SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 42

GEORGE TOWER,

Plaintiff,

- against -

VALLEVILLE LTD., LE PARIS REST, LE PARIS BISTROT FRANCAIS, 24-26 EAST 93 APARTMENTS CORP., and WHITE FRIARS EAST, LLC,

Defendant.

Index No.: 158732/2014

DECISION & ORDER

MOT SEQ 006, 007, 008

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages for personal injuries, the plaintiff, George Tower, alleges that, while walking on the sidewalk, he was caused to trip and fall on an upraised and protruding hinge attached to a metal cellar door located at 1312 Madison Avenue in Manhattan. The defendant 24-26 East 93 Apartments Corp. (24-26 East) moves pursuant to CPLR 602 to consolidate this action with another action entitled George Tower v Rudd Realty Management Corp., pending in the Supreme Court, New York County, under Index No. 154884/17, and, upon consolidation, pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it and Rudd Realty Management Corp. (SEQ 006). The defendant Valleville Ltd., d/b/a Le Paris Restaurant (Valleville), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against it (SEQ 007), and the defendant White Friars East, LLC (White Friars)

moves for the same relief (SEQ 008). The branch of 24-26 East's motion seeking consolidation is granted, and is otherwise denied, and the motion of Valleville seeking summary judgment is denied, and the motion of White Friars seeking summary judgment is granted in part.

II. DISCUSSION

A. Consolidation

"Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right'" Raboy v McCrory Corp., 210 AD2d 145 (1st Dept 1994) quoting Amtorg Trading Corp. v Broadway & 56th St. Assoc., 191 AD2d 212, 213 (1st Dept 1993). 24-26 East correctly argues that the two actions at issue, which arise from the same June 11, 2014, accident, in which the plaintiff allegedly tripped and fell at premises located in Manhattan, present common questions of law and fact. See CPLR 602; DeSilva v Plot Realty, LLC, 85 AD3d 422 (1st Dept 2011); Kern v Shandell, Blitz, Blitz & Bookson, 58 AD3d 487 (1st Dept 2009).

Although Valleville argues that consolidation will unduly delay the resolution of this action, the court is not persuaded that this will be the case. Rudd Realty Management Corp. (Rudd), the defendant in the second action, is the managing agent of 24-

26 East and is represented by the same counsel, which will presumably obviate the need for the exchange of discovery already produced and significantly reduce the need for further depositions. Moreover, the parties represent that a representative of Rudd has already been produced for a deposition in this case. The plaintiff does not oppose consolidation.

The only factor militating against consolidation is the different procedural stages to which these two actions have progressed; specifically, a note of issue was filed in this action on June 19, 2017. However, "any prejudice attributable to the circumstance can be avoided by affording [the parties] an opportunity to complete disclosure on an expedited basis." Matter of Progressive Ins. Co. v Vasquez, 10 AD3d 518, 519 (1st Dept. 2004); see Vadillo v 400 East 51st Street Realty LLC v 890 First LLC, 74 AD3d 619 (1st Dept. 2010); Collazo v City of New York, 213 AD2d 270 (1st Dept. 1995). In light of the foregoing, that branch of 24-26 East's motion which is to consolidate is granted to the extent that the actions are consolidated and the action is stricken from the trial calendar for 60 days for completion of disclosure by the defendant in the second action. See Collazo v City of New York, supra.

B. Summary Judgment

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. However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

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).

1. 24-26 East's Motion for Summary Judgment

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).

24-26 East failed to demonstrate, prima facie, that it had no contractual or statutory obligation to safely maintain the cellar doors, failed to make a showing that the cellar doors were nonstructural elements of the subject property, and failed to establish that it had no actual or constructive notice of the defect.

24-26 East's commercial lease with White Friars provided that the tenant was to be responsible for maintenance and non-structural repairs on the premises, but that the landlord remained responsible for all structural repairs not necessitated by reason of the tenant's negligence. The sublease between White Friars and Valleville, which expired in April 2006 and was never replaced or renewed, in spite of Valleville's continued occupancy, provides that the subtenant is responsible for the maintenance of the sidewalk, fixtures, and appurtenances therein, as well as non-structural repairs, but that the subtenant is not responsible for repairs or replacements to the sidewalk unless the subtenant is the cause of damage to the sidewalk, or for structural repairs not necessitated by its negligence. At his

deposition, Rudd's president, Frederick J. Rudd, testified that repairs to the cellar door would be considered a structural repair, in spite of his contradictory assertion that such repairs were the tenant's responsibility. 24-26 has not made a showing that it is not contractually obligated to maintain the cellar doors.

24-26 East also fails to demonstrate the absence of a nondelegable statutory obligation to safely maintain the subject property. Pursuant to Administrative Code § 7-210, combined with § 19-152, property owners are obligated to maintain and repair the sidewalk abutting their property in a reasonably safe condition, and are liable for injuries resulting from a violation of the statute. See Collado v Cruz, 81 AD3d 542 (1st Dept. 2011). Administrative Code § 7-210 does not impose any duty on a commercial tenant, leaving the issue to the property owner and its agreement with the tenant. The scope of a property owner's responsibility regarding the repair and maintenance of sidewalks mirrors the duties and obligations of property owners with regard to sidewalks as set forth in Administrative Code § 19-152. See Report of Committee on Transportation, 2003 New York City Local Law Report No. 49 Intro 193.

Administrative Code § 19-152 obligates property owners to repair "a defective sidewalk flag in front of or abutting" their property, which "contains a substantial defect." A substantial

defect is defined as including a number of items, among which are "hardware or other appurtenances not flush within 1/2 inch of the sidewalk surface" or "cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition." Administrative Code § 19-152(a)(6). Thus, the obligation to repair is not limited to defects in the actual material of a sidewalk flag, but includes hardware and other items installed in the sidewalk appurtenant to the owner's property for the use and benefit of the owner, such as cellar doors.

The affidavit of the plaintiff's expert witness, dated December 15, 2017, avers that the hinge over which the plaintiff allegedly tripped was measured to be 3/4 of an inch above the adjacent sidewalk level. This assessment was based on an examination the expert performed on August 4, 2014, about two months after the plaintiff's fall took place. 24-26 East does not produce any evidence to rebut the expert's calculation, which indicates the presence of a specific defect for which 24-26 East was responsible pursuant to Administrative Code §§7-210 and 19-152(a)(6).

24-26 East thus has not established that it did not retain a contractual or statutory duty to maintain the cellar doors. To the extent that 24-26 East argues that Valleville's special use of the cellar and cellar door displaced any duty it had, that is

a question of fact for a jury, as discussed below.

As to whether 24-26 East had actual or constructive notice of the defect, Rudd's president further testified that 24-26 East would respond to requests from shareholders and periodically inspect the property, and that it had inspected the sidewalks adjacent to the premises and recommended repairs to the sidewalk in the past. It is undisputed that the hinge defect existed for 19 years. In addition, given the plaintiff's expert's undisputed testimony as to the violation of a specific statute, 24-26 East, as an out-of-possession landlord with the right to reenter the premises to inspect and repair, may be charged with constructive notice of the defective condition. See Whitney v Valentin, 105 AD3d 519 (1st Dept. 2013); Landy v 6902 13th Ave. Realty Corp., 70 AD3d 649 (2nd Dept. 2010). Based on the foregoing, there is a triable issue of fact as to whether 24-26 East had, at the very least, constructive notice of the defect.

Accordingly, that branch of its motion which is for summary judgment dismissing the complaint must be denied.

2. White Friars' Motion for Summary Judgment

White Friars likewise argues that, as an out-of-possession tenant with no control over the cellar doors, it cannot be held liable for the plaintiff's injuries. Alternatively, White Friars argues that 24-26 East had a non-delegable statutory duty to

maintain the cellar doors, and that it cannot be held liable for the failures of its landlord. White Friars also avers that the cross claims of its co-defendants for indemnification should be dismissed, and that it should be granted summary judgment on its cross claim against Valleville for indemnification.

White Friars and Valleville, in its respective summary judgment motion, as discussed below, each argue that 24-26 East had a non-delegable statutory duty to maintain the cellar doors based on the Administrative Code provisions discussed above. A commercial tenant of the property abutting the purported accident location could only be liable to the plaintiff if the tenant "affirmatively caused or created the defect that caused the plaintiff to trip," or "put the sidewalk to a 'special use' for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition." Kellogg v All Saints Housing Development Fund Co., Inc., 146 AD3d 615, 617 (1st Dept. 2017); see Collado v Cruz, supra. In addition, while the provisions of a lease agreement obligating a tenant to repair the sidewalk generally do not impose on the tenant a duty to a third party, such as the plaintiff (see Collado v Cruz, supra), a lease provision may be so comprehensive and exclusive as to sidewalk maintenance as to entirely displace a landlord's duty to maintain the sidewalk (see Abramson v Eden Farm, Inc., 70 AD3d 514 [1st

Dept. 2010]; Hsu v City of New York, 145 AD3d 759 [2nd Dept. 2016]).

The commercial lease between 24-26 East and White Friars provided that the tenant was to be responsible for "all non-structural repairs" on the premises, and all repairs necessitated by reason of White Friars' negligence, but that the landlord remained responsible for all structural repairs not necessitated by reason of the tenant's negligence. This language simply cannot be read as so comprehensive and exclusive as to sidewalk maintenance as to displace 24-26 East's duty to maintain the sidewalk. Indeed, in Collado v Cruz, supra, the Appellate Division, First Department found that a more specific, yet similar, provision in a lease that required the tenant to "make all [non-structural] repairs and replacements to the sidewalks and curbs adjacent thereto" was insufficient to impose a duty on the tenant to a third party injured due to a broken sidewalk flag. In addition, none of the evidence produced suggests that White Friars created the defective condition or made special use of the sidewalk. Accordingly, the complaint must be dismissed as against White Friars.

However, since a tenant with no duty to a third party may nonetheless "be held liable to the owner for damages resulting from a violation" of a lease agreement imposing an obligation on the tenant to repair or replace the sidewalk (Collado v Cruz,

supra at 542), White Friars' arguments with respect to indemnification fail. The language of the lease and sublease, the deposition testimony of Frederick Rudd indicating that the tenants were responsible for maintenance of the sidewalk and cellar door, his contradictory testimony that such maintenance would be considered structural under the terms of the lease agreements, the testimony of White Friars' managing partner, Nina Neivens, indicating that Valleville was responsible for the cellar door because Valleville's employees had access to it, and the testimony of Valleville's principal, Patrick Laurent, indicating that White Friars was responsible for the exterior of the subject property, create questions of fact as to whether White Friars was contractually responsible for maintaining the sidewalk appurtenant to the property. Moreover, given the length of time this defect persisted, and its permanent nature and public location, it may reasonably be argued that White Friars had notice of the subject defect. Since issues of fact remain with respect to White Friars' contractual obligations, the branch of its motion seeking summary judgment dismissing the cross claims for indemnification as against it and granting it contractual indemnification from Valleville, is denied at this juncture.

3. Valleville's Motion for Summary Judgment

Valleville argues that as a mere tenant on the premises, it had no duty towards third-parties such as the plaintiff who tripped on the hinges protruding from the cellar doors. Valleville also avers that the cross claims of its co-defendants for indemnification should be dismissed.

Valleville has not established its entitlement to judgment as a matter of law dismissing the complaint. As discussed above, Valleville could only be liable to the plaintiff if it actually caused or created the defect causing the plaintiff to trip, put the sidewalk to a special use for its own benefit, thus assuming a responsibility to maintain the part used in a reasonably safe condition, or entered into a lease agreement containing a provision so comprehensive and exclusive as to sidewalk maintenance that the landowner's duty to maintain the sidewalk was transferred to Valleville. See Kellogg v All Saints Housing Development Fund Co., Inc., supra; Collado v Cruz, supra; Abramson v Eden Farm, Inc., supra; Hsu v City of New York, supra.

There is no evidence presented to indicate that Valleville in any way contributed to the creation of the hazard here, as Valleville did not install or oversee the installation of the defective cellar doors, and the plaintiff offers no other theory as to the cause of his fall. In addition, the terms of the sublease are insufficient to result in the complete displacement

of 24-26 East's duty to maintain the sidewalk in a reasonably safe condition pursuant to the Administrative Code.

