Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice

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LIZ RODRIGUEZ,
Plaintiff,
-against-
KING KULLEN GRICERY CO., INC., COVE ASSOCIATES, INC. and BOBORW BROS. LLC,
Defendants.

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Index No. 702577/19
Seq. No. 2

The following papers numbered EF25 to EF45 read on this motion by King Kullen Grocery Co., Inc., and Bobrow Bros. LLC (together herein referred to as "defendants"), for summary judgment dismissing the complaint, insofar as asserted against them, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF25-EF35
Answering Affidavits – Exhibits……	EF37-EF44
Reply Affidavits……	EF45

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on July 30, 2018, when she fell down the stairs while working for her employer, King Kullen Grocery Co., Inc. ("King Kullen"). It is alleged that plaintiff was going down the stairs to the basement within the King Kullen Grocery Store at 77 Forest Ave., County of Nassau, State of New York (the "Premises"), when the defective staircase and/or handrail caused her to trip and fall down the stairs.

Bobrow Bros., LLC ("Bobrow"), is the out-of-possession landlord of the premises. King Kullen leases the Premises pursuant to a written agreement dated January 1, 2002 (the "Lease") between Bobrow, as Landlord, and Cove, King Kullen's predecessor-in-interest, as Tenant. By Assignment and Assumption of Ground Lease dated December 3, 2002, Cove assigned its interest in the Lease to King Kullen. The Lease grants King Kullen the right to use and occupy the Demised Premises, including the land and the building erected thereon. King Kullen agreed to "maintain, repair and/or replace, where necessary, the Shopping Center, including but not limited to, all structural and non-structural repairs to the exterior or load bearing walls, footing, columns and foundation of the Demised Premises, and, in addition, the repair, maintenance and replacement of the Common areas of the Shopping Center, including all parking areas, sidewalks, curbs, sewage and utility facilities." King Kullen further agreed to, at its sole cost and expense, comply with all of the requirements of all county municipal, state, federal and other applicable governmental authorities ... pertaining to the said premises."

Notably, on December 3, 2019, a default judgment was entered against defendant Cove Associates, Inc.

The Complaint alleges that Defendants were negligent in the manner in which they "owned, operated, maintained, managed, leased and controlled" the Premises.

King Kullen and Bobrow move for summary judgment in their favor dismissing the complaint, insofar as asserted against them. In moving for summary judgment in its favor, King Kullen asserts that Workers Compensation precludes a lawsuit by plaintiff against her employer, King Kullen. Bobrow alleges that it was an out-of-possession landlord with no duty to make the repairs at issue. Plaintiff opposes the motion.

Discussion

King Kullen

"Workers' compensation benefits are [t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment" (*Weiner v City of New York,* 19 NY3d 852, 854 [2012] [internal quotation marks omitted]). "This precludes suits against an employer for injuries in the course of employment" (*id.* at 854; *Cunningham v State of New York,* 60 NY2d 248, 251 [1983]). "[W]henever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving noncoverage falls on the plaintiff" (*Murray v City of New York,* 43 NY2d 400, 407 [1977]; *see Villatoro v Grand Blvd. Realty, Inc.,* 18 AD3d 647, 647 [2d Dept 2005]; *Rainey v Jefferson Vil. Condo No. 11 Assoc.,* 203 AD2d 544, 546 [2d Dept 1994]).

Here, in support of their motion for summary judgment, defendants presented evidence that the plaintiff, an employee of King Kullen, was injured in the course of her employment, and that King Kullen maintained a Workers' Compensation policy on the date of the accident. Accordingly, the defendants established prima facie that the exclusivity provisions of Workers' Compensation Law § 11 bars plaintiff from seeking a recovery in tort against King Kullen (*see Vitello v Amboy Bus Co.,* 83 AD3d 932, 933–934 [2d Dept 2011]; *Beaucejour v General Linen Supply & Laundry Co., Inc.,* 39 AD3d 444, 444–445 [2d Dept 2007]; *Villatoro v Grand Blvd. Realty, Inc.,* 18 AD3d at 648). In opposition, plaintiff failed to raise a triable issue of fact as to the exclusivity provisions of the Workers' Compensation Law (*see DiTommaso v Marino,* 6 AD3d 572, 572 [2d Dept 2004]).

Moreover, plaintiff's common-law negligence claim against King Kullen is also dismissed. The Courts have long refused to condone the circumvention of the workers' compensation scheme by means of a theory that would allow an employer to be sued in its capacity as property owner (*De Los Santos v Butkovich,* 126 AD3d 845, 846 [2d Dept 2015]; *see Billy v Consol. Mach. Tool Corp.,* 51 NY2d 152, 160 [1980]). "[A]n employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment" (*id.*). Here, plaintiff's injuries arose from and are connected with her employment with King Kullen.

Accordingly, the court grants that branch of the defendants' motion which is for summary judgment dismissing the complaint insofar as asserted against the defendant King Kullen (*see generally Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]).

