

<b>Oliver v B-Vest, LLC</b>
2016 NY Slip Op 30444(U)
February 4, 2016
Supreme Court, Bronx County
Docket Number: 301952/2014
Judge: Jr., Kenneth L. Thompson
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This opinion is uncorrected and not selected for official publication.

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Dismissed v. ADFP Mgt  
and ADF PIZZA I, LLC

STD-denied as to  
B-Vest LLC

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 X

DARNELL OLIVER,

Plaintiff,

-against-

B-VEST, LLC, ADFP MANAGEMENT, INC., and ADF  
PIZZA I, LLC,

Defendants X

B-VEST, LC,

Third-Party Plaintiff,

-against-

MIGUEL MARTINEZ and MIGUEL GARDENING  
CORP.,

Third-Party Defendants.

X

The following papers numbered 1 to 10 read on this motion for summary judgment

No	On Calendar of December 22, 2015	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		1, 2, 6, 7
Answering Affidavit and Exhibits-----		3, 8, 9
Replying Affidavit and Exhibits-----		4, 5, 10
Affidavit-----		
Pleadings -- Exhibit-----		
Memorandum of Law-----		
Stipulation -- Referee's Report --Minutes-----		
Filed papers-----		

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, B-Vest, LLC, (B-Vest), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against B-Vest, for judgment on its cross-claim for indemnification as against co-defendants, ADFP Management, Inc. and ADF Pizza I, LLC. (Collectively, Pizza). In the alternative, B-Vest moves pursuant to CPLR 3126 to preclude Pizza from offering any evidence concerning sums paid to B-Vest stemming from B-Vest's November 15, 2014 supplemental discovery demands.

Pizza moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims or counterclaims as against Pizza, and moves for summary judgment

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DECISION AND ORDER

Present:

HON. KENNETH L. THOMPSON, JR.

Action No. 2 Index # 83869/2015

holding B-Vest owes Pizza, indemnification.

The two aforementioned motions are hereby consolidated for purposes of decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff on February 20, 2014 in a slip and fall on ice on a sidewalk on Westchester Avenue. Plaintiff slipped on ice in the early morning hours, while on the way to work. B-Vest argues that there is testimony that plaintiff fell in the late evening hours, but that testimony does not identify plaintiff as the one who fell and is therefore irrelevant to this motion. Plaintiff fell on a sidewalk that is on the side of the Pizza Hut business owned by Pizza. Pizza leased the premises from co-defendant, B-Vest.

The lease provides that the tenant, Pizza shall keep the sidewalks free of snow and ice. However, in a letter dated November 14, 2013, B-Vest admitted that it had been providing free maintenance to Pizza and three other adjacent businesses and that effective December 1, 2013, Pizza's share of the maintenance was assessed at \$375. The letter explicitly provides that snow removal services will be provided. B-vest admitted in the deposition of David Bang, that it did snow removal and salting at the premises. (Transcript, p. 22). Pizza provided an affidavit of its having paid the additional \$375 rent beginning December 1, 2013 and provided supporting documentary evidence.

B-Vest argues that it is an out of possession landlord and cannot be held liable for plaintiff's injuries. However:

A landlord that has transferred possession and control over property to a tenant is generally not liable for accidents caused by a subsequently arising dangerous condition (*see, Johnson v Urena Serv. Ctr.*, 227 AD2d 325, *lv denied* 88 NY2d 814). This rule does not apply where the landlord, either contractually or **through a course of conduct**, has become obligated to maintain or repair the property or a portion of the property which contains the defective condition (*see, Johnson, supra; Cherubini v Testa*, 130 AD2d 380, 382). A landlord who has the right but not the obligation to enter the premises and make needed repairs at

the tenant's expense may be liable if the dangerous condition constitutes a significant structural or design defect that is contrary to a specific safety provision (*see, Johnson, supra*, at 326, citing *Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24).

*Melendez v. Am. Airlines, Inc.*, 290 A.D.2d 241, 242 [1<sup>st</sup> Dept 2002]). (Emphasis added). *See also Davison v. Wiggand*, 259 A.D.2d 799, 800-01 [3<sup>rd</sup> Dept 1999]).

In response to *Melendez*, B-Vest argues that the exception to rule of no liability for out of possession landlords resulting from a course of conduct must affect a significant structural or design defect and not a transient condition such as an iced over sidewalk. B-Vest misconstrues *Melendez* by picking and choosing words from two different sentences. The second and third sentences of the above cited language are separate exceptions to the general rule.

Accordingly defendant, Pizza's motion is granted to the extent that the complaint and all cross-claims and counterclaims are dismissed against it.

With respect to that branch of B-Vest's motion that seeks to dismiss the complaint, no averments were submitted of someone with "personal knowledge of when defendants' employees last inspected the sidewalk or of the sidewalk's appearance before the accident. (*De La Cruz v Lettera Sign & Elec. Co.*, 77 A.D.3d 566 [1<sup>st</sup> Dept 2010]). As a result, B-Vest has failed to establish its entitlement to summary judgment as a matter of law.

With respect to any claims for indemnification, there is no evidence of Pizza's negligence, nor may B-Vest be indemnified for its own failure to perform a duty that it assumed in performing snow removal services, first on an unpaid basis, and at the time of plaintiff's fall, on a paid basis.

That branch of B-Vest's motion that seeks a preclusion order pursuant to CPLR 3126, the sought after documents were produced in Pizza's motion papers and this the application is

denied. Pizza produced the documents prior to any preclusion order.

CONCLUSION

The motion of B-Vest is denied. The motion of ADFP Management, Inc. and ADF Pizza I, LLC, is granted to the extent that the complaint and all cross-claims and counterclaims are dismissed as against it.

The foregoing shall constitute the decision and order of the Court.

Dated: FEB 04 2016

  
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KENNETH L. THOMPSON JR. J.S.C.