Cunningham v A&Y Realty Corp.
2019 NY Slip Op 31990(U)
June 20, 2019
Supreme Court, Kings County
Docket Number: 508354/2015
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of June, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JOSHUA CUNNINGHAM,

Plaintiff,

- against -

A&Y REALTY CORP.

Defendants.

Index No.: 508354/2015

DECISION AND ORDER

Motions Sequence #7

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A&Y REALTY CORP.

Third Party Plaintiff,

- against -

IBI ARMORED SERVICES, INC.

Third Party Defendant,

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an alleged trip and fall incident that occurred on August 11, 2014. On that day the Plaintiff Joshua Cunningham (hereinafter "the Plaintiff") allegedly injured himself at the premises known as 58-17 28th Avenue, in the County of Queens, City and State of New York (the "Premises"). At his Examination Before Trial (EBT), when asked what caused his fall, the Plaintiff stated "[a] pothole inside the garage ." (See Defendant's Motion, EBT Testimony of Plaintiff, Attached as Exhibit H, Page 44).

Defendant A&Y Realty Corp. (hereinafter "the Defendant") moves for an order pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of the Plaintiff and granting Defendant summary judgment on its cross-claim for indemnification as against IBI Armored Car Services, Inc.[1] In its motion for summary judgment, the Defendant argues that it cannot be liable for Plaintiff's injuries because pursuant to the subject lease agreement with IBI Armored Car Services, Inc., the Defendant is a landlord out of possession and therefore has no duty to keep the garage floor in the subject Premises in good repair. The Defendant also contends that the alleged condition was open and obvious and not inherently dangerous. What is more, the Defendant argues that the lease between the Defendant and IBI Armored Car Services, Inc. states that IBI Armored Car Services, Inc. has a contractual duty to indemnify the Defendant.

The Plaintiff opposes the motion and argues that it should be denied. Specifically, the Plaintiff contends that the Defendant has failed to meet its *prima facie* burden in as much as it has failed to show that Defendant neither created nor had actual or constructive notice of the allegedly dangerous condition. What is more, the Plaintiff contends that the Defendant has not met its initial burden given that the lease provision is unclear. Lastly the Plaintiff avers that the Defendant is not an out of possession landlord in as much as the Defendant retained a right of re-entry.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See*

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[1] On May 8, 2019, the parties stipulated that the third party action as against IBI Armored Services, Inc. was discontinued. As a result, that aspect of the Defendant's motion seeking summary judgment on its cross-claims against Third Party Defendant IBI Armored Services, Inc. are denied as moot.

Sheppard-Mobley v. King, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Generally, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008]. What is more, "a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall." *Baldasano v. Long Island Univ.*, 143 A.D.3d 933, 933, 40 N.Y.S.3d 175, 176 [2nd Dept, 2016]; *see also Matadin v. Bank of Am. Corp.*, 163 A.D.3d 799, 799, 80 N.Y.S.3d 439, 440 [2nd Dept, 2018]; *Razza v. LP Petroleum Corp.*, 153 A.D.3d 740, 741, 60 N.Y.S.3d 325 [2nd Dept, 2017].

"An out-of-possession landlord is not liable for injuries that occur on the premises after the transfer of possession and control to a tenant unless the landlord (1) is contractually obligated to repair the premises, or (2) has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision." *Sangiorgio v. Ace Towing & Recovery*, 13 A.D.3d 433, 433 34, 787 N.Y.S.2d 51, 52 [2nd Dept, 2004]; *see Ingargiola v. Waheguru Mgmt., Inc.*, 5 A.D.3d 732, 774 N.Y.S.2d 557 [2nd Dept, 2004]. From this it reasonably follows that "[a]n out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect that proximately caused the injury." *Spencer v. Schwarzman*, LLC, 309 A.D.2d 852, 766 N.Y.S.2d 74(2nd Dept.2003].

Turning to the merits of the instant motion, the Court finds that the Defendant has failed to meet its *prima facie* burden. In support of its application, the Defendant relies on the deposition of the Plaintiff, the lease agreement between the Defendant and IBI Armored Car Services, the deposition of Marc Salerno, and the deposition of Dwayne Willis. When asked (Defendant's Motion, Exhibit H, Page 44) what caused his fall, the Plaintiff stated "[a] pothole inside the garage ." When asked (Page 44) to describe how long it was, the Plaintiff stated "nine, ten, about ten inches." During the deposition of Dwayne Willis, an employee of IBI Armored Car Services, when asked for how long he remembers seeing the pothole that allegedly caused the Plaintiff's fall Mr. Willis states "[a]bout nine, ten years." (Defendant's Motion, Exhibit N, Page 34) Marc Salerno testified at his deposition (Defendant's Motion, Exhibit J, Page 8) that he acts "[a]s a representative for this situation, I'm also they're [sic] insurance broker." When asked (Defendant's Motion, Exhibit J, Page 11) how long IBI Armored Car Services has leased the premises he testified that "I think it was 2007 when it began."

When asked whether the Defendant made any renovations or repairs to the Premises after IBI Armored Car Services leased the premises he testified (Defendant's Motion, Exhibit J, Page 18) that "I don't believe so." When asked whether there would have been a record of repairs made during this time, Mr. Salerno testified (Defendant's Motion Exhibit J, Page 19) that "I know the lease required the tenant to maintain everything so I don't think we made any renovations." When asked (Defendant's Motion Exhibit J, Page 19) whether anyone from the Defendant visited the Premises from the time IBI Armored Car Services leased the Premises until the date of the accident, Mr. Salerno testified "I don't know for sure."

While Paragraph 2 of the Lease Agreement does provide that the tenant shall "make all repairs", Paragraph 6 of that same Lease Agreement provides that "the Landlord and the Landlord's agents and other representatives shall have the right to enter into and upon said premise or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof." Given the ambiguity of the afore-referenced lease provisions and the lack of information provided by Mr. Salerno, the Defendant failed to establish, *prima facie*, that it was an out-of-possession landlord with no duty to maintain the Premises at issue or that it did not cause or create the condition. *See Azumally v. 16 W. 19th LLC*, 79 A.D.3d 922, 923, 913 N.Y.S.2d 730, 730 [2nd Dept, 2010]. More specifically, and in light of the Defendant's right of re-entry, the Defendant, through the testimony of Mr. Salerno, was unable to provide evidence regarding what the course of conduct was regarding the subject Premises. "The Court of Appeals has restated several times in recent years the general common-law rule of limited liability for out-of-possession landlords with respect to leased premises; an out-of-possession landlord has a duty imposed by statute or assumed by contract or a course of conduct, and not merely through its "control" as that term is currently used." *Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 18, 929 N.Y.S.2d 620, 627 [2nd Dept, 2011]; *see also Rivera v. Nelson Realty, LLC*, 7

N.Y.3d 530, 858 N.E.2d 1127 [2006]; *Chapman v. Silber*, 97 N.Y.2d 9, 760 N.E.2d 329 [2001]; *Juarez by Juarez v. Wavecrest Mgmt. Team Ltd.*, 88 N.Y.2d 628, 672 N.E.2d 135 [1996].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motion sequence #7) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
FILED
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