Moriarty v Redux Realty LLC

2008 NY Slip Op 30258(U)
January 14, 2008
Supreme Court, New York County
Docket Number: 0118110/2003
Judge: Barbara Kapnick

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SCANNED ON 1/30/2008
[* 1]

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

PRESENT: BARBARA R. KAPNICK
J.S.C. Justice

PART 12

Index Number : 118110/2003
MORIARTY, DEBORAH
vs
REDUX REALTY, LLC
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 118110/03
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

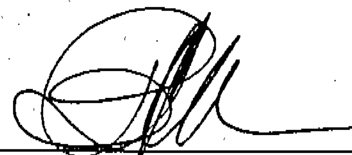
Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED
JAN 30 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/14/08



J.S.C.
BARBARA R. KAPNICK
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

---------------------------------------X

DEBORAH MORIARTY and PATRICK E. MORIARTY,

Plaintiffs,

-against-

REDUX REALTY LLC, THE WITKOFF GROUP LLC, A & A MAINTENANCE ENTERPRISE, INC. and THYSSENKRUPP ELEVATOR CORPORATION,

Defendants.

---------------------------------------X

REDUX REALTY LLC and THE WITKOFF GROUP LLC,

Third-Party Plaintiffs,

-against-

PEPSI CO., INC., THE PEPSI BOTTLING GROUP, INC. AND BOTTLING GROUP LLC,

Third-Party Defendants.

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DECISION/ORDER
Index No. 118110/03
Motion Seq. No. 002

FILED
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Third-Party
Index No. 590[illegible]/05

BARBARA R. KAPNICK, J.:

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Deborah Moriarty on January 31, 2003 at her place of employment, One Pepsi Way, Somers, New York. Plaintiff, a senior consumer relations representative for third-party defendant Pepsi Co., Inc. was on her way back from the cafeteria when she tripped and fell on an allegedly misleveled elevator on the fifth floor.

[* 3]

Defendants/third-party plaintiffs Redux Realty LLC ("Redux") and the Witkoff Group LLC ("Witkoff") are the owner and managing agent of the building, respectively. At the time of plaintiff's accident, the building was leased to third-party defendant Bottling Group LLC ("Bottling Group"), a wholly-owned subsidiary of co-third-party defendant The Pepsi Bottling Group, Inc. ("Pepsi Bottling"). Bottling Group also does business as "Pepsi Bottling Group".

Third-party defendant Pepsi Bottling Group, Inc. acted as a guarantor of the Lease. The Pepsi Bottling Group, LLC entered into a Building Service Contract with defendant A&A Maintenance Enterprise, Inc. ("A&A Maintenance"), and "Pepsi Bottling Group" entered into an Elevator Maintenance Agreement with defendant Thyssenkrupp Elevator Corporation ("Thyssenkrupp").

Third-party defendant Bottling Group has assumed the defense and agreed to indemnify Redux and Witkoff pursuant to the terms of its Lease, but defendant Thyssenkrupp has asserted a 'cross-claim' against the third-party defendants for indemnification. Defendant Thyssenkrupp has also asserted a cross-claim against defendant A&A Maintenance for contribution.

Defendant A&A Maintenance now moves for summary judgment dismissing plaintiffs' complaint and all cross-claims against it.

Defendants/third-party plaintiffs Redux and Witkoff and third-party defendants Pepsi Co., Inc., Pepsi Bottling and Bottling Group cross-move for summary judgment dismissing all claims against them.[1]

Defendant A&A Maintenance argues that it is entitled to summary judgment on the ground that defendant Thyssenkrupp was solely responsible for maintaining the elevator.

However, although plaintiff's Bill of Particulars alleges that the cause of the accident was the misleveling of the elevator, an Investigation Report prepared by Phil Davis, a Security Supervisor for Pepsi Bottling, represents that plaintiff stated on the day of the accident that there "was some type white sticky substance on the brass plate that caused her to fall because she noticed some similar type residue on shoe when she got back to her desk."

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[1] Although the cross-motion was not brought within 60 days of the filing of the Note of Issue, as required by the Preliminary Conference Order (Beeler, J.) dated June 22, 2004, said Order was issued prior to the commencement of the third-party action. Since the instant motion and cross-motion were both brought within 120 days of the filing of the Note of Issue, as required by CPLR § 3212(a), both applications shall be considered by this Court on their merits.

[* 5]

Accordingly, based on the papers submitted and the oral argument held on the record on August 8, 2007, this Court finds that there are triable issues of fact as to whether plaintiff's accident was caused solely as a result of the misleveling of the elevator, or whether plaintiff's accident was also caused by A&A Maintenance's failure to properly clean the floor of the elevator, which preclude the granting of summary judgment dismissing the cross-claims asserted against defendant A&A Maintenance.[2]

That portion of the cross-motion seeking to dismiss all claims against plaintiff's employer, third-party defendant Pepsi Co, Inc., is granted on consent.

That portion of the cross-motion seeking to dismiss all claims against third-party defendant Pepsi Bottling is denied. Pepsi Bottling argues that there is no basis for liability because it merely acted as a guarantor of the Lease.

However, it is not clear from the papers submitted whether or not said third-party defendant is the same "Pepsi Bottling" entity which entered into the contracts with A&A Maintenance and

[2] Plaintiffs' claims against defendant A&A Maintenance are, however, dismissed since plaintiffs have not filed a supplemental bill of particulars alleging the presence of the white sticky substance. See, cf., Sarmiento v. C&E Associates, 40 A.D.3d 524 (1st Dep't 2007).

[* 6]

Thyssenkrupp. Therefore, this Court finds that there are issues of fact as to whether or not third-party defendant Pepsi Bottling retained some control over the premises which precludes the granting of summary judgment.

That portion of the cross-motion seeking to dismiss all claims against defendant/third-party plaintiff Redux is granted since there is no evidence that Redux, an out-of-possession landlord, had actual or constructive notice of the allegedly defective condition.

Likewise, that portion of the cross-motion seeking to dismiss all claims against defendant/third-party plaintiff Witkoff is granted since there is no evidence that Witkoff retained any control over the premises and/or had actual or constructive notice of the allegedly defective condition.

Those portions of the cross-motion seeking to dismiss all claims against third-party defendant Bottling Group or, in the alternative, for summary judgment on its cross-claims against Thyssenkrupp and A&A Maintenance for contractual indemnification are denied as premature, since there are outstanding issues of fact as to whether plaintiff's accident arose out of the alleged misleveling elevator or as a result of any alleged failure of A&A Maintenance to clean the floor of the elevator.

[* 7]

In addition, defendant Thyssenkrupp has raised an issue of fact as to whether third-party defendant Bottling Group was negligent in permitting a defective condition to exist in the fifth floor south wing elevator lobby, since, according to Thyssenkrupp's expert, Patrick J. McPartland, P.E., the height of the carpeting was 1/4 inch lower than the height of the stationary sill of the hallway entrance leading into the elevator.[3]

Accordingly, the Clerk may enter judgment (i) dismissing plaintiffs' Complaint and all cross-claims against defendants/third-party plaintiffs Redux Realty LLC and The Witkoff Group LLC with prejudice and without costs or disbursements, and (ii) dismissing all third-party claims and 'cross-claims' against the third-party defendant Pepsi Co., Inc. with prejudice and without costs or disbursements.

In addition, plaintiffs' claims against defendant A&A Maintenance Enterprise, Inc. are dismissed with prejudice and without costs or disbursements. The remaining claims are severed and continued.

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[3] Mr. McPartland is of the opinion that plaintiff more likely tripped on this height differential as opposed to the alleged misleveled elevator.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on February 6, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 14, 2008

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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