

Huacuz v 3280 Broadway Realty Co. LLC

2007 NY Slip Op 33115(U)

September 25, 2007

Supreme Court, New York County

Docket Number: 0108669/2005

Judge: Eileen A. Rakower

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

PRESENT. Rakower PART 5

Index Number : 108669/2005

HUACUZ, DENISE

vs

3280 BROADWAY REALTY

Sequence Number : 002

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
 OCT 01 2007
 NEW YORK COUNTY CLERK'S OFFICE
 DECIDED IN ACCORDANCE WITH
 ACCOMPANYING DECISION / ORDER

Dated: 9/25/07


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
DENISE HUACUZ,

Plaintiff,

Index No.
108669/05

- against -

Decision and
Order

3280 BROADWAY REALTY COMPANY LLC,

Defendant.

-----X
3280 BROADWAY REALTY COMPANY LLC,

Third-Party Plaintiff,

- against -

THE CITY OF NEW YORK, DEPARTMENT OF
GENERAL SERVICES and THE NEW YORK CITY
POLICE DEPARTMENT,

Third-Party Defendants.

-----X
HON. EILEEN A. RAKOWER

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, a New York City Police Department Sergeant, brings this action for personal injuries allegedly sustained when a box fell striking her on her feet and ankles while she was attempting to retrieve files from the Internal Affairs Bureau ("IAB") records room in the basement of 3280 Broadway New York, New York on August 4, 2003. Plaintiff claims that the incident was caused by an outage and lack of adequate lighting in the room. Defendant/third-party plaintiff and owner of the subject building, 3280 Broadway Realty Company LLC("Realty") moves for

summary judgment on the issue of contractual indemnification as against third-party defendants The City of New York, Department of General Services and the New York City Police Department (“City”). City, which rents and uses the sixth floor and basement area of Realty for the New York City Police Department (“NYPD”) and IAB, opposes the motion.

Realty, in support of its motion, submits the following: (1) the pleadings; (2) the Lease Between the City of New York Department of General Services & Jarvis Doctorow, 3280 Broadway Realty Company (“the Lease”); (3) a copy of the EBT transcript of Anthony Holmes (“Holmes”), an NYPD Lieutenant who works at Realty and acts as a liaison between the NYPD and the building ownership which was taken in an unrelated case involving Realty; (4) an affidavit of Kurt Cordner, superintendent of the subject building; and (5) a so ordered stipulation dated March 13, 2007, signed by all parties.

Realty argues that it is entitled to contractual indemnification from City because plaintiff was injured in a locked and secured room exclusively controlled by City. Furthermore, Realty claims that the Lease requires that City specifically request “relamping” in writing and that City never made such request. The relevant portions of the Lease are as follows:

Article 13-Repairs:

Landlord shall perform interior repairs to the Demised Premises *at the request of Tenant* (emphasis added) after submission to the occupying agency’s lease administration personnel of a cost estimate for any such repair and obtaining approval of Tenant. .

Article 9-Landlord’s Services:

At Tenant’s request, Landlord shall provide the following additional services: *relamping* (emphasis added) . . . Landlord shall obtain a contract for the requested additional services . . .

Article 22- Save Harmless:

Landlord and Tenant shall each indemnify and hold harmless the

other party from and against any and all liability, fines, suits, claims, demands, expenses and actions of any kind or nature arising by reason of injury to person or property occurring on or about the Demised Premises, the Building, or real property . . . *occasioned in whole or in part by its acts or omissions* (emphasis added) . . .

Kurt Corder, in his affidavit, states:

In August 2003, the Internal Affairs Bureau maintained a locked and secured area in the basement. Neither I nor my staff were allowed into this locked and secured area without a police escort. At no time prior to August 4, 2003 did I, my staff or anyone on behalf of the building perform any lighting or relamping work in the basement area leased by NYPD. The lights in the locked and secured basement area maintained by the NYPD use special sodium lights. Relamping or replacing the sodium lights would not have been done by me or my staff. If the NYPD had requested lighting work to be performed in the basement area, I would have had to investigate, and hire or retain an electrician to estimate the work to be done. The request to do this work would then have to be approved in advanced by the NYPD. No such work was ever done prior to plaintiff's August 4, 2003 incident. (Corder Affidavit, Paragraphs 3-6).

City, in opposition, argues that questions of fact remain as to notice of the allegedly defective condition and that summary judgment is premature because discovery remains outstanding. City submits: (1) the Corder affidavit; (2) an affidavit of Lieutenant Anthony Holmes; (3) relevant portions of the lease; and (4) two so-ordered stipulations dated March 13, 2007 and July 17, 2007. City claims that there was a dispute between Jarvis Doctorow, owner of Realty, and NYPD Facilities Management over the cost of repairs which evidences that Realty was on notice that the bulbs needed replacing. Holmes states in his affidavit:

Shortly after August 4, 2003, I met with Jarvis Doctorow to discuss Sgt. Huacuz's accident. At that meeting, Doctorow acknowledged to me that he had been aware for an extended period of time, prior to the date of the accident, that the lighting in the IAB record room was not functioning

properly. During this conversation, Doctorow indicated to me that he had previously been involved in conversations with NYPD Facilities Management concerning replacement of these bulbs, but that there was a disagreement over who was going to pay for them. (Holmes Aff. Paragraph 3).

Additionally, City claims that the lease does not require that requests be in writing. Further, although Cordner's affidavit implies that no relamping work was done he does not state definitely that it was not requested.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

CPLR 3212(f) states:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Summary judgment relief should not be granted where there is any doubt as to existence of triable issue or where issue is even arguable, since it serves to deprive party of his day in court, especially where there are salient facts within knowledge and control of movant which may be revealed through pretrial disclosure proceedings. (*Integrated Logistic Consultants v. Fidata Corporation*, 131 A.D.2d 338[1st. Dept. 1987]). Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212(f)) The opposition must offer more

than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. See Pow v. Black, 182 AD2d 484 (1st Dept. 1992).

Article 9 of the lease makes clear that the Landlord must obtain a contract when relamping is requested. In a so-ordered stipulation dated July 17, 2007, City was directed to produce any "documents as to requests for relamping/lighting/maintenance and repair work in basement area made prior to Aug[ust] 4, 2003." To date, City has not produced any of those documents. However, depositions have not been conducted despite the fact that there is a so-ordered stipulation dated March 13, 2007 scheduling them for May 23, 2007 and June 6, 2007. Holmes's affidavit raises a question of fact as to whether Jarvis Doctorow, Realty's owner, was aware of the lighting issue prior to plaintiff's accident. City is entitled to depose Mr. Doctorow as well as Mr. Corder in order to clarify the issues that City has raised. Thus, Realty's motion is premature.

Wherefore it is hereby

ORDERED that defendant/third-party plaintiff 3280 Broadway Realty Company LLC's motion for summary judgment is denied without prejudice as premature.

This constitutes the decision and order of the court.

DATED: September 25, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE