

Correge v 1472 Broadway, Inc.

2009 NY Slip Op 31822(U)

August 12, 2009

Supreme Court, New York County

Docket Number: 114166/08

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 114166/2008

CORREGE, JOY

INDEX NO. _____

vs

1472 BROADWAY

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

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

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

ORDERED that the application of defendant Excel Security Corp., for an order granting summary judgment, dismissing the complaint of plaintiff Joy Corregge and all cross claims as asserted against Excel, is granted and the complaint and all cross claims as asserted against defendant Excel Security Corp., are hereby severed and dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant Excel Security Corp. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: 8/12/09


HON. CAROL EDMEAD c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

JOY CORREGE,

Plaintiff,

-against-

1472 BROADWAY, INC., 500 FIFTH AVENUE
INC., L&B REALTY ADVISORS, LLP, EXCEL
SECURITY CORP., and GVA WILLIAMS,

Defendants.

EDMEAD, J.S.C.

Index No. 114166/08

DECISION/ORDER

MEMORANDUM DECISION

Defendant Excel Security Corp. ("Excel") moves for an order granting summary judgment, dismissing the complaint of plaintiff Joy Corregge ("plaintiff") and all cross claims as asserted against Excel.

Only co-defendants 500 Fifth Avenue, Inc. ("500") (formerly known as 1472 Broadway Inc. ("1472")) and GVA Williams ("GVA") submit opposition to Excel's motion. As co-defendant L&B Realty Advisors, LLP ("L&B") did not oppose Excel's motion, any and all cross claims asserted by co-defendant L&B as against defendant Excel, are dismissed.

This is a personal injury action in which plaintiff alleges that on April 11, 2008 at approximately 11:00 a.m., she was injured when the barrier arms of Turnstile No. 3 at the building 500 Fifth Avenue, New York, New York (the "subject premises") closed on plaintiff's leg as she was exiting the building.

Excel's Contentions

Excel is entitled to summary judgment because it neither manufactured, maintained, inspected, serviced or repaired any of the turnstiles which were in place at the building on the date of the accident. Rather, its sole function was to remotely monitor the building access control system whereby a person seeking entrance swipes an HID card through the turnstile reader unit. It is unnecessary to swipe the HID reader card to exit the building, as plaintiff was doing at the time of the accident. Therefore, no monitoring of the system was necessary with regard to building egress. Accordingly, Excel did nothing to cause or contribute to plaintiff's alleged accident.

Paragraph 5 of co-defendant 500 and L& B's Response to Combined Demand for Discovery and Inspection attaches as Exhibit B a "500 5th Ave. Incident Report," states in part:

"Interviewed Mr. [sic] Joy Correge tenant suite [illegible] who stated that at T/P/O while exiting Bldg. Arms (wings) of turnstile #3 closed on her legs causing pain around thigh Area."

Martin Hausman, Chief Financial Officer of Excel, avers in his affidavit that in his position, he is aware that at the time of the alleged accident, there was in effect an oral agreement between GVA and Excel, pursuant to which Excel remotely monitored the access control system from the subject building from Excel's office, but did not have employees at the location. A diligent search of Excel's records reveals that it does not have a written contract to perform security or other services at the building which was in effect in April 2008.

Excel had originally installed optical turnstile bollards (which are security devices designed to control access to a building, and they rely on electric beams rather than mechanical arms) at the building as of March 8, 2002. Thereafter, on December 3, 2007, this system was

replaced by GVA with barrier arm turnstiles, which were in place at the time of the alleged accident. The barrier arm turnstiles were manufactured by Gunnebo Entrance Control, Inc. and installed by FireQuench, Inc., a subcontractor hired by Gunnebo. At the time of the installation, Jason Miguel, who is presently Excel's Installation and Service Foreman, was employed by Gunnebo, and was present when FireQuench installed the barrier arm turnstiles.

Excel's sole function is to remotely monitor the HID reader card operation from Excel's offices. It is unnecessary to swipe the HID card to exit the building; therefore, no monitoring of this system is necessary with regard to exiting the building.

Mr. Hausman is unaware of any complaints or accidents where persons have been stricken by the turnstile barrier arms at the building in question prior to April 2008.

Plaintiff's Opposition

Excel's motion for summary judgment is premature. The record suggests that there are numerous witnesses, none of whom are under plaintiff's control, who could shed light on responsibility for the accident. As such, facts essential to opposition may exist but cannot now be stated. Issues concerning the terms of Excel's oral agreement are yet unknown.

500 and L&B's Opposition

Very little substantive discovery regarding the happening of the accident and how the "turnstile" involved works has occurred. Clearly facts essential to justify opposition may exist but cannot be stated due to the early juncture of the discovery phase of this case.

And, Excel's arguments are based on the technical nature of Excel's business, and thus witnesses from Excel will have exclusive knowledge regarding how their systems work.

Further, nowhere in the Excel papers is it established that a malfunction of the HID reader

and the sending of the signal for valid entry could not have been a proximate cause for the opening, and the timing of the closing of the two barrier arms.

While it is true that from what we currently know about this matter that the plaintiff was exiting at the time of her accident, and according to Excel's representations, it is not necessary to swipe the HID card to exit the building, the fact remains that from what we currently know about this matter, the plaintiff claims that her injury was sustained when the clear wings or barrier arms of the security gate closed laterally on her knee. As such the gates had to be open at the time the plaintiff approached the turnstile in order for them to close on her knee, and the proper opening of the gate prior to the closing of the gate would be a function of Excel's obligations.

Excel's Reply

Essentially, the opposing papers allege that the motion should be denied because of outstanding discovery. Also, the opposing papers raise hypothetical questions regarding Excel's connection with the subject security turnstiles in an attempt to raise issues of fact. These are not valid bases to deny summary judgment.

To address some of these hypotheticals, Mr. Hausman states in a further affidavit that Excel services and maintains the HID Global Brand card reader that is used when a person *enters* the building and swipes her access card across the reader. Excel does not service or maintain the mechanism for opening the turnstile gates when a person *leaves* the building. In fact, a person does not need to swipe her access card to leave the building because the card reader does not control the opening of the turnstile gates when a person leaves the building. Plaintiff's accident occurred when she was *leaving* the building.

Also any malfunction of the HID reader card would only occur when a person *enters* the

building not when a person *leaves* the building. Therefore, a malfunction, if any, would simply result in the turnstile gates remaining closed and not open.

Analysis

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, 2003]). Thus, 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.*, *supra*; *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]). 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]).

Excel has met its burden and has made a sufficient showing to obtain summary judgment. Excel has established that it neither manufactured, maintained, inspected, serviced or repaired any of the turnstiles which were in place at the building on the date of the accident. Further, Excel has established that its sole function was to remotely monitor the building access control system whereby a person seeking entrance swipes an HID card through the turnstile reader unit.

As it is uncontested that plaintiff's accident occurred as she was exiting the building, Excel has established that its duties and obligations were unrelated to plaintiff's accident.

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, *supra* 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], *aff'd*, 62 NY2d 686 [1984]).

The opposing papers raise hypothetical questions regarding Excel's connection with the subject security turnstiles in an attempt to raise issues of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*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]).

And, as to the opposition’s argument that discovery is needed, the mere hope that evidence sufficient to establish Excel’s liability may be obtained during discovery does not fulfill the opposition’s obligation to demonstrate the likelihood of such disclosure (*see Steinberg v Abdul*, 230 AD2d 633 [1966]; *Jones v Gamera*, 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]).

Further, the opposition position that Excel’s arguments are based on the technical nature of Excel’s business, and thus witnesses from Excel will have exclusive knowledge regarding how their systems work, belies the fact that these witnesses will be available via subpoena.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant Excel Security Corp., for an order granting summary judgment, dismissing the complaint of plaintiff Joy Correge and all cross claims as asserted against Excel, is granted and the complaint and all cross claims as asserted against defendant Excel Security Corp., are hereby severed and dismissed; and it is further


ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant Excel Security Corp. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: August 12, 2009

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NEW YORK



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD