

Archer v TSI E. 41, LLC.
2009 NY Slip Op 31925(U)
August 24, 2009
Supreme Court, Queens County
Docket Number: 14501/07
Judge: Bernice Daun Siegal
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Bernice D. Siegal
Justice

Part 5

-----X

MYRNA ARCHER,
Plaintiff,
-against-

Index No. 14501/07
Motion Date: 5/27/09
Calendar No. 1,2,3
Motion Seq. No. 1,2,3

TSI EAST 41, LLC., TOWN SPORTS
INTERNATIONAL, LLC, TOWN SPORTS
INTERNATIONAL, INC. D/B/A NEW YORK
SPORTS CLUBS, THE 633 THIRD AVENUE
CONDOMINIUMS, JORDACHE ENTERPRISES, INC.
AND SANDHURST ASSOCIATES, LTD.,

Defendants.

-----X

The following papers numbered 1 to 30 read on the foregoing motions for summary judgment and cross-motion to amend the caption.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Cross-motion.....	5-8
Affirmation in Opposition to Cross-motion.....	9-12
Affirmation in Opposition.....	13-15
Reply.....	16-18
Reply in Support of Cross-Motion.....	19-21
Stipulation to Adjourn.....	22
Notice of Motion-Affirmation-Exhibits (Jordache)	23-26
Notice of Motion-Affirmation-Exhibits (TSI East)	27-30

Upon the foregoing papers, it is ordered that 633 Third Avenue Condominiums, and Sandhurst Associates, Ltd.'s motion, Plaintiff's cross-motion, Jordache Enterprises, Inc's separately noticed motion and TSI East 41, LLC, Town Sports International, LLC, and Town Sports International, Inc. d/b/a New York Sports Clubs' separately noticed motion are determined as follows, and more fully set forth below:

633 Third Avenue Condominiums, and Sandhurst Associates, Ltd.'s motion for summary judgment is granted. Plaintiff's cross-motion to amend the caption is granted. Jordache Enterprises, Inc's motion for summary judgment is granted. TSI East 41, LLC, Town Sports International, LLC, and Town Sports International, Inc. d/b/a New York Sports Clubs' motion for summary judgment is

denied.

Background

Plaintiff Myrna Archer commenced the within premises liability action for money damages as a result of an alleged slip and fall down metal steps at the entrance of the condominium leased by defendants TSI East 41 LLC. Town Sports International LLC, Inc d/b/a New York Sport's Club (collectively referred to as the "Sports Club") located at 633 Third Avenue on June 8, 2004. Plaintiff alleges that the condominium unit was owned by 633 Realty LLC or Jordache Enterprises, Inc. ("Jordache"). In August 2006, Third Avenue Realty, LLC transferred its ownership of the subject premises to 633 Realty, LLC. Access to the unit is through the entrance on Third Avenue, through the lobby and down the steps to the Sport's Club. Defendant Sandhurst Associates. LTD ("Sandhurst") is the managing agent for the 633 Third Avenue Condominiums ("Condominiums"). On the day of the accident, Plaintiff alleges that a maintenance worker was washing the sidewalk in front of the building with a hose, making the entire sidewalk and the bottoms of her shoes wet, that the metal steps to the sports Club had been worn through in places so that steel could be seen where the tread had once covered and that she slipped and fell, sustaining injuries.

Defendants all now move for summary judgment claiming that Plaintiff has failed, as a matter of law, to establish a prima facie case of negligence. Plaintiff cross moves for leave to amend the caption to include 633 Realty LLC., a "misnamed" party.

DiscussionJordache Enterprises Motion for Summary Judgment

Defendant Jordache Enterprises, Inc. ("Jordache"), moves for summary judgment dismissing the complaint against it. Jordache asserts that it has no ownership interest in the property located at 633 Third Avenue, contending that a principal of Jordache and not Jordache itself is a principal in the entity that owned the condominium where the alleged accident occurred.

It is well established that to establish a prima facie case of negligence, the plaintiff must demonstrate (1) that the defendant owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach. (see *Solomon v City of New York*, 66 NY2d 1026 [1985].) It is well established as a general rule, "liability for a dangerous condition on property is predicated upon ownership, occupancy, control, or special use of the property." (*Millman v. Citibank, N.A.*, 216 Ad2d 278 [2d Dept 1995].)

It is undisputed that Joel Nakash (one of the principals of Jordache), is the sole principal of Third Avenue Realty LLC and 633 Realty LLC. Jordache submits the deposition testimony of Robert Speigelman wherein he testifies that there was no relationship between 633 Third Avenue/Third Avenue Realty, LLC, the alleged owners of the subject property, and defendant Jordache. Spiegleman also testified that at the time of the

accident the subject premises was owned by Third Avenue Realty, LLC.

Plaintiff's counsel refers to correspondence sent by investigators retained by Jordache's insurance carrier wherein the investigator demanded that Sports Club assume Jordache's defense. However, the letters fail to provide an admission on behalf of Jordache or proof that Jordache is the alter ego of 633 Realty LLC and plaintiff's submission is devoid of any proof in admissible form establishing that Jordache owned the property in question or was an alter ego of 633 Realty LLC. Accordingly, defendant Jordache's motion for summary judgment dismissing the complaint, as against Jordache, is granted.

Sports Club's Motion for Summary Judgment

Defendants Sports Club move for summary judgment dismissing the complaint against them, which is denied because material issues of fact are in dispute, namely the condition of the stairs at the time of the accident and whether Sports Club had notice of the condition. A motion for summary judgment may only be granted when it clearly appears that no material and triable issue of fact is presented (Nicholas Di Menna & Sons v. City of New York, 301 NY 118 [1950]). Moreover, a defendant who moves for summary judgment in a slip and fall action has the initial burden of showing prima facie that it neither created the alleged condition, nor had actual or constructive notice of the defect in sufficient time to discover and remedy the problem. (Birnbaum v.

New York Racing Assn., Inc., 57 AD3d 598 [2nd Dept 2009] "The defendant must offer some evidence as to when the area in question was last... inspected relative to the accident." (Arzola -v- Boston Properties Limited Partnership, 63 AD3d 655,656 [2nd dept 2009] quoting Birnbaum -v- New York Racing Assn., Inc., 57 AD3d 598, 599.) It is undisputed that the leased premises included the stair case upon which the alleged slip and fall occurred. The lessee defendant, Sports Club, by merely alleging that no complaints were received (see deposition of Velasquez) or that the property manager at 633 Third Avenue manages the "common areas" fails to establish that it had neither actual or constructive notice of the alleged defect in the steps. Whether or not the slip might have been precipitated by soles being wet is a separate issue of fact. As the defendant has failed to make a prima facie showing with respect to the condition of the stairs, which were part of the leased space, the court need not consider Plaintiff's submission in opposition. Accordingly, defendant's motion to dismiss is denied.

633 Third Avenue Condominiums and Sandhurst Associates,
Ltd.'s Motion for Summary Judgment

Defendants 633 Third Avenue Condominiums ("Condominiums") and Sandhurst Associates, Ltd. ("Sandhurst") moved for summary judgment dismissing the complaint against them. The motion is granted. Plaintiff's complaint against Condominiums and Sandhurst alleges a breach of "duty to keep the premises, more

particularly, the steps and stairs located thereon in a safe and non-hazardous condition.”

An out of possession owner/lessor will generally not be held liable in negligence for conditions upon the land after transfer of possession and control. *Del Giacco v. Noteworthy Co.*, 175 AD2d 516 [2d Dept 1991].) namely that a non-possesory landlord or property manager is not liable in tort for accidents resulting from the allegedly negligent construction or maintenance of the premises over which a tenant has full and exclusive control. (*Vijayan v. Bally's Total Fitness* (289 AD2d 224 [2d Dept. 2001].)

It is undisputed that Condominiums did not own the subject premises at the time of the accident. Condominiums attach the License Agreement between Condominiums and ASC-CSFB (the prior owner of the subject premises) which states that ASC-CSFB is the owner of the subject premises. (Condominium's Exhibit "E".)

Ken McGill, an employee of Sandhurst, testified at a deposition wherein he explained that Sandhurst, as the property manager, only managed the common areas of the building and not the individual condominium units. McGill also testified that incident occurred on the condo unit owner's property and not in the common area.

The court notes that the plaintiff has failed to rebut Condominium or Sandhurst's contentions regarding the ownership or maintenance of the subject premises.

