

Raimundo v Rockefeller Group Intl., Inc.

2010 NY Slip Op 31254(U)

May 18, 2010

Supreme Court, NY County

Docket Number: 109500/2008

Judge: Louis B. York

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

J. 24/10

LOUIS B. YORK

PART 2

PRESENT.

Index Number : 109500/2008

RAIMUNDO, CARLOS

vs

ROCKEFELLER GROUP

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion for summary judgment are decided in accordance with the accompanying decision/order

FILED

MAY 24 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/18/10

Lou
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 2

-----X

CARLOS RAIMUNDO,

Index No.: 109500/2008

Plaintiff,

-against-

DECISION/ORDER

ROCKEFELLER GROUP INTERNATIONAL,
INC., ROCKEFELLER CENTER NORTH, INC.,
TIME, INC. and TMC SERVICES, INC.,

Defendants.

-----X

LOUIS B. YORK, J.S.C.:

On July 10, 2008, plaintiff commenced a personal injury action against Rockefeller Group International, Inc. ("Group") and Rockefeller Center North, Inc. ("North") (collectively, "the Rockefeller defendants") and Time, Inc. ("Time") and added TMC Services, Inc. ("TMC") in his supplemental summons and amended complaint. In their amended answer to the amended complaint, the Rockefeller defendants included cross claims against TMC based on contractual indemnification. On November 16, 2009, all claims and cross claims against Time were discontinued by stipulation, leaving North, Group and TMC as defendants.

In this lawsuit, plaintiff alleges that he sustained serious injuries on May 27, 2008, when he fell on the landing of the plaza staircase which is part of the Rockefeller Center site. According to plaintiff, it had rained earlier in the day and a rubber mat was on the landing, extending its entire length and width. When plaintiff stepped down on the mat, he claims, there was no step underneath. Therefore when his foot went down, he lost his balance and fell. In his bill of particulars plaintiff identifies as the single

defect the movable mat which, he alleges, overhung the step and created a trip hazard. Paragraphs five and six of the bill of particulars, which describe the incident and alleged negligence, mentions only that the mat overhung the step. It does not state that the mat was slippery or that the parties had allowed rain or any other substance to accumulate on the mat.

Not surprisingly, plaintiff did not know who had placed the mat on the landing or when that party had placed it there. However, the Rockefeller defendants claim that TMC, which provided cleaning and maintenance services on the site under a contract with North, was responsible for placing mats on the landing and had placed the mat in question on the landing that day. In addition, they claim that under contract TMC was to police the plaza stairwell where the accident occurred. The Rockefeller defendants also state that prior to the incident at issue here, they had received no complaints about the mats at any time. They state that TMC designed the mats specifically for the landing in question so that it would fit properly and that two individuals moved the mat to the landing whenever it rained because of the weight of the mat.

Currently, the Rockefeller defendants move for indemnification as against TMC and for summary judgment as to liability as against plaintiff. TMC opposes the portion of the Rockefeller defendants' motion seeking indemnification and it also cross moves for summary judgment dismissing the claims and cross claims asserted against it. Plaintiff opposes both motions in their entirety.

Analysis

1. Group

Group claims that it has no liability for the accident regardless of whether plaintiff

has a claim. In support, it submits the affidavit of Gerald W. Blume, its Assistant Vice President and Assistant Secretary. In particular, the affidavit states that "Rockefeller Group International, Inc. did not own, operate, maintain, control or lease any portion of the situs of Plaintiff's accident, or the adjacent premises" Blume Aff. ¶ 3. As it had no relationship to the property, it cannot be held liable for any accident. The Court also notes that the covering letter to the services contract with TMC refers to North as "owner" and to another entity, Rockefeller Group Development Corporation, as North's agent.

Contrary to Group's contention, plaintiff opposed this prong of the Rockefeller defendants' application. Plaintiff contends that under Administrative Code of City of New York § 7-210, an out-of-possession landlord has a nondelegable duty to maintain the sidewalk and other areas abutting the property in a safe condition. Simon v. Astoria Federal Savings, 27 Misc.3d 1206(A), 2010 WL 1380369 (Sup. Ct. Kings County April 8, 2010); see Cook v. Consol. Edison Co. of New York, Inc., 51 A.D.3d 447, 448, 859 N.Y.S.2d 117, 119 (1st Dept. 2008). Moreover, this obligation extends to snow, ice and rain removal. See Litkenhaus v. 1158 Hylan Blvd. Corp., 26 Misc. 3d 19, 21, 891 N.Y.S.2d 859, 861 (Sup. Ct. App. T. 2nd, 11th & 13th Dist. 2009).

Plaintiff is correct that the Administrative Code places a nondelegable duty on out-of-possession landlords. Unfortunately for plaintiff, this is irrelevant to Group's argument. Here, Group does not state that it is an out-of-possession landlord but that it is not a landlord, owner or lessee at all. Faced with Blume's statement that Group is not involved in the site at issue, plaintiff was required to present evidence showing that Group is the owner of the property or has some other interest in it. As he failed to

counter Group's evidence, summary judgment dismissing the claims against Group is appropriate.

