Tessa v Laundry Palace
2020 NY Slip Op 30482(U)
February 4, 2020
Supreme Court, Kings County
Docket Number: 514569/2017
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 4th day of February, 2020.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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GUECHNED TESSA,

Plaintiff,

- against -

LAUNDRY PALACE, LAUNDRY PALACE HEMP, INC., and ALDRICH MANAGEMENT, CO., LLC.,

Defendants.

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Index No.: 514569/2017

DECISION AND ORDER

Motions Sequence #2

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, 4,
Reply Affidavits (Affirmations)	5,

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

The instant action results from an alleged accident that occurred on October 5, 2015. On that day the Plaintiff, Guechned Tessa (hereinafter "the Plaintiff") allegedly injured herself at the premises known as 2939 Hempstead Turnpike, Levittown, New York (the "Premises"). The Plaintiff contends that she suffered injuries due to a falling/tipping cart on the sidewalk fronting the Premises.

Defendant Aldrich Management Co., LLC. (hereinafter "Aldrich"), purportedly the owner of the Premises, 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 Defendants Laundry Palace, Laundry Palace Hemp, Inc (hereinafter "the Laundry").[1] In its motion for summary judgment, the Defendant argues that it cannot be held liable for Plaintiff's injuries because pursuant its lease agreement with the Laundry, the Defendant is a landlord out of possession and therefore has no duty to keep the subject Premises in good repair. The Defendant also contends that the alleged accident as alleged was not a product of a defective premises, but rather a falling/tipping cart. Aldrich contends that the laundry carts are owned and maintained by the Laundry. What is more, the Defendant argues that the Defendant Laundry has a common law duty to indemnify Aldrich.

The Plaintiff opposes the motion and argues that it should be denied. Specifically, the Plaintiff contends that Aldrich has failed to meet its *prima facie* burden in as much as it has failed to show that Aldrich neither created nor had actual or constructive notice of the allegedly dangerous condition. What is more, the Plaintiff contends that Aldrich has not met its initial burden given that a course of conduct was not established, which is required in order to excuse Aldrich. Lastly, the Plaintiff avers that the Defendant is not an out of possession landlord in as much as Aldrich 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 Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68

[1] Aldrich seeks contractual and common law indemnification, contribution and breach of contract. However, the Aldrich answer only sought common law indemnification and contribution, therefore this decision will only address those cross-claims. The purported amended answer of Aldrich in its reply is a nullity in that no leave was sought as required by CPLR 3025(a). Therefore, the purported additional cross claims contained therein will not be addressed further.

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 Aldrich has met its *prima facie* burden. In support of its application, Aldrich relies on the deposition of the Plaintiff, the lease agreement between Aldrich and the Laundry, as assignee, the deposition of Erik Wieboldt, the principal of the laundry, and the deposition of Milton Atshuler, Aldrich's insurance director. When asked (Aldrich's Motion, Exhibit D, Page 32) what caused her accident, the Plaintiff stated that the accident occurred five or six steps outside the laundry, while she was using a cart. The Plaintiff stated (Page 33) "I pushed the cart out and took the bag out to put in my car and the cart fell over my face." The Plaintiff also generally stated that the sidewalk was not smooth. (Page 97). The Plaintiff denied that there was debris or garbage on the sidewalk (Page 99). The Plaintiff stated that she did not know what caused the cart to tilt. (Page 101).

During his deposition, Erik Wiebolt, principal of Defendant Laundry, stated that the laundry owns the laundry carts. (Aldrich's Motion, Exhibit E, Page 20). Milton Altschuler testified at his deposition (Aldrich's Motion, Exhibit F, Page 9) that he "is Aldrich's insurance director." Mr. Altschuler (Aldrich's Motion, Exhibit F, Page 19) identified the lease at Exhibit G of Aldrich's motion (the "Lease Agreement"). Aldrich maintains that the Plaintiff points to no defect in the sidewalk or in the Premises generally. Aldrich contends that it does not operate out of the Premises and does not own or maintain the laundry carts. As such Aldrich argues that it owes no duty to the Plaintiff and that it has nothing to do with the accident. Aldrich maintains that in any event, it is an out of possession landlord and there is no allegation of a specific violation of a statute relating to a structural or significant design defect.

Paragraph 52 of the Lease Agreement does provide that the tenant shall "make all repairs" and Paragraph 49 of the Lease Agreement provides that the Tenant shall keep the sidewalk free of snow and ice and debris. Aldrich has established, *prima facie*, that it was an out-of-possession landlord with no liability for the accident and 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]. Neither the Plaintiff nor the Laundry has raised an issue of fact to rebut this showing. As such the action is dismissed as against Aldrich.

The Court agrees that Aldrich's application for common law indemnification and contribution is meritorious. However, Aldrich's common law indemnification cross-claim is conditioned upon proof that the Laundry was negligent. Such proof has not been established at this time. See *Kielty v. AJS Const. of L.I., Inc.*, 83 A.D.3d 1004, 1005, 922 N.Y.S.2d 467, 469 [2nd Dept, 2011]; *Benedetto v. Carrera Realty Corp.*, 32 A.D.3d 874, 875, 822 N.Y.S.2d 542, 544 [2nd Dept, 2006]. In any event the application is academic in light of this holding.

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

The motion by the Defendant Aldrich (motion sequence #2) is granted in that Defendant Aldrich is granted summary judgment on the issue of liability and the matter is dismissed as against them. The remaining relief is denied as academic.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
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