

Saretsky v 85 Kenmare Realty

2009 NY Slip Op 33255(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 112444/07

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
J.S.C.
Justice

PART 44

Index Number : 112444/2007

SARETSKY, LORELLE

INDEX NO. _____

vs

85 KENMARE REALTY

MOTION DATE 9/29/09

Sequence Number : 003

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

The following papers, numbered _____ is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
SEP 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

The co-defendant Sheryl Shoe Incorporated (“Sheryl”) moves to dismiss the complaint; directing the co-defendant 85 Kenmare Realty Corp. (“Kenmare”) to undertake the defense of Sheryl; directing Kenmare to indemnify Sheryl for all and any damages found against Sheryl; and directing Kenmare to indemnify Sheryl to the extent that negligence is not attributable to Sheryl. The co-defendant Kenmare cross-moves for summary judgment dismissing the plaintiff’s complaint and all cross-claims; summary judgment against co-defendant Sheryl on the grounds it breached the terms of its lease with Kenmare; directing Sheryl to assume the defense and provide indemnification to Kenmare pursuant to the aforementioned lease. The respective parties oppose the motions.

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of fact exists. C.P.L.R. Section 3212; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The proponent of a summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it entitled to summary judgment. *Zuckerman, supra*. Both defendants move against the plaintiff on the grounds the plaintiff fails to rebut her sworn testimony from the statutory oral examination of the plaintiff taken by the City of New York pursuant to Section 50(h) of the General Municipal Law wherein she states she fell because she didn’t see the step.

This action arises from an accident wherein plaintiff “fell down....didn’t...trip....just went down” at a sidewalk transition step, that extends the entire length of the sidewalk and by

Dated: 9/24/09

met
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

pg 1 of 2

happenstance the scene of the accident just happened to be in front of the store rented by Sheryl. The lease between Kenmare and Sheryl did not require Sheryl to maintain the structural integrity of the sidewalk. Sheryl was required to maintain the sidewalk free of rubbish, snow and ice..." But no such things are alleged to have played a part in this accident. In essence, we have a plaintiff under oath testifying as previously stated that she fell because she wasn't looking. The plaintiff's opposition fails to raise a triable issue of fact. In fact, there isn't any opposition except a plaintiff's affirmation which fails to raise a triable issue of fact.

Accordingly, the defendants' motion and cross-motion for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed. Clerk is directed to enter judgment accordingly.

DATED: September 11, 2009

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~~NEW YORK COUNTY CLERK~~
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SEP 18 2009
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NEW YORK