

De La Cruz v New York Palace Hotel

2011 NY Slip Op 31640(U)

June 16, 2011

Supreme Court, New York County

Docket Number: 103034/10

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 103034/2010

DELACRUZ, FATIMA

vs
N.Y. PALACE HOTEL

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 103034/10
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2,3,4</u>

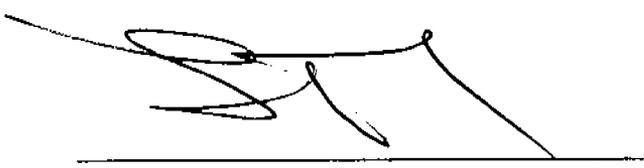
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 20 2011
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/16/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

FATIMA DE LA CRUZ,

Plaintiff,

Index No.
601197/10

- against -

Decision and
Order

NEW YORK PALACE HOTEL, DORCHESTER
SERVICES, INC., ALLSTATE OVERHEAD
GARAGE DOORS, INC., ACME ROLLING STEEL
DOOR, CORP. ARCHDIOCESE OF NEW YORK,
MICHAEL SKURNIK WINES, INC., and FOND DU
LAC COLD STORAGE LLC.,

Defendants.

Mot. Seq. 001

-----X

AMADEO HOTELS, LTD d/b/a NEW YORK PALACE
HOTEL,

Third-Party Plaintiff,

-against-

MICHAEL SKURNIK WINE, INC.

Third-Party Defendant.

-----X

ACME ROLLING STEEL DOOR CORP.,

Defendant/Second
Third-Party Plaintiff,

-against-

MICHAEL SKURNIK WINES, INC.

Third-Party Defendant/
Second Third-Party
Defendant.

-----X
AMADEO HOTELS, LTD., d/b/a NEW YORK PALACE
HOTEL,

Third Third-Party Plaintiff,

-against-

FOND LAC COLD STORAGE, LLC,

Third Third-Party Defendant.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she was struck in the head by the door of a freight elevator at the New York Palace Hotel, located at 455 Madison Avenue in the County and State of New York on November 6, 2007. Defendants Amadeo Hotels, LTD d/b/a New York Palace Hotel (“Hotel”) and Acme Rolling Steel Door Corp. (“Acme”) brought a third-party action against Michael Skurnik Wines, Inc. (“Skurnik”). Hotel also brought a third-party action against Fond Du Lac Storage, LLC (“Fond Du”).

Skurnik now moves to dismiss the complaint, and any cross claims or third party actions against it, pursuant to CPLR 3211(a)(2) and 3211(a)(7). Plaintiff, defendant Allstate Overhead Doors (“Allstate”), and Hotel oppose the motion.

Skurnik is a wine distribution company which has its principal place of business in Syosset, New York. Fond Du operates a storage and warehouse facility in New Jersey. Skurnik contracted with Fond Du on January 31, 2007 to “ship store, and process orders for the wines and other products [Skurnik] imports and/or distributes . . .”

On November 6, 2007, Fond Du made a delivery on behalf of Skurnik to the Palace Hotel. Plaintiff alleges that, “the person dispatched by Defendant, FOND DU

LAC COLD STORAGE LLC, entered the freight elevator of the . . . HOTEL and pressed the 'close door' button of the freight elevator, closing the door on plaintiff's head."

Skurnik, in support of its motion, submits: the pleadings in the main action and in the various third party actions; the affidavit of Jim Leskody, CEO of Skurnik; and the contract between Skurnik and Fond Du. Skurnik asserts that, as it had no presence at the Hotel on the date of the accident, the complaint fails to state a cause of action against it. Because Fond Du was an independent contractor, Skurnik argues that it cannot be held liable, as it did not control Fond Du's employee.

The opposing parties, who mistakenly refer to Skurnik's motion as one for summary judgment, argue that the motion should be denied as premature because there have been no depositions held yet.

Initially, Skurnik is clearly seeking relief pursuant CPLR 3211, not CPLR 3212. On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

It is undisputed that Fond Du's delivery person was not employed by Skurnik. Thus, in order to establish a prima facie case of vicarious liability for the actions of independent contractor, "there must be more than simply a connection between the parties." (*Escudero v. Long Beach Medical Center*, 1 Misc.3d 902(A)[Sup. Ct. NY Cnty. 2003]). Indeed, the most crucial factor in determining whether or not an entity can be held vicariously liable for the acts of its employees, is to what extent a principal controls the "method and means by which work is to be performed." (*Anikushina v. Moodie*, 58 AD3d 501[1st Dept. 2001]).

Plaintiff merely alleges, in her Second Amended Complaint, that Fond Du entered into an agreement with Skurnik to sell, distribute, and/or store Skurnik's wines, and that Skurnik "requested a delivery to be made to the . . . HOTEL on November 6, 2007." Thus, even if plaintiff's allegations are taken as true, as they must be on a motion to dismiss, the complaint fails to allege facts that would make Skurnik vicariously liable for the negligence of Fond Du's employee.

Wherefore it is hereby

ORDERED that the motion is granted; and it is further

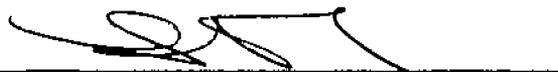
ORDERED that the complaint is hereby severed and dismissed as against defendant Michael Skurnik Wines, Inc.; and it is further

ORDERED that all cross-claims and third party actions are dismissed as against defendant Michael Skurnik Wines, Inc.; and it is further

ORDERED that the remainder of the action continues.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 16, 2011


Eileen A. Rakower, J.S.C.

FILED
JUN 20 2011
COUNTY CLERK'S OFFICE
NEW YORK