

Cherry v Akam Assoc., Inc.

2008 NY Slip Op 32788(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 103641/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

Index Number : 103641/2006

CHERRY, PATRICIA

VS.

AKAM ASSOCIATES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 103641/06

MOTION DATE 9/2/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 20

The following papers, numbered 1 to 15 were read on this motion and cross motions for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-J	<u>1-2</u>
Answering Affidavits — Exhibit A	<u>3</u>
Replying Affidavits — Exhibits	<u>4</u>
Notice of Cross Motion— Affidavits — Exhibits A-B	<u>5-6</u>
Answering Affirmations	<u>7-8</u>
Replying Affirmations	<u>9-10</u>
Notice of CrossMotion— Affidavits — Exhibits A-K	<u>11-12</u>
Answering Affirmations	<u>13-14</u>
Replying Affirmation	<u>15</u>

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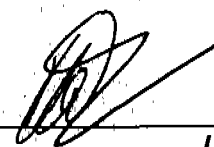
NEW YORK

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

Cross-Motions (2) : Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 10/6/08
New York, New York



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MICHAEL D. STALLMAN
J.S.C.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
PATRICIA CHERRY,

Plaintiff,

-against-

AKAM ASSOCIATES, INC., THE 350 EAST
62nd STREET CONDOMINIUM and CARMEN
PACHECO, ALLIED BARTON SECURITY
SERVICES, LLC, INITIAL SECURITY, LLL
and RAMON LOPEZ,

Defendants.

-----X
AKAM ASSOCIATES, INC. THE 350 EAST
62nd STREET CONDOMINIUM,

Third-Party Plaintiffs,

-against-

ALLIED BARTON SECURITY SERVICES,
INITIAL SECURITY and RAMON LOPEZ

Third-Party Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Defendants/Third-Party Defendants Allied Barton Security
Services, LLC, Initial Security, LLC and Ramon Lopez (collectively
Initial) move for summary judgment, pursuant to CPLR 3212, to
dismiss the action against them. Defendant Carmen Pacheco
(Pacheco) cross-moves to dismiss the action against her.
Defendants Akam Associates, Inc. and The 350 East 62nd Street
Condominium (collectively Akam) also cross-move to dismiss the
action against them, or, in the alternative, to have summary

Index No.: 103641/06

DECISION AND ORDER

Third-Party
Index No. 590397/07

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NEW YORK

judgment granted to them for common-law indemnification from Initial.

BACKGROUND

Plaintiff was allegedly injured when her foot caught in the retractable leash of a dog owned by Pacheco as she was descending the stairs in a building owned and managed by Akam. According to the examination before trial transcripts, plaintiff entered the building to visit a tenant. When she entered the lobby, attended by Ramon Lopez, an employee of Initial, she noticed the dog leashed to the security guard's desk. She spoke to the guard, who told her that the dog liked to sit in the lobby and people watch. Plaintiff bent down and petted the dog, at which time she became aware of the leash attached to the dog.

When plaintiff was leaving the building, the lobby was unattended, the guard allegedly having gone to the bathroom. Plaintiff said good-bye to the dog, who was still leashed to the desk. To get to the entrance staircase, plaintiff had to walk between the dog and the desk. After descending a few steps, plaintiff alleged that her foot got caught in the dog's leash, causing her to fall. The color of the leash was allegedly in a similar tone to the lobby floor, and the leash could extend 8-10 feet.

Pecheco testified that she sometimes had the guard walk her dog if she was working. She stated that she never knew the guard

let the dog stay in the lobby. According to her deposition, she only asked the guard to walk the dog and then return the dog to her apartment. She claims that she has owned the dog since 1996, and that there has never been any accident of this sort before.

Akam manages the building for the condominium, and hired Initial as an independent contractor to provide security services for the premises. Initial alleges that Allied Barton Security Services, LLC no longer exists. Lopez was hired as the security guard/doorman by Initial. There has been no allegation that there was anything wrong with the stairs, the lobby, the handrail, the floors, or any other physical part of the building. Further, there is no evidence that there has ever been an incident similar to the one in question.

DISCUSSION

"The proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable

fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant Pacheco's cross-motion for summary judgment dismissing the claim against her is granted.

Plaintiff has failed to make a prima facie showing that Pacheco was negligent or was a substantial cause of the alleged accident. " To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury [citation omitted]." *Howard v Poseiden Pools, Inc.*, 72 NY2d 972, 974 (1988). Pacheco did not leave her dog leashed and unattended in the lobby of the building, nor was she aware of the fact that the guard would keep the dog in the lobby without her knowledge. The evidence indicates that Pacheco only requested that the guard walk her dog and then return the dog to her apartment. Furthermore, because there is no evidence that a similar occurrence had ever taken place before the incident in question, Pacheco could not be alleged to have even constructive knowledge of a possibly dangerous condition. See *Roberts v Joller*, 39 AD3d 1224 (4th dept 2007) (dog owners not liable for injuries caused by their dog colliding with plaintiff since they had no actual or constructive knowledge of the dog's propensity to interfere with traffic).

Defendants Akum's crossmotion for summary judgment is also granted.

Plaintiff, in opposition to this crossmotion, alleges that Akam's liability lies in its failure to maintain the common areas of the premises in good repair, pursuant to Multiple Dwelling Law § 78. However, there is not one iota of evidence that there was any problem with the building itself, making this argument specious at best.

"The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" *Rosenberg v Equitable Life Assurance Society of the United States* (79 NY2d 663, 668 [1992]), with certain exceptions for inherently dangerous work, statutorily imposed liability, or supervision and control of the work, not here relevant.

Additionally, even if leashing a dog to the desk of the lobby might be considered a dangerous condition, to hold Akam liable, plaintiff must show that Akam had actual or constructive knowledge of the condition, and that Akam had a reasonable amount of time to correct the condition prior to the alleged accident. *Mercer v City of New York*, 88 NY2d 955 (1996). As indicated above, there had never been a similar occurrence before, and there is no indication that Akam was aware of the fact of the dog being was being leashed to the desk in the building's lobby.

Based on the foregoing, Akam's third-party action against Initial is dismissed.

Lastly, Initial's motion for summary judgment dismissing the action against it is denied. There is a question of fact as to whether Initial's employee was negligent in leaving the dog unattended in the lobby, with a long leash on the floor thereby not providing any control over the dog or the leash.

"Plaintiff's evidence that she fell after becoming entangled in defendant's dog's retractable leash when the dog playfully ran around her legs is sufficient to make a prima facie showing that defendant was negligent in failing to control [the] dog."

Clifford v Turkel, 7 AD3d 251 (1st Dept 2004).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Carmen Pacheco's crossmotion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that defendants Akam Associates, Inc. and The East 62nd Street Condominium's crossmotion for summary judgment is granted, and the complaint is dismissed; and it is further

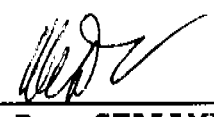
ORDERED that defendants Akam Associates, Inc. and The East 62nd Street Condominium's third-party complaint is dismissed; and it is further

ORDERED that defendants Allied Barton Security Services, LLC, Initial Security, LLC and Ramon Lopez' motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 6, 2008
New York, New York

ENTER:



MICHAEL D. STALLMAN, J.S.C.

MICHAEL D. STALLMAN
J.S.C.

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