Bobrow

Defendant Bobrow, through its submission of the lease for the subject premises, showed that it was an out-of-possession landlord with no duty to maintain the area where the accident occurred or remedy the defect alleged (*see Kopetic v Port Auth. of New York and New Jersey*, 176 AD3d 530, 531 [1st Dept 2019]; *Kittay v Moskowitz*, 95 AD3d 451 [1st Dept. 2012], *lv denied* 20 NY3d 859 [2013]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept. 2010]). A landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and

control to a tenant unless the landlord is either contractually obligated to make repairs 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 [1996], *lv denied* 88 NY2d 814 [1996]; *see McDonald v Riverbay Corp*., 308 AD2d 345 [1st Dept 2003]; *Quinones v 27 Third City King Rest*., 198 AD2d 23 [1st Dept 1993]).

Here, the lease between Bobrow and King Kullen imposes no obligation on the former to make repairs or maintain the demised premises. The Plaintiff's Bill of Particulars alleges that the accident occurred as the result of "dangerous, defective, hazardous, depressed, worn and dilapidated" staircase at the King Kullen store where she worked, a staircase that allegedly failed to conform to New York State regulations. Pursuant to the Lease, however, Bobrow divested itself of possession and control of the Premises on January 1, 2002, sixteen years prior to the accident. During that sixteen-year period of time, King Kullen (or its predecessor in interest) was solely and exclusively responsible for the repair and maintenance of the staircase, including all structural and non-structural repairs thereto. King Kullen was also solely and exclusively responsible for complying with the requirements of all county municipal, state, federal and other applicable governmental authorities pertaining to the staircase.

Plaintiff argues that Bobrow should be denied summary judgment because of purported ambiguities in King Kullen's lease for the Shopping Center (the "Lease") and/or because the Lease purportedly grants Bobrow the right to re-enter the Premises and repair the alleged defects. Neither argument is persuasive as both are inconsistent with the plain language of the lease agreement. Here there is no uncertainty or ambiguity in the Lease language regarding who is responsible for maintenance and repair of the staircase and railing allegedly involved in the accident. The Lease clearly states that Bobrow leased to King Kullen the entire Shopping Center on a "triple net lease" basis. Based thereon, King Kullen assumed sole and exclusive responsibility for the maintenance and repair of the entire Shopping Center, including the land, Common Areas and the building that included King Kullen's Demised Premises and the leased spaces occupied by other tenants. The broad scope of King Kullen's responsibility included both structural and non-structural repairs and even required King Kullen to rebuild the Shopping Center in the event of its destruction. Given the absence of any limitations on the scope of King Kullen's obligation to maintain and repair the Shopping Center, the fact that the Lease does not make specific mention of the staircase or railing involved in the accident is patently insufficient to create ambiguity.

Similarly, Plaintiff's assertion that Bobrow can be charged with a non-delegable duty to maintain the staircase and railing because it retained a right to re-enter the Shopping Center is incorrect. The Lease language cited by Plaintiff is contained in the section of the Lease entitled Parking and Common Use Areas and Facilities and, in context, clearly grants Landlord right to address any failure by King Kullen to maintain the Common Areas in "good condition and in compliance with applicable law." However, this accident did not occur in a Common Area of the Shopping Center and, as such, Plaintiff cannot rely on Bobrow's rights with respect thereto to claim a duty to repair conditions on the Demised Premises. The accident occurred on an interior staircase inside King Kullen's Demised Premises and Plaintiff cites no Lease language that allows Bobrow to re-enter the Demised Premises to make repairs therein.

Plaintiff's reliance on Article 23 of the Lease is similarly misplaced. That section of the Lease provides for Landlord's rights in the event of a default by King Kullen. This includes Bobrow's right to terminate the lease and dispossess King Kullen through summary proceedings. The Lease does provide Bobrow the right to "alter and repair" the Shopping Center under those circumstances, while retaining the right to recover the costs associated with same from King Kullen, but only where it has first terminated the lease or recovered possession. Here, King Kullen clearly remained in possession and Bobrow enjoyed no general right of re-entry while King Kullen remained sole possession and control of the Shopping Center. Finally, there is no merit to the plaintiff's contention that defendants' motion should be denied as premature. A summary judgment motion is not premature merely because discovery has not been completed (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]; *Northfield Ins. Co. v Golob*, 164 AD3d 682, 683-84 [2d Dept 2018]; *Lamore v Panapoulos*, 121 AD3d 863, 864 [2d Dept 2014]). "A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (*Reynolds v Avon Grove Props.*, 129 AD3d 932, 933 [2d Dept 2015]; *see Haidhaqi v Metropolitan Transp. Auth.*, 153 AD3d 1328, 1329 [2d Dept 2017]). Here, in the opposing papers, plaintiff has given no indication as to what "essential" facts she believes exist that would justify a denial of defendants' motion to dismiss her complaint, that are within the exclusive control of these particular defendants (*see*, CPLR 3212 [f]). Plaintiff may not rely upon mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process (*Drug Guild Distributors v 3-9 Drugs Inc.*, 277 AD2d 197, 198-99 [2d Dept 2000]; *see Weltmann v RWP Group*, 232 AD2d 550 [2d Dept 1996]).

Accordingly, the branch of the motion by defendants to dismiss the complaint, insofar as asserted against Bobrow, is also granted.

Conclusion

The motion for summary judgment in favor of King Kullen and Bobrow, is granted.

DATED: March 30, 2021

ROBERT I. CALORAS, J.S.C.

FILED
3/31/2021
11:37 AM
COUNTY CLERK
QUEENS COUNTY