

Ghodbane v 111 John Realty Corp.
2021 NY Slip Op 32762(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 159695/2014
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

-----X

INDEX NO. 159695/2014

HASSENE GHODBANE,

MOTION SEQ. NO. 008 009

Plaintiff,

- v -

111 JOHN REALTY CORP., BRAUN MANAGEMENT, INC.,
and GEMSTAR CONSTRUCTION CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 243, 244, 245, 262, 263, 264, 265, 266, 267, 274, 275, 278, 280, 282, 285, 286, 289, 290

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 242, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 268, 269, 270, 271, 272, 273, 276, 277, 279, 281, 283, 287, 288, 291, 292, 293

were read on this motion for JUDGMENT - SUMMARY.

Elefterakis, Elefterakis & Panek, New York, NY (Eileen Kaplan of counsel), for plaintiff.
Congdon, Flaherty, O'Callaghan, Travis & Fishlinger, Uniondale, NY (Laura A. Endrizzi of counsel), for defendants 111 John Street Realty Corp. and Braun Management, Inc.
McManus Ateshoglou Aiello & Apostolakos PLLC, New York, NY (Peter Naber of counsel), for defendant Gemstar Construction Corp.

Gerald Lebovits, J.:

Plaintiff in this personal-injury action, Hassene Ghodbane, was a 7-Eleven employee who fell down an interior staircase within premises leased by 7-Eleven from defendant 111 John Realty Corp. and managed by defendant Braun Management, Inc. After 7-Eleven leased the premises from 111 John Realty, it hired defendant Gemstar Construction Corp. to do renovations.

Plaintiff contends that negligence by these three defendants caused his fall and ensuing injuries. In motion sequence 008, Gemstar moves for summary judgment dismissing both plaintiff's claims against it and 111 John Realty and Braun's cross-claims against it for common-law indemnification. In motion sequence 009, 111 John Realty and Braun move for summary

judgment dismissing plaintiff's claims against them; and plaintiff cross-moves to strike 111 John Realty and Braun's pleadings for failure to turn over material information in discovery.

Gemstar's motion for summary judgment is denied in its entirety. 111 John Realty and Braun's motion for summary judgment is granted; plaintiff's cross-motion to strike is denied.¹

DISCUSSION

To obtain summary judgment, the movant must establish a cause of action or defense sufficient to "warrant the court as a matter of law in directing judgment" in the movant's favor. CPLR 3212. The movant "must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986].) Once the *prima facie* showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Id.*)

I. Gemstar's Motion for Summary Judgment (Motion Sequence 008)

A. The Branch of Gemstar's Motion Seeking Dismissal of Plaintiff's Claims

Plaintiff has claimed that he fell while going down the interior staircase at issue because an unexpected wobble in one of the steps caused him to lose his balance. He has contended that Gemstar, in the course of renovating the premises for 7-Eleven, created or exacerbated the dangerous, wobbly condition of the stairs, rendering it liable to him in negligence. In moving for summary judgment, Gemstar contends that there is no evidence that it made any alterations to the area of the staircase at issue, and that in any event it completed its construction work a year before plaintiff's fall. This court finds Gemstar's arguments unpersuasive.

Plaintiff has submitted deposition testimony of a former 7-Eleven store manager, Anastasia Pinteris, indicating that (i) a metal covering was placed on the original cement staircase during the renovation work, and that she was told by a Gemstar representative that someone would be covering the original staircase during the renovations; (ii) the metal covering did not fit perfectly over the original stairs; (iii) as a result, the covered stairs were shaky; and (iv) she called Gemstar's construction manager several times to complain about the condition of the covered staircase. And plaintiff himself testified at his deposition that he found the stairs unstable and scary. This evidence suffices to raise a factual dispute about whether Gemstar's renovation work on the leased premises negligently created a dangerous condition that proximately caused plaintiff's fall and injuries.

¹ This court previously announced and explained these dispositions in a decision delivered on the record following argument, as incorporated by reference in a short-form order. (*See* NYSCEF No. 282.) Unfortunately, a computer malfunction caused the loss of the argument transcript, leaving the parties without a complete record of the court's decision and reasoning. Upon being informed of this problem, this court notified the parties that it would issue this written decision in place of the decision delivered on the record.

Gemstar argues that deposition testimony by a handyman for 111 John Realty and Braun demonstrated that the stairs had not been covered during the renovations carried out by Gemstar; but that testimony is more uncertain and equivocal than Gemstar would have it. And although Gemstar emphasizes that the renovation drawings and specifications contained no indication that Gemstar performed work on the top of the interior staircase (*i.e.*, where plaintiff fell), Gemstar does not respond to or refute the point that the drawings and specifications also did not reflect work that Gemstar undisputedly *did* perform on the bottom of the staircase—suggesting that the absence of top-of-the-stairs work from the renovation drawings should not receive dispositive weight.

Gemstar also argues that it cannot have been responsible for creating a dangerous condition on the stairs because plaintiff did not fall until approximately a year after Gemstar's renovation work—and emphasizes plaintiff's admission that the motion of the stairs that caused him to fall was not one that he had felt before. These facts might well raise a genuine dispute about whether it was the conduct of Gemstar, rather than some other party, that caused plaintiff's injuries. The evidence relied on by Gemstar do not, however *dispel* all questions of fact so as to entitle Gemstar to summary judgment—particularly given plaintiff's testimony that he had found the interior staircase frighteningly unstable *before* his fall.

Gemstar's motion for summary judgment dismissing plaintiff's claims against it is denied.

B. The Branch of Gemstar's Motion Seeking Dismissal of 111 John Realty/Braun's Cross-Claims

111 John Realty and Braun have brought cross-claims against Gemstar, seeking common-law indemnification. Gemstar moves for summary judgment to dismiss these cross-claims based on two related arguments: (i) Gemstar did not act negligently, so it does not owe indemnity to the cross-claimants; and (ii) even if Gemstar were found to have acted negligently, 111 John Realty and Braun would necessarily themselves be negligent as well, barring them from recovering common-law indemnity from Gemstar. Gemstar's first argument fails for the reasons discussed in Section I.A, *supra*. This court also is not persuaded by Gemstar's second argument, for the reasons discussed below in Point II, *infra*.

Gemstar's motion for summary judgment dismissing 111 John Realty and Braun's cross-claims against it is denied.

II. 111 John Realty and Braun's Motion for Summary Judgment (Motion Sequence 009)

111 John Realty and Braun filed a joint motion for summary judgment dismissing plaintiff's claims against them. 111 John Realty/Braun's argument is straight-forward: it lacked any tort duty to plaintiff as a matter of law because it is an out-of-possession landlord under the lease without a contractual obligation to maintain the staircase where plaintiff fell.

Under the lease, 111 John Realty/Braun is undisputedly out-of-possession. Its right (and responsibility) to re-enter the premises is limited to (i) maintaining the structural soundness of the foundation/slab and the building itself; and (ii) accessing the electrical, plumbing, and other mechanical systems in the building and keeping them in good repair. Ensuring that a metal covering placed over the treads of an interior staircase fits properly (and thus is secure rather than shaky) does not come within those limited responsibilities.

Plaintiff's principal argument opposing summary judgment is based on issue preclusion. Plaintiff asserts that a recent decision of the Appellate Division, First Department "presents a rare and shiny jewel of collateral estoppel the likes of which are scarcely seen" that bars 111 John Realty/Braun from contesting their duty in tort to maintain the staircase in a safe condition. (NYSCEF No. 247 at ¶ 8 [emphasis omitted], citing *Mollette v 111 John Realty Corp.*, 194 AD3d 614, 615 [1st Dept 2021].) This court disagrees.

Mollette, also a suit against 111 John Realty, arose from a different fall on the same staircase at issue here. In that case, the First Department affirmed the holding of Supreme Court (Bannon, J.) that an issue of fact existed about whether defendant was responsible for the condition that caused plaintiff's accident. (See *Mollette v 111 John Realty Corp.*, 2020 NY Slip Op 31881[U], at *3 [Sup Ct, NY County June 1, 2020], *affd* 194 AD3d at 615. The material facts in *Mollette*, though, were subtly—but crucially—different from those presented here. There, the plaintiff (a fire inspector) testified that he had slipped on the stairs because in the course of his inspection, he had gotten soles of his shoes wet in a puddle in the building's mechanical room that he testified was "coming from underneath the machinery." (*Id.* at *1.) And because 111 John Realty's lease with 7-Eleven "provided that it had the right to enter the premises to access the electrical, plumbing, and other mechanical and electrical systems located there and to keep them in good repair," the presence of a dangerous condition related to the premises' mechanical systems potentially implicated a duty owed by 111 John Realty in tort. (See 193 AD3d at 615.)

Mollette, in other words, did *not* concern whether 111 John Realty owed a duty in tort to maintain the interior staircase in a safe condition, but whether that tort duty existed with respect to the building's *mechanical room*. The *Mollette* plaintiff did not allege that he fell by reason of any dangerous condition on the staircase itself. Rather, his claim was that the staircase merely furnished the occasion for a slip-and-fall due to wet shoes stemming from the mechanical-room puddle.² Here, on the other hand, plaintiff's claim is based on the condition and stability of the staircase itself—an issue that is not only outside the scope of *Mollette*, but also outside the scope of 111 John Realty/Braun's limited remaining responsibilities under the lease to 7-Eleven. Issue preclusion does not, therefore, bar movants' summary-judgment argument about the absence of a tort duty to plaintiff under the circumstances of *this* case.

This court also is not persuaded by plaintiff's additional argument that because (i) 111 John Realty/Braun had the right to reenter the premises to keep the building's mechanical/electrical systems in good repair, and (ii) walking down the staircase at issue was the

² In describing the circumstances of the accident, Supreme Court's decision in *Mollette* characterizes the plaintiff as having fallen on a "concrete"—not metal—staircase in July 2013. (2020 NY Slip Op 31881[U], at *1.)

only way to access those mechanical/electrical systems, 111 John Realty/Braun retained control over that staircase, and thus owed a duty in tort to maintain the staircase in a safe condition. At most, 111 John Realty/Braun had the right in this scenario to access the staircase to discharge its obligations under the lease; but that is quite different from a contractual obligation to maintain or repair the staircase. (*See Melendez v American Airlines, Inc.*, 290 AD2d 241, 242 [1st Dept 2002] [distinguishing between a landlord's contractual right to enter leased premises and the landlord's obligation to maintain those premises].) And plaintiff does not identify any other circumstances that might transform movant's right to use the stairs into an obligation to maintain the stairs in a safe condition.

111 John Realty/Braun's motion for summary judgment dismissing plaintiff's claims against it for lack of a tort duty is granted.³

III. Plaintiff's Cross-Motion to Strike 111 John Realty/Braun's Pleadings (Motion Sequence 009)

In addition to relying on the First Department's decision in *Mollette* to oppose 111 John Realty/Braun's summary-judgment motion, plaintiff also cross-moves to strike or preclude under CPLR 3126 based on their asserted failure to disclose the underlying slip-and-fall in that case in response to one of plaintiff's discovery requests. The cross-motion is denied.

Plaintiff was, at the latest, put on notice of the *Mollette* action no later than November 2018, when the case was discussed during a deposition at which plaintiff's counsel was present. (*See* NYSCEF No. 260 at Tr. 89-90, 154.) And plaintiff did not file its note of issue here until March 2021, nearly two-and-a-half years later. Given that timing, this court is hard-pressed to see how plaintiff could have been meaningfully prejudiced by 111 John Realty/Braun's disclosure failure. And plaintiff has not identified any ground for finding prejudice. In these circumstances, the court declines to apply the severe sanction of precluding 111 John Realty/Braun from offering evidence on liability at trial, much less striking defendants' pleadings altogether.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that this court's orders resolving motion sequence 008 and motion sequence 009, entered October 27, 2021, are hereby withdrawn; and it is further

³ The dismissal of plaintiff's claims against 111 John Realty and Braun does not render academic their common-law-indemnification cross-claims against Gemstar. 111 John Realty/Braun still have a live cross-claim against Gemstar for attorney fees incurred in defending against plaintiff's claims. (*See Swan v Pier 1 Imports (U.S.) Inc.*, 173 AD3d 1105, 1106-1107 [2d Dept 2019], citing *Chapel v Mitchell*, 84 NY2d 345, 347-348 [1994]; *see also* NYSCEF No. 32 at 4 [111 John Realty/Braun cross-claim, seeking "the amount of any recovery herein against these answering defendants together with attorneys' fees"].)

ORDERED that the branch of defendant Gemstar’s motion for summary judgment under CPLR 3212 seeking dismissal of plaintiff’s claims against it (mot seq 008) is denied; and it is further

ORDERED that the branch of defendant Gemstar’s motion for summary judgment under CPLR 3212 seeking dismissal of the cross-claims against it of defendants 111 John Realty and Braun (mot seq 008) is denied; and it is further

ORDERED that 111 John Realty and Braun’s motion for summary judgment under CPLR 3212 seeking dismissal of plaintiff’s claims against them (mot seq 009) is granted; and it is further

ORDERED that plaintiff’s cross-motion under CPLR 3126 to strike or preclude brought against 111 John Realty and Braun (mot seq 009) is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of its entry on all parties.

12/22/2021
DATE


HON. GERALD LEBOVITZ
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE