

Medina v 3500 48th St. Owner, LLC

2007 NY Slip Op 31933(U)

June 22, 2007

Supreme Court, New York County

Docket Number: 0113187/2004

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

JILL N. MEDINA

INDEX NO. 113187/04

MOTION DATE 4-11-07

MOTION SEQ. NO. 006

MOTION CAL. NO. 117

- v -

3500 48th STREET OWNER, LLC, and
JOVANA MOUKENGESCHAIÉ

FILED

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NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion by defendant for summary judgment on the issue of liability and cross-motion by the plaintiff to amend the complaint to add an additional defendant.

- Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
- Notice of Cross-Motion – Affidavits – Exhibits _____
- Answering Affidavits – Exhibits (Memo) _____
- Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

- 1
- 2
- 3
- 4

Cross-Motion: Yes No

On November 9, 2003, at approximately 3:30 p.m., plaintiff Jill Medina parked her vehicle in the parking lot of a shopping center owned by defendant 3500 48th Street Owner, LLC, and was walking toward a Blimpie's restaurant when she was struck by a vehicle operated by defendant Jovana Moukengeschaie. The plaintiff, who suffered an open fracture of the tibia, commenced the instant action alleging that defendant Moukengeschaie negligently operated and controlled her vehicle and that defendant 3500 48th Street failed to properly design and maintain the parking lot. Specifically, she alleges that 3500 48th Street failed to provide a safe pedestrian route between the parking lot and Blimpie's, failed to paint proper parking lines, failed to repair and maintain speed bumps and failed to provide stop signs or other signals to guide drivers and pedestrians.

Defendant 3500 48th Street now moves for summary judgment on the issue of liability, dismissing all claims against it. See CPLR 3212. Plaintiff cross-moves for leave to amend the complaint to add Phillips International Holding Corp., managing agent of the parking lot, as a defendant. See CPLR 3025(b). Defendant Moukengeschaie opposes the motion of defendant 3500 48th Street and takes no position on the plaintiff's cross-motion. Defendant 3500 48th Street opposes the plaintiff's cross-motion.

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). In support of its motion, defendant 3500 48th Street proffers the pleadings, a police report and the plaintiff's deposition testimony, and argues that defendant Moukengeschaie's negligence in striking the plaintiff with her vehicle is the sole proximate cause of the plaintiff's injuries. In so arguing, defendant 3500 48th Street relies upon a statement allegedly made by Moukengeschaie to the police that while making a left turn she was blinded by the sun glare. This statement is contained in the report prepared by an officer who responded to the scene but did not witness the accident himself. However, this statement constitutes hearsay and, thus, is not proof in admissible form.

Police reports may be admissible as business records (CPLR 4518) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d 392 (1st Dept. 2003), Yeargans v Yeargans, 24 AD2d 280, 282; see also Mooney v Osowiecky, 235 AD2d 603, 604). Where, as here, the information contained in the report comes from witnesses not engaged in the police business in the course of which the report was made, or from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., supra; Yeargans v Yeargans, supra; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Connors v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). A driver has no duty to report the circumstances or the causes of an automobile accident. See Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); cf. Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]. Furthermore, the First Department has made clear that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980).

Nor does the plaintiff's deposition testimony establish that Moukengeschaie was solely liable for the accident. In that regard, the plaintiff testified only that, while she was lying on the ground after being struck, Moukengeschaie ran to her aid and told her that she did not see her. Like the police report, this testimony constitutes hearsay, and the moving defendant fails to establish its admissibility under any exception to the hearsay rule. The court notes that, by an order of this court dated December 11, 2006, (Tingling, J.) defendant Moukengeschaie has been precluded from testifying at trial due to her repeated failure to appear for a

deposition. However, summary judgment based on an order of preclusion is not automatic in the First Department... rather, the Court must analyze the effect of the preclusion order in each particular case." Mendez v Queens Plumbing Supply, Inc., 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, defendant Moukengeschaie's answer was not stricken and she was not precluded from establishing the affirmative defense of comparative negligence through the cross-examination of the witnesses at trial. Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1st Dept. 2004).

As to the claims asserted against it, defendant 3500 48th Street argues that it had no duty to the plaintiff, a pedestrian within its parking lot, and that, in any event, she failed to allege any viable theory of premises liability. However, it is well settled that a landowner is under a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to a third party, the potential that such injury would be of a serious nature and the burden of avoiding such risk. See Basso v Miller, 40 NY2d 233 (1976); Hayes v Riverbed Housing Company Inc., – AD3d – (1st Dept. May 29, 2007); Alexander v New York City Transit, 34 AD3d 312 (1st Dept. 2006); Karamarios v Bernstein Management Corp., 204 AD2d 139 (1st Dept. 1994). "Generally, the question of whether [a landowner] breached this duty is a question of fact." Gross v New York City Transit Authority, 256 AD2d 128 (1st Dept. 1998); see Gordon v Muchnik, 180 AD2d 715 (2nd Dept. 1992). That is, proximate cause and foreseeability are generally questions best resolved by the trier of fact. See Derdiarian v Felix Contr. Corp., 51 NY2d 308, *rearg denied* 52 NY2d 829 (1980); Selja v American Home Products, 307 AD2d 840 (1st Dept. 2003); Levitt v Lenox Hill Hospital, 184 AD2d 427 (1st Dept. 1992); Forrester v Port Authority, 139 AD2d 449 (1st Dept. 1988). The proof submitted by that defendant on this motion fails to demonstrate the absence of triable issues of fact and entitlement to judgment as a matter of law on these issues.

Since defendant 3500 48th Street failed to meet its burden in the first instance, the burden never shifted to the plaintiff to come forward with proof in admissible form to raise a triable issue of fact. See Alvaraz v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*. Thus, while the trial evidence may ultimately establish the collision as an intervening act which broke the "causal nexus" (Derdiarian v Felix Contr. Corp., *supra* at 315) or otherwise demonstrate the moving defendant's lack of liability, the instant motion for summary judgment must be denied.

In her cross-motion, the plaintiff seeks to amend the complaint pursuant to CPLR 3025(b) to add Phillips International Holding Corp. as a defendant under what appears to be the same or similar theories of negligence alleged against 3500 48th Street. However, the plaintiff fails to provide any proposed amended complaint with her moving papers. While leave to amend "should be freely granted upon such terms as may be just," (CPLR 3025[b]), it is also well established that before

granting such leave, the courts "should pass upon the merit of the proposed pleading so as to promote judicial economy and avoid wasteful motion practice." Washington Ave Assoc.v Euclid Equip., 229 AD2d 486 487-489 (2nd Dept. 1996);see NM IQ LLC v Ominsky Corp., 31 AD3d 315 (1st Dept. 2006);Hynes v Start Elveator, 2 AD3d 178 (1st Dept. 2003). Without reviewing the proposed amended complaint, this court is unable to accurately pass upon its merits. Therefore, the plaintiff's cross-motion is denied without prejudice to renew upon the proper papers.

For these reasons and upon the foregoing papers, it is

ORDERED that the motion of defendant 3500 48th Street Owner LLC for summary judgment on the issue of liability is denied; and it is further,

ORDERED that the plaintiff's motion cross-motion for leave to amend the complaint pursuant to CPLR 3025(b) is denied without prejudice for the plaintiff to renew upon the proper papers within 30 days of entry of this order.

This constitutes the Decision and Order of the Court.

Dated: June 22, 2007

Deborah Kaplan
Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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