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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 106620/2005
ADAMS, DONNA L.
vs
WOODMEN OF THE WORLD
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/25/08
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of defendant Sara Lee Corporation, for an order pursuant to CPLR 3211 and 3212, granting summary judgment in its favor dismissing and severing all causes of action asserted against Sara Lee Corporation in the Verified Complaint of plaintiffs Donna L. Adams and Vernon Adams, and dismissing and severing all counterclaims and cross claims asserted against Sara Lee Corporation, as asserted by co-defendants Sbarro, Inc., Sbarro Properties, Inc., Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society, Stahl Midtown Properties, LLC, Stahl Real Estate Company and Madison/Fifth Associates, LLC, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly;** and it is further

ORDERED that counsel for defendant Sara Lee Corporation shall serve a copy of this Order with notice of entry within twenty days of entry.

FOR THE FOLLOWING REASON(S):

Dated: 4/28/08

J.S.C.

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 35

DONNA L. ADAMS and VERNON ADAMS,

Plaintiffs,

Index No. 106620/06

-against-

DECISION/ORDER

SBARRO, INC., SBARRO PROPERTIES, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and/or OMAHA WOODMEN LIFE INSURANCE SOCIETY, SARA LEE CORPORATION, STAHL MIDTOWN PROPERTIES, LLC, STAHL REAL ESTATE COMPANY and MADISON/FIFTH ASSOCIATES, LLC,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Sara Lee Corporation ("Sara Lee") moves for an order pursuant to CPLR 3211 and 3212, granting summary judgment in its favor dismissing and severing all causes of action asserted against Sara Lee in the Verified Complaint of plaintiffs Donna L. Adams ("plaintiff") and Vernon Adams (collectively, "plaintiffs"), and dismissing and severing all counterclaims and cross claims asserted against Sara Lee, as there exists no material issue of fact of Sara Lee's non liability for plaintiff's alleged injuries as a matter of law.

This is an action to recover damages for personal injuries sustained by plaintiff on December 29, 2004 as a result of a trip and fall on the sidewalk area located outside of and adjacent to the street level S'barro's Pizzeria at the premises located at 574 Fifth Avenue, New York, New York (the "subject premises").

Sara Lee's Contentions

Sara Lee never had any proprietary ownership and/or possessory rights to the subject premises and abutting sidewalk area on the date of plaintiff's accident. Sara Lee believes that defendant Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society ("Woodmen") owned the subject premises at the time of plaintiff's accident.

Beginning in 1947, the subject premises were leased from Woodmen to Richard Bennett Associates, Inc. Thereafter, the lease was assigned by Richard Bennett Associates, Inc. to Amalgamated Textiles Limited by agreement dated November 28, 1952 and further assigned by Amalgamated Textiles Limited to William Black by agreement dated May 16, 1957 and again to 574 5th Corp. on February 1, 1974.

Subsequently, Chock Full O'Nuts Corporation ("Chock") as successor by merger to 574 5th Corp., transferred all rights, title and interest to said property by Quit-Claim Deed and by Assignment and Assumption of Ground Lease both dated June 21, 2001 to defendant Stahl Midtown Properties, LLC ("Stahl"). These documents were then filed with the Office of the City Register of the City of New York.

On October 18, 1999 the merger of CFN Acquisition Corporation ("CFN"), a New York Corporation and wholly-owned subsidiary of Sara Lee with and into Chock was consummated in accordance with the Agreement and Plan of Merger, dated as of June 8, 1999, among Sara Lee, CFN and Chock, and Chock became a wholly-owned subsidiary of Sara Lee[1].

Chock, a then wholly-owned subsidiary of Sara Lee had transferred all rights, duties, responsibilities and obligations to the extent they existed, with regard to the subject premises

[1] Copies of the documents referred to herein are annexed to the instant motion.

and/or adjacent sidewalk area to Stahl some three and one half years prior to the date of plaintiff's accident.

While the abutting premises were leased by Chock prior to the date of plaintiff's accident, this lease was subsequently assumed by defendant Stahl some three and one half years prior to the date of plaintiff's accident. Accordingly, Chock had divested itself of all rights, title and interest to the property long before the subject occurrence. In addition, Sara Lee was never directly vested with any rights, title or any possessory interest to the premises or adjacent sidewalk area at issue.

Moreover, following the assignment to Stahl and prior to the plaintiff's accident, Stahl executed an Assignment of Ground Lease pertaining to the subject premises dated March 13, 2003 in which it assigned all of its right, title and interest in the premises to defendant Madison/Fifth Associates LLC ("Madison"). In said assignment, Madison agreed to pay and perform all outstanding liabilities and obligations under the lease. Accordingly, Chock and by extension Sara Lee are even further removed from any connection to the subject premises.

Further, there is no basis upon which any of the co-defendants can prevail on their cross claims against Sara Lee for indemnification and/or contribution in this action.

Plaintiffs' Opposition

Sara Lee's application is premature. Discovery is incomplete. More importantly, depositions have not been completed of defendant Sbarro, Woodmen, Stahl, Madison or Sara Lee.

Of note, Sara Lee's motion does not include a shred of sworn testimony to support it. Further, Sara Lee's own moving papers acknowledge that "absent evidence that defendant Sara

Lee either created the alleged condition on the sidewalk...summary judgment should be granted." Clearly, the chain of possession of this piece of property and the question of what was done to the sidewalk by each entity in possession is extremely relevant to this matter. Without the taking of depositions of all parties to the action, it is completely impossible for plaintiff to ascertain what repair or maintenance work may have been done to the premises by each of the entities in possession of same. And, prior land owners can be liable for defects on premises transferred.

Plaintiffs should at least be afforded the opportunity to depose Sara Lee and the other defendants in this case to determine the validity and meaning of the alleged title documents, as well as to ascertain what, if any, work was done by Sara Lee or its subsidiary Chock.

Woodmen's Opposition

Sara Lee's motion should be denied as issues of fact exist at this juncture with respect to Sara Lee's negligence and/or responsibility. The depositions of defendants have yet to be conducted. Thus, it is unknown if Sara Lee may have caused or created the condition that plaintiff alleged caused her accident. Moreover, during the time that Sara Lee was the lessee from Woodmen, Sara Lee was obligated to maintain the premises and keep it in good order and repair. Furthermore, the lease required Sara Lee to defend and hold harmless Woodmen.

Sara Lee's Reply

With respect to both plaintiffs' and Woodmen's opposition to Sara Lee's instant motion, a self-serving claim that discovery would lead to relevant evidence, by itself, is insufficient to withstand a motion for summary judgment. Here there is no factual support for the conclusory assertion by plaintiffs and Woodmen that further discovery is warranted.

In addition, plaintiffs are incorrect in asserting that no depositions of defendants have

been conducted. A Stahl representative was deposed on August 8, 2006, prior to Sara Lee appearing in this action. And, at that deposition, a copy of the Quit-Claim deed between Chock and Stahl was marked as an exhibit.

With respect to Chock's liability as a prior land owner, as a general rule, liability for a dangerous condition on land does not extend to a prior owner of the premises. And, the narrow exception wherein liability may be imposed where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known, is unfounded herein. Here, the idea that the new lessees would not have had an opportunity to observe and remedy the condition on a sidewalk immediately adjacent to the premises during a three and one half year period prior to plaintiff's accident is factually untenable.

Further, Woodmen erroneously states that Sara Lee was a "lessee" of the subject premises who was compelled to defend and hold harmless Woodmen. First, at no time was Sara Lee ever a lessee of the subject premises. Indeed, although Chock, as successor by merger to 574 5th Corp. was a prior lessee of the premises, even its involvement ceased some three and one half years prior to the date of the occurrence when it transferred all rights, title and interest to said property by Quit-Claim deed and by Assignment and Assumption of Ground Lease both dated June 21, 2001 to defendant Stahl. And, in opposition to the instant motion, neither plaintiffs nor Woodmen have proffered the argument or proof of the argument that the parent/Sara Lee has so intervened in the management of the subsidiary/Chock so as to permit the court to pierce the corporate veil.

Thus, any potential duty to plaintiffs or obligation to defend or indemnify Woodmen, runs

to Chock. Sara Lee was never directly vested with any rights, title or any possessory interest in the subject premises or adjacent sidewalk area at issue.

With respect to Woodmen's argument that Sara Lee fails to provide a shred of sworn testimony, and hints at a question concerning the validity of the documents submitted in support of summary judgment, first, there are other forms of competent evidence other than testimony, which can serve as a basis for summary judgment. Second, Sara Lee requests that the court take judicial notice of the authenticity of the copies of these documents which are public record and can be printed by anyone who has access to a computer and the internet.

Analysis

CPLR 3211 [a] [1]; Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In the instant case, documentary evidence and undisputed facts negate or dispose of the claims in the complaint and/or cross claims and/or counterclaims, and conclusively establish a defense. As such, dismissal is warranted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill*

Housing Apt. Corp., 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

While pleadings should be liberally construed on a motion to dismiss, claims "flatly contradicted by documentary evidence" must be rejected], *citing Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]).

Further, in this case, the documents, including contracts and leases, rationally construed, are not consistent with plaintiffs' and/or co-defendants' contention that liability might lie with Sara Lee. *Baystone Equities, Inc. v Gerel Corp.*, 305 AD2d 260, 759 NYS2d 78 [1st Dept 2003]

3212: Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by

advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay

bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

In the instant case, the court agrees with Sara Lee that a self-serving claim that discovery would lead to relevant evidence, by itself, is insufficient to withstand a motion for summary judgment.

The mere hope that evidence sufficient to establish defendant's liability may be obtained during discovery does not fulfill plaintiffs' and Woodmen's obligation to demonstrate the likelihood of such disclosure (*see Steinberg v Abdul,* 230 AD2d 633 [1966]; *Jones v Gameray*, 153 AD2d 550 [1989]). Accordingly, that discovery has not been completed is insufficient reason to deny defendant's motion for summary judgment (*see Chemical Bank v PIC Motors Corp.,* 58 NY2d 1023, 1026 [1983]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Although a motion for summary judgment may be denied if the facts essential to establish opposition "may exist but cannot then be stated" (CPLR 3212[f]), "'[m]ere hope that somehow

the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, NYLJ Jan. 18, 2005 p 26 col 3, citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*,, 133 AD2d 669 [1987]).

Further, Sara Lee's motion for summary judgment is not improper on the ground that it is based on an attorney's affirmation, given that the affirmation is based upon documentary evidence (*see Delaney v Westchester County*, 90 AD2d 819 [2d Dept 1982] *appeal dismissed by* 59 NY2d 763 [1983]; *Beagle v Parillo*, 116 AD2d 856 [3d Dept 1986]).

Sara Lee has sufficiently established entitlement to summary judgment. And, in opposition, plaintiffs and Woodmen have failed to raise a genuine issue of fact that the alleged defective condition was either caused or created by Sara Lee. Further Sara Lee has sufficiently established that it was not under any duty to ensure that the sidewalk adjacent to the premises be reasonably safe at the time of the occurrence. And, plaintiffs and Woodmen have failed to raise a genuine issue of fact of this assertion as well.

Liability of Former Land Owner

Plaintiff's reliance on *Bittrolff v Ho's Development Corp.*, 77 NY2d 896, 571 N.E.2d 72, 568 NYS2d 902 (1991) for the proposition that prior land owners can be liable for defects on premises transferred, is misplaced. *Bittrolff* stands for the proposition that liability for dangerous conditions on land does not extend to a prior owner of the premises unless the condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if unknown, and to remedy it once it is known. In the instant case, neither plaintiff nor

Woodmen has offered any evidence to show that the alleged defective condition existed at the time Chock's conveyance of the property to Stahl more than three and one half years prior to plaintiff's accident, or that the new owner did not have adequate time to discover and remedy such defects.

Conclusion

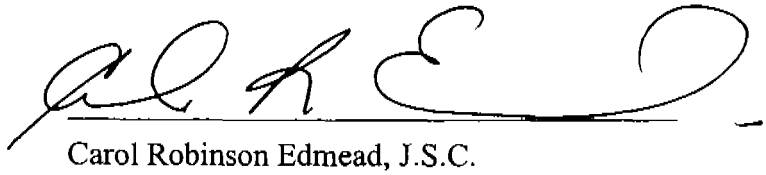
Based on the foregoing, Sara Lee has submitted irrefutable evidence establishing as a matter of law that it lacked ownership and/or control of the subject premises, and has established entitlement to summary judgment. Therefore, it is hereby

ORDERED and ADJUDGED that the application of defendant Sara Lee Corporation, for an order pursuant to CPLR 3211 and 3212, granting summary judgment in its favor dismissing and severing all causes of action asserted against Sara Lee Corporation in the Verified Complaint of plaintiffs Donna L. Adams and Vernon Adams, and dismissing and severing all counterclaims and cross claims asserted against Sara Lee Corporation, as asserted by co-defendants Sbarro, Inc., Sbarro Properties, Inc., Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society, Stahl Midtown Properties, LLC, Stahl Real Estate Company and Madison/Fifth Associates, LLC, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly;** and it is further

ORDERED that counsel for defendant Sara Lee Corporation shall serve a copy of this Order with notice of entry within twenty days of entry.

This constitutes the decision and order of this court.

Dated: April 28, 2008



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD