

Tassi v Marriott Intl., Inc.

2009 NY Slip Op 32318(U)

October 6, 2009

Supreme Court, New York County

Docket Number: 113505/06

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan

PART 36

Index Number : 113505/2006

TASSI, PHILLIP

INDEX NO. _____

vs

MARRIOTT INTERNATIONAL

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits -- Exhibits _____

3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment*
by Twin Forks Concrete, Inc. is denied as
per the attached memorandum decision.

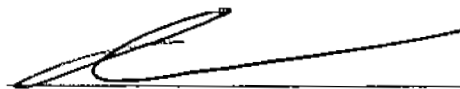
FILED

OCT - 8 2009

NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 10/6/09



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
PHILLIP TASSI,

Plaintiff,

Index No. 113505/06

- against -

MARRIOTT INTERNATIONAL, INC. d/b/a
COURTYARD BY MARRIOTT, URGO HOTEL
MANAGEMENT, LLC. d/b/a COURTYARD BY
MARRIOTT, COURTYARD BY MARRIOTT
LIMITED PARTNERS d/b/a COURTYARD BY
MARRIOTT, COURTYARD BY MARRIOTT II
LIMITED PARTNERSHIP d/b/a COURTYARD BY
MARRIOTT and SAYVILLE BROWNING
PROPERTIES, INC. d/b/a COURTYARD BY
MARRIOTT, TWIN FORKS CONCRETE, INC. and
LAND DESIGN ASSOCIATES, P.C.,

Motion Seq. No.: 004

Defendants.

-----x

MARRIOTT INTERNATIONAL, INC. d/b/a
COURTYARD BY MARRIOTT, URGO HOTEL
MANAGEMENT, LLC. d/b/a COURTYARD BY
MARRIOTT, COURTYARD BY MARRIOTT
LIMITED PARTNERS d/b/a COURTYARD BY
MARRIOTT, COURTYARD BY MARRIOTT II
LIMITED PARTNERSHIP d/b/a COURTYARD BY
MARRIOTT and SAYVILLE BROWNING
PROPERTIES, INC. d/b/a COURTYARD BY
MARRIOTT,

Third-Party Plaintiffs,

- against -

TWIN FORKS CONCRETE, INC. and
LAND DESIGN ASSOCIATES, P.C.,

Third-Party Defendants.

-----x

HON. DORIS LING-COHAN, J.:

In this negligence action, defendant/third-party defendant
Twin Forks Concrete, Inc. ("Twin Forks") moves, pursuant to CPLR

§3212, for summary judgment dismissing the Complaint and cross-claims against it.

BACKGROUND

Plaintiff, Phillip Tassi, commenced this action seeking to recover damages for personal injuries he allegedly sustained on April 23, 2006, when he tripped and fell in the walkway area of the Courtyard by Marriott hotel, located at 5000 Expressway Drive, Ronkonkoma, New York a/k/a 60 Mill Road, Ronkonkoma, New York (the "subject premises"). At the time of the alleged incident, plaintiff was a guest at the hotel. The incident allegedly occurred while plaintiff was walking from his parked vehicle toward the hotel's lobby doors. He reportedly tripped on a drop, a wheelchair access or cut curb, in the walkway in front and to the west of the main entrance to the hotel.

The subject premises are owned by defendant Sayville Browning Properties d/b/a Courtyard by Marriott ("Sayville Browning") and managed by defendant Urgo Hotel Management, LLC. d/b/a Courtyard by Marriott ("Urgo"). The hotel was built in 2001 or 2002.

Sometime in 2001, the general contractor for the hotel construction project had hired Twin Forks to construct the walkways for the subject premises. There was no written contract, and Twin Forks reportedly used designs and drawings given by the owner and general contractor. Twin Forks completed

its work on the walkways in 2002 and did not perform any additional work for the project.

Plaintiff arrived at the subject premises on April 22, 2006, at approximately 4:00 p.m. He traversed the area from the parking lot to the hotel entrance several times before he tripped and fell the next morning.

Plaintiff initially commenced this action against Marriott International, Inc. d/b/a Courtyard by Marriott, Urgo, Courtyard by Marriott Limited Partners d/b/a Courtyard by Marriott, Courtyard by Marriott II Limited Partnership d/b/a Courtyard by Marriott and Marriott and Sayville Browning (collectively, "Marriott"). Thereafter, Marriott impleaded Twin Forks and defendant Land Design Associates, P.C. ("Land Design"), seeking contribution or indemnification. Plaintiff filed an amended Complaint naming Twin Forks and Land Design as defendants.

The amended Complaint essentially alleges that defendants were negligent in the ownership, operation, and maintenance of the subject premises, and that the alleged incident and plaintiff's injuries were caused solely by the negligence of defendants. The Bill of Particulars contains similar allegations and outlines the injuries allegedly suffered by plaintiff.

Issue was joined as to Marriott and Twin Forks with the service of separate answers, generally denying the allegations in the pleadings. Twin Forks now seeks summary judgment dismissing

the amended Complaint and third-party Complaint against it. Plaintiff and Marriott oppose the motion for summary judgment.

DISCUSSION

It is well settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the amended Complaint alleges negligence claims against defendants. Negligence consists of the breach of a duty owed by the defendant to the plaintiff, resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

At an examination before trial ("EBT"), held on October 30, 2008, plaintiff testified that he had taken his bags to his car and was returning to the hotel, during a "light drizzle," when the incident occurred (Transcript of Plaintiff's EBT, Not of Mot, Exh K, pp. 39-44). Plaintiff stated that he walked along the

driveway to cross the parking lot, entered the sidewalk in front of the hotel, and proceeded in an easterly direction toward the hotel (*id.*, pp. 42-44). He also stated that he did not notice anything unusual about the sidewalk (*id.*, p. 43). He further stated that he was looking straight ahead at eye level; that nothing was obstructing his view, and that he was able to see the walkway in front of him even though it was raining (*id.*, p. 53). In addition, plaintiff testified that he was walking on the sidewalk, close to the curb, when the alleged incident occurred (*id.*). He stated that there was a drop, a wheelchair access or cut curb approximately four feet wide, and so his foot went down a lot further than he expected (*id.*, p. 55-56). He also stated that when his foot came in contact with the area, he started to lose his balance, he hit his left foot and went down, and that his right knee and forearm hit the ground (*id.*, p. 57). He further testified that he lost his balance because of the difference in the grade of the sidewalk (*id.*, p. 58). In addition, he stated that he could not tell what caused the accident because there were no markings or anything on the curb to show that it was not a straight curb or sidewalk (*id.*, p. 60).

In seeking summary judgment, Twin Forks argues that it did not owe any duty of care to plaintiff since it completed the walkway construction project four years before the alleged incident and did not perform any additional work for the project. Twin Forks makes a *prima facie* showing that it was not at fault

for the happening of the alleged incident (see *Greenstein v Realife Land Improvement, Inc.*, 13 AD3d 338, 339 [2nd Dept 2004]).

However, the opponents maintain that a triable issue of fact exists as to whether Twin Forks assumed a duty of care by failing to exercise reasonable care in the performance of its duty in causing/creating the allegedly defective condition which caused plaintiff's injuries. To bolster their position, the opponents rely, in part, on the EBT testimony of Twin Forks' owner and principal, Christopher Andersen, who testified that Twin Forks followed the site plan when doing its construction work (Transcript of Anderson EBT, Not of Mot, Exh H, pp. 14, lines 2-7); such testimony is contrary to that of Lee Browning, Sr., the principal of Marriot, who testified that the curb-cut/ramp area in question, did not appear on the site plan (Transcript of Browning EBT, Not of Mot, Exh I, pp. 17, lines 2-5). Opponents of Twin Forks' motion also submit an affidavit from Richard Berkenfeld, an engineer, stating, in part, that the "lack of any visual perception or visual cues of the curb ramp in a walkway represented a hidden hazard;" that the slope of the curb ramp at the subject premises "exceeded the maximum slope by 50%;" that "the slope of the sides of the curb ramp is approximately four times as steep as it would be required by code;" that the provision of the State's building codes that requires that a curb

ramp have detectable warning texture was violated (Berkenfeld Affid, Affid in Opp, Exh 2).

On review of the submissions, the Court concludes that triable issues of fact exist as to whether Twin Forks exercised reasonable care in constructing the walkway and curb cuts where plaintiff fell, to preclude summary judgment.

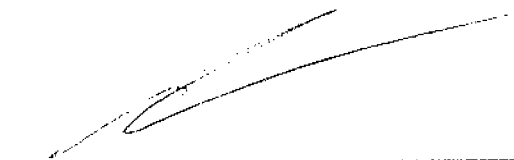
Accordingly it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated:

10/8/09



Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\TASSI.marriot intl.wpd

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