

Fisher v JRMR Realty Corp.

2007 NY Slip Op 32918(U)

September 12, 2007

Supreme Court, Nassau County

Docket Number: 4380-04/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
LINDA FISHER,

TRIAL TERM PART: 50

Plaintiff,

INDEX NO.:14380/04

-against-

**MOTION DATE:9-7-07
SUBMIT DATE:9-7-07
SEQ. NUMBER - 002**

JRMR REALTY CORP., and THE LEMON TREE

Defendant.

-----x
JRMR REALTY CORP.,

Third-Party Plaintiff,

Third-Party Index No.

-against-

014386/04

D.L.I. CONTRACTING, INC.,

Third-Party Defendant.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 8-9-07..... 1**
- Affirmation in Opposition, dated 8-24-07.....2**
- Reply Affirmation, dated 9-4-07.....3**

This motion for summary judgment by the third-party defendant D.L.I. Contracting, Inc. ("DLI") pursuant to CPLR 3212 dismissing the third-party complaint is granted and the third-party action against it is dismissed.

Plaintiff Linda Fisher alleges that on May 24, 2002, while walking to the Long Island Rail Road station in Merrick, New York along a sidewalk on Merrick Avenue, she fell when she tripped over a raised portion of that sidewalk, causing injury. She sued defendant JRMR Realty Corp. (“JRMR”) as the adjacent premises owner and The Lemon Tree, as tenant, in front of whose store the accident occurred.¹ In her bill of particulars, she alleged that the cause was “an elevated portion of pavement-paving stones.”

JRMR subsequently sued movant DLI in a third-party action, alleging that it was bound to indemnify JRMR under both an agreement to provide insurance, which it breached, and as a matter of the common law, or to contribute to payment of any judgment rendered against it. The factual basis for the third-party action, as stated in JRMR’s bill of particulars, is that DLI installed pavers (paving stones) in a negligent manner. In its bill, at number 13, JRMR states that indemnity is claimed by virtue of the negligence of DLI.² The negligence alleged in the bill of particulars is as follows: “[I]n the improper installation of the sidewalk pavers at issue in this case; in failing to properly level said pavers, in failing to properly remove all tree roots and limbs in the area to avoid a misleveling of the pavers.”

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82

¹ The action against The Lemon Tree has been discontinued.

² No mention of indemnity under, or for breach of, a contract is made, indicating abandonment of such claims.

AD2d 168 (3d Dept. 1981).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

Applying these well-established standards to the record before the Court, it is apparent that the third-party complaint should be dismissed.

By way of deposition testimony of the plaintiff, and the principals of JRMR and DLI,

and bills of particulars, the third-party defendant has made out its *prima facie* case.

The plaintiff testified that she was walking on the sidewalk in front of the Lemon Tree when the accident occurred. The store was to her left, the curb to her right. She was more to the right, the curb side, where a tree was located. She was a few feet from the tree, and closer to the tree than to the store, when she fell over a raised portion of the sidewalk.

The testimony of Domenico Ianucci, sole shareholder of DLI, reveals that DLI installed pavers at the accident site sometime between 1990 and 1993. He did not have records regarding this particular installation, and could not recall the owner's name, but recognized the site from a photograph of the subject sidewalk. He was able to describe an installation process he personally oversaw.

The process led to a finished job in which all pavers were flush together on top of a concrete base, with sand added in between pavers touching each other. It was the custom and practice to remove any tree roots if they were in the way. It also was the custom and practice of DLI to inspect the finished work to see that the area of the work was level, and would have been redone if it were not level. The witness testified that DLI had never been called back to the site to do any other work after the job was completed. Finally, he was shown a photograph of the raised portion of a paving stone near a tree, and testified that based on his experience the raised area was caused by tree roots.

John C. Romero was the witness for JRMR. He is a principal of the corporation that purchased the property from another corporation, Pando Realty, in 1999. Prior to the purchase, Romero was a tenant from 1993, and was familiar with the sidewalk adjacent to the property. He testified that the sidewalk originally was concrete but was changed to

paving stones sometime between 1993 and 1999. The prior owner, Pando Realty, had hired the company that had installed the pavers .

In or about the year 2000, the nearby Long Island Rail Road station was renovated, and as part of that renovation the witness recalled that a company called “Palvac,” as general contractor for the renovation, did some digging near JRMR’s property. This required removal of some of the pavers to perform electrical or plumbing work. The witness testified that although he could not recall precisely where they worked, it appeared that they were working in the area near a tree in front of the Lemon Tree. He told Palvac personnel to make sure that they put the paving stones back correctly the way they found them. After they completed their work the pavers were not as level as he wanted them to be, but they weren’t sticking up.

The foregoing is *prima facie* proof that DLI had installed the pavers in the subject area correctly, that work in the area of the accident was done by another company subsequent to the completion of DLI’s work but prior to the accident, and that the elevation of pavers could be attributed either to the acts of the later contractor or the natural action of tree roots, but not to the acts or omissions of the third-party defendant. The burden thus shifts to the defendant- third-party plaintiff to demonstrate that issues of fact exist with regard to DLI’s responsibility for the happening of the accident. *Zuckerman v. City of New York, supra*.


That burden has not been met in this case. All that is offered is the speculation of counsel for the third-party plaintiff that DLI was negligent in failing to remove tree roots in the area, as claimed in the bill of particulars, but this is unsupported by evidence of any kind. An unsubstantiated claim does not demonstrate the existence of a triable issue of fact. *Fleet*

Credit Corp. v. Harvey Hutter & Co., Inc., supra. The Court finds that the exculpatory evidence advanced by the third-party defendant is thus un rebutted, and under such circumstances its motion should be granted.

This shall constitute the Decision and Order of this Court

ENTER

DATED: September 12, 2007


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
SEP 14 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE