and she fell down the remainder of the staircase, sustaining injuries. She averred that, although she attempted to retain her grasp on the handrail as her foot buckled and she began to fall, the handrail ended several steps above the first floor landing.

Store manager Ariel Acevdedo testified at his deposition that Andy leased the premises from the owners. He was familiar with the staircase, which was constructed of wood, with each step partially covered with a rubber strip, and that one lightbulb was installed at the top of the staircase to provide light in the stairwell. He confirmed that photographs shown to him at his deposition were fair and accurate representations of the subject staircase as of December 2012. Acevedo revealed that, sometime prior to Tavares's accident, both he and Bernarda Urena, the sister of Andy's principal, had fallen down the staircase before 2012.

The landlord defendants' witness, Manuel Valerio, only began managing the premises two years after the accident. Valerio confirmed that the defendant 1588-98, LLC, was an owner of the subject property, and 325 Wadsworth Realty, LLC, was its partner, and that the owners had the right to reenter the property to make structural repairs, if necessary. He was generally unfamiliar with the premises, although he remembered that the subject

staircase connected the first and second floors, with steps approximately three feet wide. He confirmed that the photos shown to him were a fair representation of the steps as they existed in 2014, when he began managing the subject property. He also averred that no structural changes had been made to the staircase from the time he began managing the property until Andy's retail operations were permanently closed one year later.

The landlord defendants' expert, Pitera, asserted in an affidavit that he inspected the staircase, and that it did not violate any applicable building code provisions or present a tripping hazard, and that the fact that the handrail did not span the entire descent of the staircase did not render it unsafe.

In opposition to the motions, the plaintiff relied on the defendants' submissions, and also submitted the affidavit of her retained professional engineer, Michael Kravitz, which incorporated his report by reference. He asserted that he inspected the staircase in January 2015, and reviewed Building Department filings referable to the subject premises and the photos identified by the deposition witnesses. Kravitz concluded that the building was erected in or about 1928, and was thus subject to the 1916 New York City Building Code. He opined that each tread overlapped the tread below it from 2 3/8" to 3 3/8", resulting in a reduced effective tread depth that created a tripping or misstepping hazard and obstruction. Kravitz reported

that the riser heights of the staircase's 10 steps varied from 6 1/4" to 9 3/4", and that riser heights of 6 of the 10 steps thus exceeded the 1916 code maximum of 7". He further reported that the depth of all 10 steps was less than the 9 1/2" required by that code, the width of all 10 steps was less than the 44" required by that code, the "step geometry" of each of the steps was far less than the figure of 70 required by that code, and the one handrail was of insufficient length. Kravitz concluded that these constituted violations of sections 153(3), 153(4), and 153(6) of the Exit Facilities provisions New York City Building Code of 1916, as amended, and presented a hazard to persons ascending or descending the staircase because the steps were not large enough to safely place one's foot on them, and the irregular and excessive spacing affected one's perception of the staircase, thus increasing the risk of misstep.

III. DISCUSSION

A lessee has a duty to keep leased property in a reasonably safe condition. See Kipybida v Good Samaritan Hosp., 35 AD3d 544 (2nd Dept. 2006). An out-of- possession landlord "is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's

expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." Johnson v Urena Serv. Ctr., 227 AD2d 325, 326 (1st Dept. 1996). Either a lessee or such an out-of-possession landlord may be held liable if it had actual or constructive notice of the allegedly dangerous condition (see Barbuto v Club Ventures Invs., LLC, 143 AD3d 606 [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).

The defendants' submissions reveal the existence of triable issues of fact as to whether the staircase was dangerous, whether the danger arose from a significant structural or design defect, whether they had constructive notice of the condition, and whether the landlord defendants had a right to re-enter. To the extent that the defendants made a prima facie showing that the staircase complied with all relevant building codes, Kravitz's affidavit raised a triable issue of fact as to whether it violated the relevant code, as well as whether it constituted a significant structural or design defect. See Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559 (1987). Hence, those branches of the defendants' motions which are for summary judgment dismissing the complaint and cross claims for contribution are denied.

Common-law indemnification is available to a party that has

been held vicariously liable from the party who was at fault in causing plaintiff's injuries. See Hawthorne v South Bronx Community Corp., 78 NY2d 433 (1991); Structure Tone, Inc. v Universal Servs. Group, Ltd., 87 AD3d 909, 911 (1st Dept. 2011). Since there is no basis upon which any defendant may be held vicariously liable for the negligence of another in this case, summary judgment dismissing those cross claims is warranted.

IV. CONCLUSION

Accordingly, it is

ORDERED that the summary judgment motion of the defendant 129 Andy Supermarket, Inc. (SEQ 003), is granted to the extent that the cross claim of the defendants 1588-98, LLC, 325 Wadsworth Realty, LLC, and Atakoy Realty, LLC, for common-law indemnification is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the summary judgment motion of the defendants 1588-98, LLC, 325 Wadsworth Realty, LLC, and Atakoy Realty, LLC (SEQ 004), is granted to the extent that the cross claim of the defendant 129 Andy Supermarket, Inc., for common-law indemnification is dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order fo the court.

Dated: March 13, 2018 ENTER: _____ J.S.C.
HON. NANCY M. BANNON

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