2. Indemnification.

Now, the Court turns to the motion and cross motion as they relate to the issue of indemnification. On the issue of indemnification, North alleges that its contract with TMC requires TMC to indemnify it in this lawsuit and reimburse it for all litigation expenses it has incurred. TMC failed to procure insurance, breached the contract, and therefore is liable.

In its cross-motion TMC argues that the alleged accident does not relate to the performance of its contractual duties. It states it was only required to put down and pick up the mats, and the contract did not make it responsible for placement of the mats. It challenges Rockefeller's statement that it was required to monitor the area and make sure there were no problems with the mats. It also seeks to limit both plaintiff and North to arguments which it bases on an accident report. Finally, TMC states that North failed to notify TMC either that rainwater had accumulated on the mats and made them slippery or that the mat was not placed properly on the landing, and therefore TMC is not responsible for claims due to either of these alleged problems.

Before it addresses Rockefeller and TMC's discussion of this issue, the Court notes that plaintiff's arguments relating to indemnification have no merit. Plaintiff contends that this issue has no place in his personal injury lawsuit. However, there are cross claims in this lawsuit which assert indemnification. Therefore, the issue is a part of this lawsuit. Plaintiff also claims that the Rockefeller defendants' request for a hearing to determine the legal fees they incurred is trivial and is an unnecessary

distraction in his lawsuit. However, these defendants have a right to a hearing on legal fees. Moreover the hearing will not impede this lawsuit, as the Court has the power to direct that the hearing take place during or after the trial. Finally, plaintiff raises various arguments relating to discovery and potential conflicts of interest in the deposition process. However, all discovery issues were resolved in the order which decided the two discovery motions to which plaintiff refers. They are not before the Court at this time and the Court does not consider them.

Now, the Court turns to the substantive arguments. Neither of the parties point to the pertinent language in the service contract between North and TMC but are in agreement that, at minimum, TMC was required to put down and remove the mats during inclement weather. They also agree that the mats were too large for one individual to carry and therefore two TMC employees were required to place the mats on the steps. As the parties' remaining dispute over the scope of TMC's duties relates to notice, which is not part of plaintiff's claim, the Court does not address this aspect of the indemnification argument.

The indemnification clause is located at paragraph 9 in the contract and provides in pertinent part:

[TMC] will indemnify . . . [North] . . . from and against any and all liability . . . and any and all costs and expenses (including . . . counsel fees and disbursements) arising out of or incurred in connection with, any and all . . . [lawsuits] . . . which shall be made or brought . . . for or in relation to: (a) any (or any alleged) injury to . . . any person . . . arising out of or in connection with the performance of the Services . . . which shall be (or shall be alleged to be) in whole or in part due to . . . any . . . negligence . . . on the part of [TMC] . . .

In addition, under paragraph ten of the contract TMC was obliged to provide

comprehensive general liability insurance and to provide insurance relating to the acts for which it was contractually liable under paragraph nine. North moves for indemnification under this agreement.

In the bill of particulars, plaintiff claims that the injury occurred due to defendants negligence. In particularizing the negligence, he further states that the mat was misaligned due to defendants' negligence when they placed the mat on the step. Moreover, North and TMC agree that defendant TMC was responsible for placing the mat on the step. Therefore, the indemnification agreement above clearly applies to the alleged incident.

TMC argues that under the contract it was required to clean the mat of water or debris only when notified by North and that it was not required to police the mat. However, as already stated, this relates to notice and is not relevant to plaintiff's contention. Similarly, TMC's argument that neither it nor North had notice also is not relevant. In addition, TMC notes that in an accident report, a Rockefeller employee named Michael Lewis wrote that plaintiff stated he slipped and fell down the wet steps. TMC's suggestion that this is binding on all parties as to plaintiff's claims is incorrect for reasons too obvious to describe further. Finally, TMC argues that indemnification is premature. The contract requires it to indemnify for an injury or alleged injury which is or allegedly is in whole or in part due to TMC's negligence. The contract's use of the words "alleged" and "allegedly" emphasize that indemnification is triggered when a plaintiff contends that liability exists and not when TMC's liability is established.

3. Summary judgment dismissing the complaint.

Defendants claim an order of summary judgment dismissing plaintiff's complaint

is proper because defendants lacked notice of the alleged condition. In addition, defendants argue that plaintiff has not raised a triable issue of fact regarding notice because plaintiff did not know how long the condition existed or when defendants placed the mats on the steps. They also point to several other alleged deficiencies in plaintiff's argument. In addition, TMC points to the accident report in which Mr. Lewis wrote that plaintiff stated he slipped and fell down wet steps. Apparently, TMC suggests that plaintiff is bound by Mr. Lewis' description of plaintiff's statement.

Plaintiff opposes both motions as they relate to the complaint.¹ He states that once defendants put down the mat they assumed a duty to do so in a way that reasonably protected those people who used it. He argues that notice is not a prerequisite here, where defendants created the problem, but that even if it were relevant the photographs of the mats create an issue of fact regarding notice. He also states that landowners are responsible for their sidewalks and therefore Group is liable regardless of its involvement with the property.

As for the evidentiary support for his allegations, he submits his own deposition testimony, in which he describes the accident in detail. In addition, he submits the affidavit of Susan DeLuca, who alleges that she worked in the area during the period in question and that the mats often were placed so that they overhung the steps, creating tripping hazards. However, she clarifies that she had no particular knowledge of the

¹Plaintiff suggests in his papers in opposition to the Rockefeller defendants' motion that they sneak in the application to dismiss his complaint. This is incorrect. On the contrary, their notice of motion immediately mentions that the motion seeks the dismissal of plaintiff's claims against the Rockefeller defendants. Moreover, the Court notes that it prefers parties' papers to stick to the issues at hand, without unnecessarily accusatory language directed at opposing counsel.

placement of the mat on the date of the accident and she did not witness plaintiff's accident. Finally, plaintiff submits photographs of the stairs leading to the subway station; the top and bottom steps have the mats on them, and one of the mats overhangs the steps. The date on the photographs are September 24, 2009 and October 1, 2009, though it is not clear when the photographs were taken.

A defendant who moves for summary judgment in a slip and fall case bears the burden of showing not only that it had no notice of the condition but that it did not create the condition. See Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 500, 856 N.Y.S.2d 573, 575 (1st Dept. 2008); Britto v. Great Atlantic & Pacific Tea Co., Inc., 21 A.D.3d 436, 436-37, 799 N.Y.S.2d 828, 829 (2nd Dept. 2005). To prevail on summary judgment, moreover, defendants must not simply throw out credible theories which would rebut plaintiff's claim; instead, they must show that plaintiff cannot prevail. See Alvarez v. 21st Century Renovations, Ltd., 66 A.D.3d 524, 525, 887 N.Y.S.2d 64, 65 (1st Dept. 2009). If it is even arguable that an issue of fact exists, a court must deny the motion. Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 A.D.2d 572, 573, 536 N.Y.S.2d 177, 179 (2nd Dept. 1989). Finally, the court considers the moving parties' evidence in the light most favorable to the nonmoving party. Id. at 573-744, 536 N.Y.S.2d at 179.

Plaintiff's complaint is unclear as to the specifics of his allegations of negligence. In plaintiff's bill of particulars, however, he clarifies his argument. Plaintiff does not contend that the rain caused his fall or that another transient condition existed. Instead, as stated throughout this decision, plaintiff's claims rest on the alleged misalignment of the mat. Because plaintiff alleges that defendants created the condition by placing the

mat down so that it was misaligned, defendants' arguments relating to notice – which, the Court notes, comprise the bulk of defendants' arguments – have no relevance.

Now, the Court turns to defendants' relevant arguments. Defendants suggest that TMC may have placed the mat down properly but due to pedestrian traffic the mat may have moved. As stated, TMC also noted a possible inconsistency between plaintiff's testimony and his statement immediately following the accident. They also state that the DeLuca affidavit has several weaknesses which make it insufficient to show a triable issue. However, this argument also rests on an improper articulation of defendants' burden on this motion. A movant "does not carry its burden . . . by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." Mennerich v. Esposito, 4 A.D.3d 399, 400, 772 N.Y.S.2d 91, 93 (2nd Dept. 2004)(citations and internal quotation marks omitted). It is only after the defendants in a summary judgment motion satisfy their initial burden that the court turns to the sufficiency of the plaintiff's opposition. Britto, 21 A.D.3d at 437, 799 N.Y.S.2d at 829. Similarly, questions about plaintiff's credibility, limitations in his knowledge, or gaps in proof go to the weight of plaintiff's evidence and the strength of his case but do not mean that he has not raised a triable issue.

Conclusion

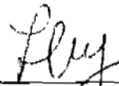
The Court has considered all of the other arguments and they do not alter the conclusions below. It is

ORDERED that the motion is granted to the extent that it seeks indemnification and dismissal of the claims asserted against Group and is otherwise denied; and it is further

ORDERED that the cross-motion is denied; and it is further
ORDERED that TMC is required to indemnify North in this action; and it is further
ORDERED that a hearing as to attorney's fees owed to North by TMC shall be
held at the conclusion of the trial or other resolution of this action; and it is further
ORDERED that the claims and cross-claims asserted against Group are severed
and dismissed, and the remainder of this action shall continue.

ENTER:

Dated: 5/18/10



Louis B. York, J.S.C.

FILED
MAY 24 2010
NEW YORK
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