

Campbell v Gordon Floral Realty, Corp.

2010 NY Slip Op 31226(U)

May 4, 2010

Supreme Court, Nassau County

Docket Number: 15513/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARGARET CAMPBELL and RICHARD CAMPBELL,

Plaintiffs,

- against -

GORDON FLORAL REALTY, CORP. and
WOODMEN OF THE WORLD LIFE INSURANCE
SOCIETY,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 15513/08
Motion Seq. Nos.: 02, 03, 04
Motion Dates: 12/15/09
02/05/10
02/05/10

XXX

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion Sequence No. 02, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Affirmation in Partial Opposition</u>	<u>3</u>
<u>Reply Affirmation</u>	<u>4</u>
<u>Notice of Motion Sequence No. 03, Affirmation and Exhibits</u>	<u>5</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>6</u>
<u>Affirmation in Opposition</u>	<u>7</u>
<u>Reply Affirmation</u>	<u>8</u>
<u>Notice of Motion Sequence No. 04, Affirmation and Exhibits</u>	<u>9</u>
<u>Affirmation in Opposition</u>	<u>10</u>
<u>Affirmation in Opposition</u>	<u>11</u>
<u>Reply Affirmation</u>	<u>12</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

In Motion Sequence No. 02, defendant, Gordon Floral Realty, Corp. ("Gordon") moves, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the

complaint and any and all cross-claims on the grounds that defendant Gordon, as out-of-possession landlords, did not create the alleged defective condition which injured plaintiff Margaret Campbell ("MC") and was not contractually responsible for maintaining the premises where the plaintiff MC was injured. Plaintiffs oppose defendant Gordon's motion. Defendant Woodmen of the World Life Insurance Society ("Woodmen") submitted an affirmation in partial opposition.

This personal injury action arises from a trip and fall accident on February 8, 2008, at the premises known as 201 Glen Street, Glen Cove, New York. At the time of the accident, defendant Gordon was the owner of the subject premises. Defendant Gordon never occupied said premises. Said property was leased to an entity named Roadway Express, Inc. The lease with respect to said property is between Terminal Industrial Park as fee owner and defendant Gordon, a contract vendee, and Roadway Express, Inc., as tenant for the property located at 140 Gordon Drive, Syosset, New York. Defendant Woodmen is the holder of the mortgage for the subject premises. It is alleged that, at the aforementioned location, on the aforementioned date, at approximately 9:25 p.m., plaintiff MC slipped and fell, on the bottom of an outdoor ramp near a parking lot, due to the accumulation of ice and/or snow. On the date of the alleged incident, plaintiff MC was employed as a Cashier Type 4 with Roadway Express, Inc. and the alleged incident took place when she was leaving work that evening via a ramp outside of her office. Said slip and fall caused injuries to plaintiff MC's left shoulder, left hip and lower back. On or about July 31, 2008, plaintiffs commenced the action by service of a Summons and Verified Complaint. On or about October 21, 2008, defendant Woodmen served a Verified Answer. On or about October 27, 2008, defendant Gordon joined issue.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue

of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Defendant Gordon submits that it is entitled to summary judgment on the grounds that as an out-of-possession landlord it did not create the alleged defective condition which injured plaintiff MC and it was not contractually responsible for maintaining the premises where plaintiff MC was injured. Defendant Gordon asserts that Roadway Express, Inc. was responsible for the removal of snow and ice on the subject premises. Defendant Gordon cites Article 5.01 of the lease agreement between itself and tenant Roadway Express, Inc. which states:

“throughout the entire term of this lease, tenant shall, at tenant’s sole costs and expense, maintain the demised premises and all systems installed therein and shall, subject to the provisions of § 1.04, 5.04, 10.03, 25.02 and 5.03, hereof, make all repairs to the demised premises at its own cost and expense, including all maintenance and repair of the parking area on the demised premises and the driveway servicing same and shall remove rubbish, snow and ice therefrom as and when necessary. Any repairs to the roof surface made by the tenant shall be done by a roofer which shall be first approved by the landlord, in writing.

Defendant Gordon contends, that pursuant to said lease agreement, the tenant, Roadway Express, Inc., has sole care and custody of the premises at issue and is responsible for all repairs and maintenance to the subject property. Defendant Gordon states that at no time did defendant

Gordon, nor a separate management company, Floral Management Realty Corp., ever retain or hire an individual to perform any work on sidewalks or ramps on the subject premises or to remove snow at the subject premises.