As to whether Valleville may be held liable for the plaintiff's injuries under a special use theory, in order "[t]o recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and control of the alleged special use area . . . and the plaintiff must demonstrate that the special use caused the defective condition which proximately caused his or her injuries." O'Toole v City of Yonkers, 107 AD3d 866 (2nd Dept. 2013); see O'Brien v Prestige Bay Plaza Development Corp., 103 AD3d 428 (1st Dept. 2013).

There are triable issues of fact as to whether Valleville made special use of the cellar doors in the sidewalk where the plaintiff tripped and fell. See Navarreto v 995 Westchester Avenue LLC, 35 AD3d 267 (1st Dept. 2006). The cellar doors provided access to a basement, where Valleville stored laundry, wine, food, and tables, and which housed the office of Valleville's principal. See id. Valleville placed a lock on the cellar door and was the only entity to have key that would open it. See Pantaleon v Lortimer Management Corp., 270 AD2d 324 (2nd Dept. 2000). While Rudd's president testified that Rudd would periodically inspect the property, including the sidewalk adjacent to the premises, Valleville was the entity that cleaned

snow and debris from the cellar doors. Finally, Valleville undertook in the sublease to maintain, but not structurally repair, the sidewalk. See Navarreto v 995 Westchester Avenue LLC, supra; Keane v 85-87 Mercer Street Associates, Inc., 304 AD2d 327 (1st Dept. 2003).

There is also a triable issue of fact as to the plaintiff's possible contribution to his own injuries. "A defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the plaintiff's case." Giaquinto v Town of Hempstead, 106 AD3d at 1049 (2nd Dept. 2013); see Torres v Merrill Lynch Purchasing., Inc., 95 AD3d 741 (1st Dept. 2012); Sabalza v Salgado, 85 AD3d 436 (1st Dept. 2011); Alvarez v 21st Century Renovations Ltd., 66 AD3d 524 (1st Dept. 2009).

Since Valleville has not made a prima facie showing that it is free from liability to the plaintiff for his injuries, the branch of its motion seeking summary judgment on the issue of indemnification is premature.

III. CONCLUSION

For the reasons set forth herein, it is

ORDERED that the branch of the motion of the defendant 24-26 East 93 Apartments Corp. seeking to consolidate this action with the action entitled George Tower v Rudd Realty Management Corp.,

pending in the Supreme Court, New York County, under Index No. 154884/17 (SEQ 006), is granted; and it is further,

ORDERED that the two actions are hereby consolidated under Index No. 158732/2014, and shall bear the caption as indicated:

GEORGE TOWER

v Index No. 158732/2014

VALLEVILLE, LTD., LE PARIS REST,
LE PARIS BISTROT FRANCAIS,
24-26 EAST 93 APARTMENTS CORP.,
WHITE FRIARS EAST, LLC, and
RUDD REALTY MANAGEMENT
CORP.

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and it is further,

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action, and it is further,

ORDERED that the consolidated action is stricken from the trial calendar for a period of 60 days from the date of this order to permit the parties to complete all outstanding discovery, if any, with regard to the defendant Rudd Realty Management Corp., and the time to file any further motions for summary judgment is extended until 60 days after the expiration

of that period; and it is further,

ORDERED that a new note of issue shall be filed upon the completion of all discovery on or before December 3, 2018; and it is further,

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his files and records to reflect the consolidation; and it is further,

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (60 Centre St, Room 158), who is hereby directed to mark the court's records to reflect the consolidation, and it is further,

ORDERED that the branch of the motion of the defendant 24-26 East 93 Apartments Corp. for summary judgment pursuant to CPLR 3212 (SEQ 006) is denied; and it is further,

ORDERED that the motion of the defendant Valleville, Ltd., d/b/a Le Paris Restaurant, for summary judgment pursuant to CPLR 3212 (SEQ 007) is denied; and it is further,

ORDERED that the motion of the defendant White Friars East, LLC, for summary judgment pursuant to CPLR 3212 (SEQ 008) is granted to the extent that the complaint is dismissed as against it, and the motion is otherwise denied; and it is further,

ORDERED that all parties shall appear for a status

conference on November 29, 2018, at 9:30 a.m.

This constitutes the Decision and Order of the court.

Dated: October 2, 2018

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON