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

PRESENT: JAFFE PART 5

Index Number : 104010/2006

ZOVAS, VASILIKI

VS

ECKERD CORP.

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment & dismissal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
JUL 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUL 16 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/12/10

BARBARA JAFFE
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

VASILIKI ZOVAS,

Plaintiff,

-against-

ECKERD CORPORATION,

Defendant.

----------x

ECKERD CORPORATION,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK and GENOVESE ENTERPRISES,

Third-Party Defendants.

----------x

Index No. 104010/06

Motion Date: 5/3/10
Motion Seq. No.: 004
Motion Cal. No.: 129
Motion Argued: 5/25/10

DECISION AND ORDER

BARBARA JAFFE, JSC:

For defendant/third-party plaintiff:
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Mintzer, Sarowitz, Zeris,
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For third-party defendant Genovese:
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By notice of motion dated February 1, 2010, third-party defendant Genovese Enterprises (Genovese) moves pursuant to CPLR 3212 for an order dismissing the third-party complaint against it and granting it summary judgment on its claims for indemnification and contribution against defendant/third-party plaintiff Eckerd Corporation (Eckerd), pursuant to CPLR

3211(a)(7) for an order dismissing Eckerd's claims against it for failure to state a cause of action, and sanctioning Eckerd for filing a frivolous action and awarding it costs. Eckerd opposes the motion.

I. PERTINENT BACKGROUND

In 1964, Genovese and Genovese Steinway Drugs, Inc. entered into a lease for the premises at 30-99 Steinway Street in Queens, New York. (Affirmation of Anna A. Higgins, Esq., dated Feb. 1, 2010 [Higgins Aff.], Exh. G). The lease requires the tenant to keep the demised premises safe and the sidewalks and curb in front of the premises clean and free from ice, snow, *etc.* (*Id.*).

In 1985, the lease was modified to require the tenant, Genovese Drug Stores, Inc., to indemnify Genovese against any personal injury claims that occur in, on or about the demised premises or on the sidewalks adjoining the premises, save for those claims that result from Genovese's negligence or failure to perform any of its obligations under the lease. (*Id.*).

On or about March 4, 2005, plaintiff was allegedly injured when she tripped and fell on debris on the sidewalk outside of Eckerd's store at the intersection of 41st Avenue and 31st Street in Queens, New York. (*Id.*, Exhs. A, C). At a deposition held on December 14, 2006, plaintiff testified that she was injured after her foot got caught on a protruding wooden pallet on the sidewalk in front of Eckerd's store after she was forced to walk around garbage bags and debris on the sidewalk. (*Id.*, Exh. H).

On May 11, 2007, Dan Punch, Eckerd's store manager, testified at a deposition that in 2005 Eckerd placed its garbage each evening in clear plastic bags for nighttime removal by a private hauler, and that illegally dumped garbage was removed by the Department of Sanitation

(DOS) which issued Eckerd citations for leaving garbage on the sidewalk. (*Id.*, Exh. I). Punch also testified that if the sidewalk in front of the store needed repair, he would notify Eckerd's district office about it. (*Id.*).

On or about June 11, 2007, Eckerd commenced the third-party action, seeking apportionment, indemnification, and contribution from the third-party defendants. (*Id.*). On or about August 10, 2007, Genovese served its answer. (*Id.*, Exh. B).

On October 16, 2009, plaintiff filed her note of issue and served it by mail on defendant and third-party defendants. (*Id.*, Exh. E). On February 19, 2009, Genovese filed the instant motion, and on February 22, 2009 served it on the other parties.

II. MOTION FOR SUMMARY JUDGMENT

Genovese argues that the instant motion is timely, having received plaintiff's mailed note of issue on October 20, 2010. It asserts that Eckerd's third-party action against it is frivolous and that in September 2009 and February 2010 it asked Eckerd to discontinue the action. (Higgins Aff., Exh. J). It relies on the lease and the 1985 modification agreement to establish that it is entitled to indemnification from Eckerd and that it had no duty to maintain the sidewalk in front of the premises. (Higgins Aff.). It also maintains that plaintiff's and Punch's testimony establishes that plaintiff's injury was caused by a condition on the sidewalk and that it was Eckerd's duty to maintain the sidewalk. In support, it submits an unsigned statement by Toby Caldwell, one of its principals, who denies that Genovese received notice of any condition on the sidewalk relating to debris or garbage or that it caused or created any unsafe condition. (*Id.*, Exh. L). Genovese thus argues that as an out-of-possession landlord it had no duty to maintain the sidewalk and had no notice of, nor did it cause or create, any unsafe condition on the sidewalk,

and that in any event, Eckerd is contractually obligated to indemnify it. (*Id.*).

Eckerd denies that Genovese's motion is timely. It observes that as the note of issue was filed on October 16, 2010, Genovese had until February 16, 2010, or 120 days from the filing of the note of issue to serve the motion, and that as the postmark reflects that it was served on February 22, 2010, Genovese's motion was served six days late. (Affirmation of Thomas G. Darmody, Esq., dated Mar. 25, 2010 [Darmody Aff.], Exh. C). Eckerd also argues that having alleged in the first instance that the motion is timely, and having initially failed to set forth any good cause for its delay, Genovese is precluded from arguing in reply that it had good cause for its delay. (Darmody Aff.).

In reply, Genovese contends that pursuant to CPLR 2103(b)(2), the motion is timely, given the five days added to the 120-day period from which the note of issue was mailed. (Reply Affirmation of Anna A. Higgins, Esq., dated Apr. 30, 2010 [Reply Aff.]). It explains that the motion, while timely filed on February 19, 2010, was not mailed until February 22, 2010 due to a breakdown in counsel's mailroom (*id.*, Exhs. C, D), and that it did not file the motion until February 19, 2010 pending Eckerd's agreement to discontinue the third-party action against it. (*Id.*, Exh. E). It also maintains that its three-day delay is *de minimis*,

A. Is the motion timely?

A motion for summary judgment must be made within 120 days after a note of issue is filed. (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]). The motion may be made after the expiration of the deadline upon good cause shown. (*Brill*, 2 NY3d at 652).

In order to determine whether such a motion is timely made, other statutes may apply. Pursuant to CPLR 2211, a motion made on notice is "made" when served, and when mailed, it is

deemed served when deposited in a United States Post Office mailbox (CPLR 2103[b][2], [f][1]). Moreover, "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period . . ." (CPLR 2103[b][2]).

Here, the issue is whether Genovese was entitled to the additional five days within which to serve its motion, as set forth in CPLR 2103(b)(2). As the period of time prescribed by law for serving a motion for summary judgment is measured from the filing of the note of issue, and not from its service (*McFadden v 530 Fifth Ave. RPS III Assocs., LP*, 28 AD3d 202 [1st Dept 2006]), logic dictates that the five-day extension afforded by CPLR 2103(b)(2) does not extend to 125 days the statutory 120-day period following the filing of the note of issue within which a motion for summary judgment must be made. (*See Mohen v Stepanov*, 59 AD3d 502 [2d Dept 2009]; *Coty v County of Clinton*, 42 AD3d 612 [3d Dept 2007]; *Khoklova v Astoria Caterers, Inc.*, 20 Misc 3d 137[A], 2008 NY Slip Op 51546[U] [App Term, 2d & 11th Jud Dists 2008]).

However, the First Department has held otherwise and has added the five days allowed for service by mail of a note of issue to the statutory period of time within which a summary judgment motion must be made. (*Krasnow v JRBG Mgt. Corp.*, 25 AD3d 479 [1st Dept 2006]; *Luciano v Apple Maintenance & Servs., Inc.*, 289 AD2d 90 [1st Dept 2001]; *Szabo v XYZ, Two Way Radio Taxi Assn., Inc.*, 267 AD2d 134 [1st Dept 1999]; *see Mohen*, 59 AD3d 502, 504 [noting disagreement between first and third judicial departments]). Consequently and notwithstanding the plain wording of CPLR 2103(b)(2), Genovese was apparently entitled to an additional five days within which to file the instant motion.

As plaintiff's note of issue was filed on October 16, 2009, the 120 plus five-day statutory

period within which Genovese's motion must have been served ended on February 18, 2010. Having served the motion on February 22, 2010, Genovese was four days late and even if *de minimis*, the delay must be supported by good cause. (*See Milano v George*, 17 AD3d 644 [2d Dept 2005] [court properly denied motion made one day past deadline in absence of showing of good cause]).

B. Is Genovese precluded from raising the issue of good cause?

The function of reply papers "is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Henry v Peguero*, 72 AD3d 600 [1st Dept 2010], *quoting Dannasch v Bifulco*, 184 AD2d 415 [1st Dept 1992]). Reply papers may not be considered in determining whether the movant has shown *prima facie* entitlement to summary judgment. (*Batista v Santiago*, 25 AD3d 326 [1st Dept 2006]).

As Genovese originally argued that its motion was timely, and alleges good cause for its delay for the first time in its reply papers, thereby affording Eckerd no opportunity to respond, Genovese is precluded from claiming good cause. (*See Cabibel v XYZ Assocs., L.P.*, 36 AD3d 498 [1st Dept 2007] [defendants moved untimely for summary judgment and offered excuse for delay only in reply to plaintiff's opposition; motion should thus have been denied as untimely]).

C. Did Genovese establish good cause?

Even if its allegations of good cause for its delay are considered, Genovese's contention that it justifiably relied on Eckerd's counsel's representation that Eckerd would discontinue the action is unsupported. The email correspondence reflects that Genovese's counsel sought a discontinuance from Eckerd's counsel in September 2009 but took no action between October

2009 and February 2010, and Eckerd's counsel's February 2010 response gave Genovese no reason to believe that he would respond by the time Genovese had to file its motion. Thus, Genovese's delay in making the motion was not the product of any misrepresentation.

Also, Genovese's counsel's mailroom manager does not explain why the motion was not mailed until February 22, 2010.

For all of these reasons, Genovese has not established good cause for its delay in moving for summary judgment.

D. Did Genovese establish its entitlement to summary judgment?

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

An out-of-possession landlord is generally not responsible for a dangerous or defective condition on the premises unless it: (1) exercises control over the premises by virtue of its contractual responsibility to repair and maintain or assumes responsibility for repairs through a course of conduct; (2) creates the condition; or (3) has actual or constructive notice of it. (*Rossal-Daub v Walter*, 58 AD3d 992 [3d Dept 2009]; *Ever Win, Inc. v 1-10 Industry Assocs., LLC*, 33

AD3d 845 [2d Dept 2006]).

Even if Genovese's motion had been timely, Genovese relies solely on a lease and modification agreement that do not reference Eckerd, and on an inadmissible statement of one of its principals. Consequently, Genovese has not established, *prima facie*, its entitlement to summary judgment on that score alone.

Even assuming that the lease and modification bind Eckerd to the extent that they show that Eckerd was duty-bound to maintain the sidewalk, Genovese fails to submit an affidavit from anyone with personal knowledge denying that Genovese had created the unsafe condition that caused plaintiff to fall or that it had actual or constructive notice of it. (*See eg Kimen v False Alarm, Ltd.*, 69 AD3d 579 [2d Dept 2010] [defendant failed to establish, *prima facie*, that it was out-of-possession landlord who did not have actual notice of condition]; *Polatsek v Congregation Bais Arye*, 48 AD3d 438 [2d Dept 2008] [as defendants did not address issue of whether they created or had notice of alleged defect, they failed to meet their *prima facie* burden]).

For the same reason, absent admissible evidence demonstrating that it was not negligent, Genovese has failed to demonstrate that Eckerd is required to indemnify it. Genovese has thus failed to establish, *prima facie*, that it is entitled to dismissal of the third-party complaint against it or to judgment on its claim for indemnification against Eckerd.

Given this result, which is based on the law, counsel's strident complaints at oral argument concerning the conduct of Eckerd's counsel are best addressed in another forum.

III. MOTION TO DISMISS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a

cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*).

However, the movant may submit affidavits or any other items of proof in order to undermine any material fact on which the claim depends, and if it is shown that any material fact claimed to be fact is not a fact and that no significant dispute exists regarding same, the motion may be granted. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3211:25 [2004 main vol]). Thus, when extrinsic evidence is submitted on the motion, the allegations are not deemed true, and the standard of review becomes whether the proponent of the pleading has a cause of action, not whether she has stated one. (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). A claim is thus subject to dismissal when it is established that "the essential facts have been negated beyond substantial question" by the evidence. (*Biondi*, 257 AD2d at 81).

For the reasons set forthh above (II.D), Genovese has not demonstrated that Eckerd failed to state a cause of action against it.

Finally, as Genovese has not shown that Eckerd's action against it is frivolous, it is not entitled to an award of costs and sanctions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant Genovese Enterprises' motion for an order

granting it summary judgment or dismissal of the third-party complaint against it or awarding it costs and sanctions is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 12, 2010
New York, New York