

Luca v Manor East of Massapequa L.L.C.

2007 NY Slip Op 34125(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 0004-07/

Judge: Thomas P. Phelan

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

MICHELLE LUCA,

Plaintiff(s),

ORIGINAL RETURN DATE: 10/29/07
SUBMISSION DATE: 11/13/07
INDEX No.: 0004/07

-against-

MANOR EAST OF MASSAPEQUA L.L.C.,
MANOR EAST PROPERTIES L.L.C., C.O.F.
REALTY CORP., THE SOUTHLAND
CORPORATION D/B/A 7-ELEVEN, INC.,
EVELYN TOEPFER, HELEN WALLACE,
JOHN H. HOWE, and MARGO PISACK,

MOTION SEQUENCE #2, 3

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1, 2
Answering Papers.....	3, 4, 5, 6, 7
Reply.....	8

Motion [sequence #2] for an order pursuant to CPLR § 3212 granting summary judgment in favor of defendants Evelyn Toepfer, Helen Wallace, John H. Howe, and Margo Pisack (Toepfer, et al.) dismissing plaintiff's complaint and all cross-claims with prejudice against them is denied. The alternative relief requested by defendants Toepfer, et al. and motion [sequence #3] by plaintiff, each seeking an order pursuant to CPLR 5015 vacating the order of this court dated August 28, 2007 [Phelan, J.] which awarded summary judgment dismissing plaintiff's complaint and all cross-claims as against defendant Steven Cooperman and Associates (Cooperman) is granted.

This is an action to recover for personal injuries allegedly sustained on January 29, 2004 as a result of a slip and fall accident that occurred due to snow and ice. Plaintiff worked in a building on the corner of Broadway and Jerusalem Avenue known as 727 Broadway, Massapequa, N.Y. As alleged by plaintiff, the parking lot at 727 Broadway was off limits to tenants working there. Only patients visiting doctors with offices in the building were permitted to use the parking lot

RE: LUCA v. MANOR EAST, et al.

Page 2.

at 727 Broadway. Across Jerusalem Avenue from 727 Broadway, at 717 Broadway, was another parking lot.

Plaintiff alleges that on January 29, 2004 while employed by a doctor in 727 Broadway she slipped and fell on snow and ice in the parking lot at 717 Broadway because that parking lot was not reasonably maintained due to the negligence of defendants in failing to remove the snow and ice or otherwise allowing same to accumulate.

The 717 Broadway parking lot where plaintiff fell was owned by defendant Southland Corp. (Southland) which also operated an adjacent 7-Eleven store. The 717 Broadway parking lot had a sign on it with the name "Manor East." Plaintiff alleges that the 717 Broadway lot was "an overflow" or second lot to another one used by Manor East, located at 201 Jerusalem Avenue. Plaintiff also claims defendant C.O.F. Realty Corp. was the owner of 201 Jerusalem Avenue which was leased to Manor East of Massapequa, LLC and Manor East Properties, LLC (collectively, Manor East).

Plaintiff contends that given the factual circumstances surrounding use of the 717 Broadway parking lot, one or more leases or agreements likely existed allowing use of the 717 Broadway parking lot by employees of the tenants of 727 Broadway during daytime business hours and by customers of Manor East during evening hours.

Defendants Toepfer, et al. own the real property upon which the office building at 727 Broadway was built. In 1961 non-parties Michael Kittis and John Souroumanis purchased the real estate (land only) known as 727 Broadway in Massapequa. Kittis and Souroumanis then leased the land to a third party under a 99-year lease wherein the third party built the present office building. When Kittis died in 1990, he left his one-half interest in the property to defendants Wallace and Toepfer. When John and Alice Souroumanis, Kittis' partners, died, they left their interest in the property to a trust f/b/o defendant John Howe.

Throughout the duration of the two families' ownership of 727 Broadway, the building has been leased to others and that lease has been assigned to a number of different parties over the years. At the time of the incident in question, defendant Cooperman held the lease to the premises located at 727 Broadway. Defendants Toepfer, et al. claim they did not own, operate, control, possess, supervise, manage, or have any leasehold or any responsibility for snow and/or ice removal regarding the parking lots at 717 Broadway, 727 Broadway, or 201 Jerusalem Avenue.

In or about January, 2007, plaintiff commenced the within personal injury negligence action. On or about May 17, 2007, defendants Toepfer, et al. served a verified answer with cross-claims. On or about June 26, 2007 defendant Cooperman filed a motion for summary judgment pursuant to CPLR 3212 [motion sequence #1]. Defendants Toepfer, et al. were not served with defendant Cooperman's motion for summary judgment which erroneously indicated that defendants Toepfer, et al. "have not appeared." However, a review of the May 17, 2007 verified answer of defendants Toepfer, et al. indicates that these defendants did appear and served counsel for

RE: LUCA v. MANOR EAST, et al.

Page 3.

defendant Cooperman on May 21, 2007. In addition, counsel for defendant Cooperman had previously been advised in writing that defendants Toepfer, et al. had retained the firm of Martello, LaMagna & Olivieri, P.C., et al. in this matter by correspondence from said law firm dated February 21, 2007. On or about July 3, 2007, plaintiff filed an amended complaint. On or about July 17, 2007, defendants Toepfer, et al. filed a verified answer to plaintiff's amended complaint, again serving counsel for defendant Cooperman with a copy.

In addition to the absence of service of the Cooperman motion upon these appearing defendants, counsel for plaintiff states that while the affidavit of service for the Cooperman motion indicates that service was effectuated on their office on July 2, 2007, the first notice they received of the motion was the court's decision granting the motion, without opposition. Plaintiff's attorneys do not suggest that Cooperman's counsel acted improperly, but rather that the motion papers which were served did not reach their office.

Thus, it is asserted by counsel for defendants Toepfer, et al. as well as counsel for plaintiff that neither office received a copy of the Cooperman Notice of Motion seeking summary judgment which resulted in such relief being granted without opposition.

Relief under CPLR 5015(a) is available where a reasonable excuse can be demonstrated for the failure to appear, and a showing of a meritorious defense (*DiLorenzo v Dutton Lbr. Co.*, 67 NY2d 138; *Szilaski v Aphrodite Constr. Co.*, 247 AD2d 532). It must also be shown that the default was not willful and vacatur will not work prejudice on the opposing party (*Asternio v Asternio & Assocs.*, 275 AD2d 517). Such a showing has been made here. The order of this Court dated August 28, 2007 awarding summary judgment dismissing plaintiff's complaint and all cross-claims asserted against defendant Cooperman is vacated. Steve Cooperman Associates, Inc. is restored as a party defendant and its previously served answer and cross claim is reinstated.

Consistent with the foregoing, the title of this action is amended to read as follows:

"MICHELLE LUCA,

Plaintiff,

-against-

MANOR EAST OF MASSAPEQUA L.L.C.,
STEVE COOPERMAN ASSOCIATES, INC.,
MANOR EAST PROPERTIES L.L.C., C.O.F.
REALTY CORP., THE SOUTHLAND
CORPORATION D/B/A 7-ELEVEN, INC.,
EVELYN TOEPFER, HELEN WALLACE,
JOHN H. HOWE, and MARGO PISACK,

Defendants."

RE: LUCA v. MANOR EAST, et al.

Page 4.

The Court will now address motion by defendants Toepfer, et al. for summary judgment. There is a lease agreement between defendant Southland and defendant Manor East concerning the use and maintenance of the 717 Broadway parking lot that was the site of the accident. The agreement (paragraph 6) states that the premises were to be used for "parking for tenants business." Under paragraph 9, "Maintenance," defendant Manor East agreed "to repair and maintain in good tenantable condition the Leased Premises as well as the Leased Premises' parking lot, sidewalks and driveways." Following Southland's prior written approval of the contractor and specifications, tenant was to make "necessary replacements of the Leased Premises parking lot, sidewalks and driveways at Tenants expense." (paragraph 9). It was further stated that the tenant could not assign or sublet the parking lot without the landlord's prior written consent. (paragraph 17).

The gravamen of plaintiff's claim against the Cooperman/Toepfer et al. defendants is based on the use by the Cooperman/Toepfer tenants of the parking lot owned by defendant Southland and leased to defendant Manor East. Defendant Cooperman offers no explanation for the use of the "Manor East" lot at 717 Broadway by subtenants of the building he leased at 727 Broadway. Plaintiff asserts that she, her co-workers and other tenants parked in the 717 Broadway lot during the entire term of her employment. Plaintiff contends that under the circumstances, she should be afforded an opportunity to obtain disclosure regarding any agreement between the Cooperman/Toepfer et al. defendants and the Manor East/Southland/C.O.F. Realty Corp. defendants regarding use of the 717 Broadway parking lot by Cooperman's sub-tenants. The Cooperman affidavit refers to plaintiff having fallen "at a location known as the parking lot contiguous to 727 North Broadway" (paragraph 2). The subject accident occurred in the lot across the street from, not contiguous to, lot 727 North Broadway.

Plaintiff's attorneys assert that the Toepfer, et al. and Cooperman defendants had a proprietary interest "in the lot across the street, encouraged their tenants to use this lot and had the concomitant duty to see to it that the lot it provided to its tenants was reasonably maintained." (O'Brien affirmation October 31, 2007, paragraph 20). CPLR 3212(f) provides that:

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.

Since very little discovery has been conducted, and the relationship, if any, between the various defendants is within the exclusive knowledge of the defendants and might be disclosed by cross-examination or examination-before-trial, the Toepfer et al. defendants' motion for summary judgment is denied at this time (see, CPLR 3211; CPLR 3212(f); *Morris v Goldstein*, 223 AD2d 582; *Yu v Forero*, 184 AD2d 506).

The affirmation in opposition submitted by counsel for defendants C.O.F. Realty Corp. and Manor East of Massapequa L.L.C. is "boilerplate" in nature, without any reference to the specific facts of the within action and the issues raised herein. And counsel for defendant Southland has not submitted any papers in support of or in opposition to the within motions.

RE: LUCA v. MANOR EAST, et al.

Page 5.

All motions for summary judgment are denied without prejudice, and may be renewed after discovery is complete, including, but not limited to, depositions on the issue of the relationship, if any, between defendants regarding use of the 717 Broadway parking lot.

All parties are reminded that this action is presently scheduled for a certification conference before the undersigned on January 9, 2008 at 9:30 A.M.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 12-13-07

[Signature]
J.S.C.

Grey & Grey, L.L.P.
Attorneys for Plaintiff
360 Main Street
Farmingdale, NY 11735

ENTERED

DEC 16 2007

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for Defendants MANOR EAST OF
MASSAPEQUA LLC and C.O.F. REALTY CORP.
150 East 42nd Street
New York, NY 10017-5639

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Tromello, McDonnell & Kehoe
Attorneys for Defendant STEVE COOPERMAN ASSOCIATES, INC.
P. O. Box 9038
Melville, NY 11747

Congdon, Flaherty, O'Callaghan, et al.
Attorneys for Defendants THE SOUTHLAND CORPORATION
D/B/A 7-ELEVEN
333 Earle Ovington Boulevard, Suite 502
Uniondale, NY 11553

MANOR EAST PROPERTIES, L.L.C.
201 Jerusalem Avenue
Massapequa, NY 11758

Martello Lamagna & Olivieri, P.C.
Attorneys for Defendants EVELYN TOEPFER, HELEN WALLACE,
JOHN H. HOWE and MARGO PISACK
666 Old Country Road, Suite 210
Garden City, NY 11530