Plaintiff further contends that Condominiums and Sandhurst created a dangerous condition by washing the sidewalk without

placing mats at the gym's entrance. However, Plaintiff did not injure herself on the wet sidewalk, and Plaintiff alleges nothing in the record that tends to charge Condominiums with knowledge of the condition of the stairs. "The presence of snow, slush, or water, without ice, would not render the walk obviously or inherently dangerous to pedestrians." (Murphy v. Hudson & M.R. Co., 180 AD 585, 592 [1st Dept. 1917]). Plaintiff cites Espinal v. Melville Snow Contractors, Inc. (98 NY2d 136 [2002]) in support of her proposition that Condominiums and Sandhurst should be held liable for exacerbating the dangerous condition on Sports Club's stairwell. However, analysis of the fact patterns discussed in the Espinal decision supports only the proposition that Condominiums would be liable to Plaintiff had it contracted with Sports Club or the owners to construct, maintain, or wash the steps on which Plaintiff fell. The actual link between Condominiums' actions and the accident is too tenuous to support liability under Espinal.

If Condominiums owed a duty to any of the parties to this action, it was to notify defendant Sports Club to place absorbent mats inside the revolving door as a result of the wetness caused by its washing of the sidewalk. "A property owner is not obligated to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation" (Curtis v. Dayton Beach Park No. 1 Corp., 23 AD3d 511, 512 [2d Dept. 2005]). Furthermore, injuries such as those allegedly suffered by Plaintiff arising from Condominiums and Sandhurst's

actions are not sufficiently foreseeable to satisfy the proximate cause element of a negligence action (see *Di Ponzio v. Riordan*, 89 NY2d 578 [1997]). To suppose otherwise would require those in Condominiums and Sandhurst's position to put down absorbent mats and caution signs on all four sides of the owner's portion of the sidewalk, ensuring that no pedestrian leaves that portion of the sidewalk without dry soles or an explicit warning, merely because the possibility exists that the sidewalk water might exacerbate the danger of some other unknown slippery surface on another's property.

Archer's Cross-Motion to Amend the Caption

Plaintiff's cross motion to amend the caption pursuant to CPLR §305(c) to include 633 Realty, LLC is granted.

CPLR §305(c), authorizes the court, in its discretion, to "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced".

Plaintiff contends that it brought the within cause of action against Jordache because it had originally believed that Jordache was the owner of the condo unit leased to Sports Clubs. Plaintiff further contends that Jordache held itself out and allowed itself to be known as the owner and insured of the subject premises.

Jordache asserts that the statute of limitations as against 633 Realty LLC has passed as the instant application to amend was

made on April 29, 2009, almost five (5) years after the accident occurred. However, plaintiff attached an affidavit of service of the Supplemental Summons and Amended Verified Complaint on 633 Realty LLC dated July 19, 2007.

"Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that two criteria are met. The first criterion is that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect. The second criterion is that the intended but misnamed defendant would not be prejudiced." (*Simpson v. Kenston Warehousing Corp.*, 154 AD2d 526, 527 [2d Dept 1989].) The allegations in the Supplemental Summons and Amended Verified Complaint properly apprised 633 Realty, LLC as they were the owners of the premises at the time of the incident. Plaintiff meets the second criteria as 633 Realty, LLC were served with Supplemental Summons and Amended Verified Complaint in July of 2007 and the attorneys for Jordache are also the attorneys who are opposing the within application. The amended caption shall be:

-----X
MYRNA ARCHER, Index No. 14501/07
Plaintiff,
-against-

TSI EAST 41, LLC., TOWN SPORTS
INTERNATIONAL, LLC, TOWN SPORTS

INTERNATIONAL, INC. D/B/A NEW YORK
SPORTS CLUBS, THE 633 THIRD AVENUE
CONDOMINIUMS, 633 REALTY, LLC,
JORDACHE ENTERPRISES, INC
AND SANDHURST ASSOCIATES, LTD.,

Defendants.

-----X

Accordingly, plaintiff's motion to amend the caption is granted and plaintiff is directed to serve a copy of this order with notice of entry upon defendants.

Conclusion

ORDERED that, 633 Third Avenue Condominiums, and Sandhurst Associates, Ltd.'s motion for summary judgment is granted.

ORDERED that, Plaintiff's cross-motion to amend the caption is granted.

ORDERED that, Jordache Enterprises, Inc's motion for summary judgment is granted.

ORDERED that, Sports Clubs' motion for summary judgment is denied.

Dated: August 24, 2009

Bernice D. Siegal, J. S. C.

