

Frenza v Montgomery Trading Co.

2008 NY Slip Op 32204(U)

August 4, 2008

Supreme Court, New York County

Docket Number: 0105973/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART _____

Index Number : 105973/2006

FRENZA, MICHAEL J.

vs.

MONTGOMERY TRADING

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

In 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

FILED
AUG 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

Dated: 8/4/08

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
MICHAEL J. FRENZA,

Plaintiff,

-against-

MONTGOMERY TRADING CO., FGM 8TH REST.
CORP. d/b/a RUMOURS BAR LOUNGE & GRILL,
DYCKMAN'S FAMILY PROPERTIES, DYCKMAN'S
N.Y., LLC and DYCKMAN'S REALTY, LLC,

Defendants,

Decision/Order

Index No.: 105973/06

Seq. No. : 003

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Def n/m § 3212 w/ JEM affirm, JD affid, exhs

FILED
AUG 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

Numbered

1

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by plaintiff Michael J. Frenza ("Frenza" or "plaintiff") arising from a slip and fall. Defendants Dyckman's Family Properties, Dyckman's N.Y., LLC, and Dyckman's Realty, LLC ("moving defendants"), now move pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint. The instant motion has been submitted to the court on default; it is not opposed by any party. Issue has been joined, but the note of issue has not yet been filed. Therefore, this motion is timely and will be considered on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Relevant Facts and Arguments Presented

Plaintiff alleges that due to the negligence of defendants, on or about January 22, 2005 (the "accident date"), he tripped and fell down an interior staircase of Rumours Bar Lounge & Grill at 933 Eighth Avenue, New York, New York 10019 (the "premises"). In his verified bill of particulars, Frenza claims that all defendants were "negligent, reckless and careless in the operation, ownership, maintenance and control of the premises," specifically of the interior staircase at the premises. Plaintiff claims that this negligence caused him to sustain such injuries as a shoulder fracture, wrist fracture, trauma to the knee, among other injuries. In plaintiff's complaint, he alleges that the defendants' negligence consists of failing to mop wet or greasy portions of the stairs, failing to provide proper lighting in the stairway, and others which created "a hazardous and dangerous condition."

The defendants are Montgomery Trading Co. ("Montgomery"), FGM 8th Rest. Corp. d/b/a Rumours Bar Lounge & Grill ("FGM/Rumours"), and the moving defendants. In his affirmation, Mr. Jacob Dyckman ("Mr. Dyckman"), an attorney, a member of Dyckman's N.Y., LLC and a partner in Montgomery, verifies that Montgomery is the owner of the premises and that FGM/Rumours is the lessee of the premises. The moving defendants have provided a copy of the deed dated December 20, 1977 and the lease dated March 1, 2003. FGM/Rumours was the lessee of the premises on the accident date.

The moving defendants argue that, as a matter of law, plaintiff cannot establish liability against them in this action. Mr. Dyckman states that he is partner of both

Montgomery, a general partnership¹ and a member of Dyckman's N.Y., LLC, but that he has no relation whatsoever to FGM/Rumours. He also asserts that the other two moving defendants named in this action, Dyckman's Family Properties and Dyckman's Realty, LLC, do not exist. Mr. Dyckman testified as follows regarding those two entities:

Q And what is Dyckman's Family Properties?

A That is a name created by the insurance agent to enable us to get a blanket policy covering this property and various other properties under one insurance policy, there is no such entity.

[* * *]²

Q How is it that you know that the insurance agent created this name?

A I don't know that they created the name. I know that when we received the blanket policy that name was placed on it. I assumed that they had been the one that made up the name, but I don't know who made up the name.

[* * *]³

Q Dyckman's Realty, LLC, what is that entity?

A I do not know. As far as my recollection there is no connection with my family with any entity that has that name.

Q Have you had a company by the name of Dyckman Realty Corp, Inc. Co.?

A Not any of those to my recollection.

Mr. Dyckman claims that Dyckman's N.Y., LLC is the only moving defendant

¹ Montgomery Trading Co. LLC, presently a limited partnership, was formerly known as Montgomery Trading Co., which was a general partnership. This transfer of ownership interest occurred after the accident date.

² Intervening questions have been omitted to include only relevant deposition testimony.

³ Intervening questions have been omitted to include only relevant deposition testimony.

which exists. In both his affirmation and at his deposition, Mr. Dyckman maintains that Dyckman's N.Y., LLC is a separate entity unrelated to Montgomery, and that Dyckman's N.Y., LLC was and is solely responsible for the accounting and bookkeeping services.

Q When you say the "management office," what is that, where is it?

A The management is divided into two areas. Jacob Holzer does the management in so far as going to the premises, dealing with day-to-day problems and tenants and alike. The bookkeeping aspect of the management is done in the management office by a separate company.

Q And what is the name of that separate company that does the bookkeeping?

A Dyckman's N.Y., LLC.

[* * *]⁴

Q What is Dyckman's N.Y., LLC?

A Dyckman's N.Y., LLC is the company that does the office type accounting work portion of the management of this building and others.

Mr. Dyckman further testified that although the entity Dyckman's N.Y., LLC exists, at no time did it occupy, own, control or make a special use of the premises. Mr. Dyckman argues that while he had an ownership interest in both Montgomery and Dyckman's N.Y., LLC, his interest in no way forms the basis of any liability on behalf of the moving defendants. Thus, the moving defendants request that the court grant summary judgment in their favor, dismissing Frenza's complaint.

⁴ Intervening questions have been omitted to include only relevant deposition testimony.

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065 (1979). Once met, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980).

A defendant is liable for negligence only if it breaches a duty of care owed to the plaintiff. Sanchez v. State, 99 N.Y.2d 247, 251 (2002). Negligence liability for a dangerous condition on property can be found only if the defendant occupied, owned, controlled or made special use of the premises at which the plaintiff was injured. Balsam v. Delma Engineering Corporation, 139 AD2d 292 (1st Dept. 1988). The burden of establishing the elements of a negligence cause of action is always upon the plaintiff and never shifts to the defendant(s) in the action. Akins v. Glens Falls City School District, 53 NY2d 325 (1981).

Mr. Dyckman testified that Dyckman’s Family Properties and Dyckman’s Realty, LLC are non-existent business entities. He further established that these entities owe no duty to plaintiff. Plaintiff has failed to come forward to establish anything different.

Accordingly, the moving defendants’ motion for summary judgment is granted in

its entirety and plaintiff's claims against the moving defendants in the complaint are hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendants' motion for summary judgment is granted. The clerk is directed to sever the claims against defendants Dyckman's Family Properties, Dyckman's N.Y., LLC and Dyckman's Realty, LLC, and to enter a judgment dismissing the claims against such defendants.

Any requested relief that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
August 4, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 06 2008
COUNTY CLERK'S OFFICE
NEW YORK