In opposition to defendant Gordon's motion, plaintiffs first argue that defendant Gordon's motion should be denied as premature as there is presently outstanding discovery. Plaintiffs claim that defendant Woodmen has yet to appear for an examination before trial and defendant Gordon has not completely complied with plaintiffs' Demand for Discovery and Inspection dated October 1, 2009 (which is the subject of plaintiffs' motion sequence 03). The discovery items plaintiffs claim are still due and owing to them from defendant Gordon deal with site plans, electrical and lighting plans and repair records, along with inspection records. Plaintiffs contend that said documentation is relevant to defendant Gordon's argument that it is not liable absent a violation of a specific statute or injuries being caused by a structural defect on the premises. Plaintiffs argue that there is an issue as to whether the area of the alleged incident lacked sufficient lighting thereby contributing to the subject accident. Plaintiffs contend that further discovery relating to the issue of lighting could indicate whether the overhead lighting was sufficient to permit a pedestrian to observe an accumulation of snow and ice at the scene of the accident. Plaintiffs state that defendant Gordon, even as an out-of-possession landlord, is still responsible for those injuries caused by structural defects and defendant Gordon's motion papers do not exclude the fact that the defect in the overhead lighting may have caused/contributed to the subject accident. Plaintiffs additionally argue that there is an issue of fact as to whether or not defendant Gordon can even be considered an out-of-possession landlord. Plaintiffs base this argument on defendant Gordon's mortgage agreement with defendant Woodmen in which, plaintiffs assert, that defendant Gordon guaranteed defendant

Woodmen, in writing, that it would manage and operate the subject premises, maintain it and keep it in repair.

In response to plaintiffs' opposition, defendant Gordon replied that it has been an out-of-possession landlord for the subject premises for approximately twenty years and re-emphasized the fact that all snow removal was the responsibility of tenant Roadway Express, Inc. Furthermore, with respect to plaintiffs' claim regarding the lighting conditions, defendant Gordon states, "[d]uring plaintiff's deposition, she testified that at the time she first noticed the subject ramp, it was covered with ice.... she also noticed that there was snow located on the ice.... Even as she was walking down the ramp, she noticed that there was ice on the ramp and that it was slippery and uneven.... She was actually holding onto the wall as she was going down the ramp.... As such, plaintiff clearly stated that she was able to see the snow and ice and actually knew that she was traveling down a ramp covered with snow and ice prior to her fall. It is respectfully submitted that the lighting conditions have no bearing on the causation of the subject accident. Even if the lighting conditions were somehow alleged to have been the proximate cause of this accident, the exterior lighting of the subject building is part of the overall maintenance of the subject building which makes it the duty of Roadway Express, Inc. and not the duty of the out-of-possession landlord, Gordon. As such, the lighting conditions at or about the time of the subject accident have no bearing upon the issues raised in the summary judgment motion as to defendant Gordon."

An out-of-possession landlord is not liable for injuries occurring on a premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs. *See Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 873 N.Y.S.2d 199 (2d Dept. 2009); *Tragale v. 485 Kings Corp.*, 39 A.D.3d 626, 834 N.Y.S.2d 256 (2d Dept.

2007); *Rhian v. PABR Assoc., LLC*, 38 A.D.3d 637, 832 N.Y.S.2d 590 (2d Dept. 2007), *Lowe-Barrett v. City of New York*, 28 A.D.3d 721, 815 N.Y.S.2d 630 (2d Dept. 2006); *O'Connell v. L.B. Realty Co.*, 50 A.D.3d 752, 856 N.Y.S.2d 165 (2d Dept. 2008); *Robinson v. M. Parisi & Son Construction Co., Inc.*, 51 A.D.3d 653, 856 N.Y.S.2d 678 (2d Dept. 2008); *Mejia v. ERA Reality Co.*, 69 A.D.3d 816, 894 N.Y.S.2d 460 (2d Dept. 2010); *Salgado v. Ring*, 21 A.D.3d 362, 798 N.Y.S.2d 920 (2d Dept. 2005). Reservation of a right to enter the premises for the purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision. See *Brewster v. Five Towns Health Care Realty Corp.*, *supra*; *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). In support of its motion for summary judgment, defendant Gordon satisfied its burden by submitting documentary evidence- the lease agreement between defendant Gordon and tenant Roadway Express, Inc. and the transcript of the examination before trial of Laurence Gordon, president and treasurer of Gordon Floral Realty Corp.-demonstrating that it was an out-of-possession landlord that was not contractually obligated to maintain or repair the premises. Specifically, defendant Gordon submitted evidence that showed that tenant Roadway Express, Inc. was specifically responsible for snow and ice removal on said premises.

As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, *supra*. In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs failed to raise a triable issue of fact to dispute defendant Gordon's status as an out-of-possession landlord.

Additionally, plaintiffs failed to raise a triable issue of fact as to whether there was a alleged defect in the lighting conditions that constituted a specific statutory violation. As defendant Gordon argued, the proximate cause of plaintiff M C's accident and injuries was not poor or inadequate lighting at the subject premises. Her testimony at her examination before trial belies that argument. She testified that she saw the snow and ice on the ramp and handrail. She testified in great detail to the condition of the ice and snow in said location. She also testified that she was using the wall of the building to balance herself on so she could attempt to traverse the snow and ice covered surface. She never once testified that she did not see the snow and ice and that is what caused her to slip and fall. As previously stated, it was quite the contrary. Plaintiff M C was aware of the conditions of the ramp and handrail before her accident occurred. *See Brewster v. Five Towns Health Care Realty Corp., supra; Robinson v. M. Parisi & Son Construction Co., Inc., supra; Sanchez v. Barnes & Noble, Inc., 59 A.D.3d 698, 874 N.Y.S.2d 528 (2d Dept. 2009).*

Moreover, the motion for summary judgment was not premature, since plaintiffs failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiffs' "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC, supra. See also Lopez v. WS Distrib., Inc., 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).*

Therefore, defendant Gordon's motion (Motion Sequence No. 02), pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the complaint and any and all cross-claims against it is hereby granted.

In Motion Sequence No. 04, defendant Woodmen moves, pursuant to CPLR § 3212, for

an order granting summary judgment and dismissing the complaint and any and all cross-claims or, in the alternative, an order granting conditional summary judgment over and against defendant Gordon. Plaintiffs oppose defendant Woodmen's motion. Defendant Gordon submitted an affirmation in partial opposition.

Defendant Woodmen argues that it is entitled to summary judgment as a matter of law because it did not own, operate or otherwise control the subject premises prior to, or at the time of, plaintiff M C's slip and fall accident. Defendant Woodmen states that its only connection to the subject premises is that it holds the note to a mortgage thereon. Defendant Woodmen further contends that, pursuant to the Assignment of Rents and Leases entered into between defendant Woodmen and defendant Gordon, defendant Woodmen would have the authority to enter onto and take possession of the property only in the event that defendant Gordon defaulted on its mortgage payments. Defendant Gordon never defaulted on its mortgage, therefore the provision never triggered. Defendant Woodmen claims it did not owe plaintiffs a duty of care because it did not own, operate or in any way control the subject premises prior to, or at the time of, the alleged accident. Defendant Woodmen contends that plaintiffs cannot show that defendant Woodmen owed a duty of care, that it breached said duty and that said breach was the proximate cause of plaintiff M C's injuries. Defendant Woodmen also argues that it did not create nor have actual or constructive notice of the dangerous, hazardous and/or defective condition that caused plaintiff M C's accident.

In opposition to defendant Woodmen's motion, plaintiffs once again argue that the motion should be denied as premature as there is presently outstanding discovery. Plaintiffs also contend that defendant Woodmen's motion should be denied based upon the fact that "the affidavit of Woodmen of the World Life Insurance Society's representative is silent as to

whether or not Woodmen of the World Life Insurance Society directed the owner of the property or its managing agent how to manage and maintain the property or if it conferred with the owner or managing agent as to the maintenance and management of the property. Clearly, had Woodmen of the World Life Insurance Society directed either the owner or managing agent how to manage or maintain the property and/or conferred with the managing agent and/or owner how to manage or maintain the property such directives could constitute control of the premises to render Woodmen of the World Life Insurance Society liable for injuries caused by the claimed defective condition.”

The Court finds that defendant Woodmen has demonstrated *prima facie* entitlement to summary judgment. Therefore, as stated previously, the burden shifts to plaintiffs to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

In opposition, plaintiffs failed to raise a triable issue of fact with respect to defendant Woodmen’s alleged liability. Plaintiffs failed to raise a triable issue of fact to dispute defendant Woodmen’s legal arguments. Additionally, the motion for summary judgment was not premature, since plaintiffs failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiffs’ “hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion.” *Conte v. Frelen Assoc., LLC, supra*. See also *Lopez v. WS Distrib., Inc.*, 134 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Therefore, defendant Woodmen’s motion (Motion Sequence No. 04), pursuant to CPLR § 3212, for an order granting summary judgment and dismissing the complaint and any and all cross-claims against it is hereby granted.

Consequently, plaintiffs' Motion Sequence No. 03, for an order striking defendants' answers for failure to comply with court ordered discovery or precluding defendants from offering any evidence at the trial, or in the alternative, compelling both defendants to comply with all discovery listed in the annexed information and for an order, pursuant to CPLR § 602, consolidating the above matter with the action entitled *Margaret Campbell and Richard Campbell v. Floral Management Realty Corp.*, Index No.816/10, presently pending in Supreme Court, Nassau County, or in the alternative, joining both actions for joint trial are hereby denied as said requests are now moot given the Court's decision on the defendants' summary judgment motions contained herein.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.
XXX

Dated: Mineola, New York
May 4, 2010

ENTERED
MAY 07 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE