Brewster v Five Towns Health Care Realty Corp.
2007 NY Slip Op 33402(U)
October 17, 2007
Supreme Court, Queens County
Docket Number: 0005809/2004
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

BESSIE B. BREWSTER, Plaintiff, -against- FIVE TOWNS HEALTH CARE REALTY CORP., HERBERT FELDMAN, LOUIS E. SEDISH EXEMPT MARITAL TURST U/W/D DECEMBER 10, 1985 AS TO A 26.83% UNDIVIDED INTEREST, LOUIS SEDRISH TRUST F/B/O THE ISSUE OF PAUL SEDRISH AS TO A 23% UNDIVIDED INTEREST AND LOUIS B. SEDRISH CREDIT SHELTER TRUST U/W/D DECEMBER 10, 1985 AS TO 50.17% UNDIVIDED INTEREST, ALL TENANTS IN COMMON C/O MICHAEL B. SEDRICH, 38 THE OAKS, ROSLLYN ESTATES, NEW YORK 11576, AND NATIONAL WASTE SERVICES, LLC., Defendants.	Index No. 5809/04 Motion Date August 7, 2007 Motion Cal. No. 2 Motion Seq. No. 2

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on March 14, 2001 due to a fall at premises, where she worked, located in the County of Nassau, City and State of New York.

All defendants, except National Waste Services, LLC., (movants) move for an order pursuant to CPLR 3212 granting summary judgment in favor of the moving defendants.

Defendant National Waste Services, LLC (National) has

not appeared in the action.

Contentions of the Parties

Movants assert that plaintiff fell when she was at work as an employee of Woodmere Rehabilitation and Health Care Inc. (Woodmere). Plaintiff testified at her examination before trial that she slipped due to greasy towlettes on a concrete area next to the dumpster where she threw garbage as part of her employment duties. Movants are the property owners while Woodmere is the tenant. The Woodmere facility straddles two properties, to wit, 130 Irving Place and 121 Franklin Place. Plaintiff has not identified the property upon which her unwitnessed fall occurred. Movants assert that the tenant had responsibility for all maintenance of both properties so that it is not necessary to determine upon which property plaintiff allegedly fell. Movants submit documents obtained from the Nassau County Clerk's Office, including the most recently recorded assignments and assumptions of lease for both properties, which note that they incorporate leases, riders, amendments, agreements and memoranda.

Based upon such documents, movants argue that, as out-of-possession landlords, they owed no duty to the plaintiff, an employee of the tenant. Pursuant to both leases, the tenant Woodmere was responsible for maintenance of the property. Specifically, as to the 121 Franklin Place property, the tenant was required at its own expense to keep the premises and sidewalks free from snow, ice, dirt and rubbish. As to the 130 Irving Place property, the tenant was not to permit the accumulation of waste or refuse matter. An affidavit by Mitchell Teller, a non-party and administrator of Woodmere, is submitted. He states that Woodmere had control over such everyday tasks as maintenance and rubbish removal. Woodmere contracted for removal of rubbish and had a maintenance staff of which plaintiff was a member. Movants were not involved in the daily function of the Woodmere business or the property.

Movants further argue that even a right to repair retained by them is, in the absence of a structural design defect or a violation of a specific statutory provision, insufficient to impose liability upon them. Here, plaintiff, a maintenance worker, allegedly slipped upon a towelette as she was performing her duties collecting trash into the dumpster. Further discovery is not required here. Plaintiff testified at her examination before trial that she

had not complained of the towelette condition to the movants but had only complained to the Woodmere administrator. The administrator states in his affidavit that he did not pass such information on to the movants. Here, plaintiff has not submitted any evidence showing that she contacted the tenant or searched the County Clerk's records concerning ownership of the subject property.

In opposition to the motion, plaintiff's counsel argues that the motion is premature as movants have not yet produced their client for deposition. Despite repeated requests, defense counsel has refused to produce their client but, instead, made the instant motion. The precise property where the accident occurred has not yet been identified and plaintiff's counsel has not had the opportunity to show pictures of the accident location to the movants at a deposition. It is necessary to have them identify whether the dumpster location and concrete pad were part of 130 Irving Place or 121 Franklin Place both of which are owned by the movants. No testimony has been provided by movants concerning their involvement in the property. Depending upon where the accident occurred, one of the two leases submitted would apply.

Plaintiff argues that movants have submitted two leases without any underlying affidavits setting forth an evidentiary foundation for the admission of the leases and lease provisions. The two leases which are not identical both provide a right to re-enter to the landlord to make any necessary repairs. Movants have failed to sustain their burden as no affidavit has been provided concerning the accident location and the lease provisions and no certified copies of the leases were provided. Movants have not attested that they were out-of-possession owners with no right of re-entry or that they did not have any maintenance responsibilities. As property owners, movants had a duty to maintain their property in a reasonably safe condition. There is sufficient proof of constructive notice as plaintiff testified that the greasy towelettes and greasy concrete pad existed for at least two weeks before the accident and she had made numerous complaints with respect thereto.

In reply, movants assert that plaintiff has not shown any reasonable attempts made to discover the facts which she alleges require further discovery. In any event, the location of the accident has no legal effect upon this motion. With respect to both properties, movants have the

same legal standing at issue in this motion. They are out-of-possession landlords who owed no duty to plaintiff and did not promise to keep the premises in repair pursuant to the leases. The mere right of re-entry is not sufficient to impose a duty. The administrator stated that the owners were not involved in the day-to-day operation or maintenance of the premises. Woodmere was responsible for garbage removal and hired a contractor to do so.

Decision of the Court

The motion by defendants is granted and the complaint is hereby dismissed as against all defendants except National Waste Services, LLC.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, the movants have established their entitlement to judgment as a matter of law.

As noted by the court in Nikolaidis v. LaTerna Restaurant, 40 AD3d 827: "An out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs. Reservation of a right to enter the premises for purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is significant structural or design defect. [citations omitted]" Movants have submitted copies of the leases pertinent to each of the properties upon which the Woodmere facility is positioned. Pursuant to the leases, the landlords demised control of the premises to the tenant. Although they retained a right to re-enter, there is no showing of any specific statutory provision violation or that a significant structural or design defect existed. The affidavit of Mr. Teller, the administrator of Woodmere,

showed that the movants were responsible for rubbish removal and that movants were not involved in the daily operations or maintenance of the properties. Rhian v. PABR Associates, LLC, 38 AD3d 637.

In opposition to the motion, plaintiff has failed to sustain her burden of submitting sufficient evidence in admissible form so as to raise a triable issue of fact. While plaintiff claims that the motion is premature in that certain discovery remains outstanding, the court notes that this accident occurred in March, 2001 and the action was commenced in 2004. Other than stating that numerous requests were made of movants to produce witnesses for deposition, it does not appear that any motions were made to compel such disclosure. While a preliminary conference order and a compliance conference order were rendered in this case, such occurred in 2005 and no explanation has been given for the failure to compel discovery in this matter. The fact that discovery has not been completed does not preclude the granting of summary judgment. Hecht v. Vanderbilt Associates, 141 AD2d 696.

Accordingly, the motion is granted and the complaint is dismissed as against all defendants except National Waste Services, LLC.

Dated:October 17,2007

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HON. DAVID ELLIOT