Vega v Wil-Cor Realty Co., Inc.

2010 NY Slip Op 32206(U)

January 10, 2010

Supreme Court, Queens County

Docket Number: 5479/08

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

--X

LUIS VEGA and CARMELINA VEGA,

Plaintiffs,

-against-

WIL-COR REALTY CO., INC.,individually and doing business as WIL-COR REALTY CO., INC., WILCOR REALTY CO., INC., individually and TULLY CONSTRUCTION CO., INC.,

Defendants.

--X

WIL-COR REALTY CO., INC.,individually and doing business as WIL-COR REALTY CO., INC, WILCOR REALTY CO., INC., individually and TULLY CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

WILLETS PROPERTY LLC and EM MASTER AUTO REPAIR SHOP, INC.,

Third-Party Defendants.

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Motion Date: 11/18/09
Motion Cal. No: 46
Motion Seq. No.: 2

The following papers numbered 1 to 13 read on this motion by defendants Wil-Cor Realty Co., Inc., individually and doing business as Wil-Cor Realty Co.,Wil-Cor Realty Co., individually and Tully Construction Co., Inc., for a judgment, pursuant to CPLR § 3212, granting summary judgment to movants and dismissing plaintiffs' complaint and all claims or, in the alternative, precluding plaintiffs Luis Vega and Carmelina Vega from putting on a damages claim; and on this cross motion by plaintiffs Luis Vega and Carmelina Vega, for an order granting partial summary judgment in favor of plaintiffs and against defendants on the issue that, pursuant to NYC Administrative Code §7-210 (effective September 14, 2003), defendants, as owners of the property abutting the sidewalk where the December 15, 2007 accident took place, owed plaintiffs a non-

delegable duty of care, as a matter of law, to maintain said sidewalk in a reasonably safe condition and that said duty existed notwithstanding the fact that defendants may have been out-of-possession owners at the time of the accident.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum of Law............	1 - 5
Notice of Cross-Motion-Exhibits...	6 - 9
Affirmation in Opposition to Cross Motion......................................	10 - 11
Reply Affirmation..	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion and cross motion are disposed of as follows:

This is a personal injury action commenced by plaintiffs Luis Vega and Carmelina Vega ("plaintiffs"), arising out of plaintiff Luis Vega's slip and fall on December 15, 2007, on ice on the sidewalk adjacent to premises located at 126-82 Willets Point Boulevard, Queens, New York, which was owned by defendant/third party plaintiff Wil-Cor Realty Co., Inc. ("Wil-Cor"), and for which defendant/third party plaintiff Tully Construction Co., Inc. ("Tully"), allegedly had a duty to keep free of ice. On June 30, 2008, Wil-Cor and Tully commenced a third party action against third party defendants Willets Property LLC and EM Master Auto Repair Shop, Inc. ("third party defendants"), the lessee and sub-lessee of the premises. By order dated December 8, 2008, Wil-Cor and Tully's motion for default judgment against third party defendants was granted for the causes of action set forth in the third party complaint, with the amount thereof to be determined at an inquest to assess damages to be held at the time of the trial of this action. Wil-Cor and Tully now move for summary judgment dismissing the complaint and plaintiffs cross move for an order granting partial summary judgment in their favor and against Wil-Cor and Tully on the issue that, pursuant to NYC Administrative Code § 7-210 (effective September 14, 2003), they, as owners of the property abutting the sidewalk where the December 15, 2007 accident took place, owed plaintiff Luis Vega a non-delegable duty of care, as a matter of law, to maintain said sidewalk in a reasonable safe condition, and that said duty existed notwithstanding the fact that Wil-Cor and Tully may have been out-of-possession owners at the time of the accident.

As a preliminary matter, defendants move to extend their time to file their summary judgment motion, based upon plaintiffs' failure to timely appear for scheduled examinations before trial and Independent Medical Examinations until August 28, 2009, with the transcripts being delivered on October 2, 2009; the Note of Issue was filed April 9, 2009. CPLR 3212(a) provides that motions for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court on "good cause" shown. In Brill v City of New York, 2 N.Y.3d 648, 652 (2004), the Court of Appeals held that that statutory provision permits a late summary judgment motion upon the showing of good cause, which "requires ... a satisfactory explanation for the untimeliness- rather than simply permitting meritorious, nonprejudicial filings, however tardy... No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" See also Miceli v State Farm Mut.

Auto. Ins. Co., 3 N.Y.3d 725, 726, 727 (2004). Under the standard announced in Brill v. City of New York, supra, leave to file a late motion for summary judgment under CPLR 3212(a) requires a showing of a satisfactory explanation for the delay in filing the motion. "Where, as here, no deadline is set by the court for the making of summary judgment motions, no such motion may be made more than 120 days after the filing of the note of issue except with leave of court on good cause shown." Tower Insurance Company of New York v Razy Associates, 37 A.D.3d 702 (2nd Dept. 2007)[citations omitted]); Paterno v. CYC, LLC, 46 A.D.3d 788 (2nd Dept. 2007). "Good cause" requires a satisfactory explanation for the untimeliness of the motion rather than permitting a late motion simply because it has merit and the adversary is not prejudiced. See, Brill v City of New York, supra; Miceli v State Farm Mut. Auto Ins. Co., 3 N.Y.3d 725, 726-727(2004); Soltes v 260 Waverly Owners, 42 A.D.3d 565 (2nd Dept. 2007). "[I]n the absence of such a 'good cause' showing, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment." Thompson v Leben Home for Adults,17 AD3d 347 (2nd Dept. 2005). Here, this Court finds that as movants proffer a reasonable excuse for the delay in making a motion (see, Miceli v State Farm Mut. Ins. Co., supra; Brill v City of New York, supra), the motion to extend the time to make a summary judgment is granted.

It is well-established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Defendants move for summary judgment dismissing the complaint on the ground that they cannot be held responsible for plaintiffs' injuries because they are out of possession landlords. An out-of-possession landlord is not liable for injuries occurring on the 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 (2nd Dept. 2009); Rosado v. Bou, 55 AD3d 710 (2nd Dept. 2008); Nikolaidis v. La Terna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007); Tragale v. 485 Kings Corp., 39 A.D.3d 626 (2nd Dept. 2007); Rhian v. PABR Assoc., LLC, 38 A.D.3d 637 (2nd Dept. 2007); Lowe-Barrett v. City of New York, 28 A.D.3d 721 (2nd Dept. 2006). 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, 621 (2nd Dept.2008); Couluris v. Harbor Boat Realty, Inc., 31 A.D.3d 686 (2nd Dept. 2006).

In support of their motion, defendants submit, inter alia, the deposition testimony of William Ryan, Vice President of defendant Tully, a street and road building company, and defendant Wil-Cor Realty, a holding company for rental properties. He testified that at the time of the accident, the property upon which plaintiff fell was owned by defendant Wil-Cor, and that at the time the property had been leased to Willets Properties, LLC, in 2002, it was vacant land, with no buildings, no sidewalks or foundations. He also testified that, pursuant to the lease, Willets Property could improve the property, and he only became aware that it had erected three or four aluminum Quonset hut buildings and a sidewalk after this action was commenced. Ryan also testified that neither Tully nor Wil-Cor ever did snow or ice removal or put salt on the snow or ice on the sidewalk or had a contract with anyone else to maintain the property, including the sidewalk.

Defendants also attached a copy of the Lease Agreement executed between Wil-Cor and Willets Properties, LLC, for the period January 1, 2004 to December 31, 2014, that referenced "vacant land," recites "the Tenant's entitlement to sublease portions thereof to others for parking, storage, garages, shops, etc., and the entitlement to construct thereon such structures as benefit the tenant and/or the subtenants for these purposes." The paragraph of the lease giving the landlord the right of reentry was stricken from the lease agreement.

However, the evidence submitted in support of the motion was insufficient to establish Wil-Cor's prima facie entitlement to a grant of summary judgment in their favor dismissing the complaint. This is made clear by reference to James v. Blackmon, 58 A.D.3d 808 (2nd Dept. 2009), a recent decision of the Appellate Division, Second Department, in which the Court stated:

> On her motion for summary judgment, the defendant failed to provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries. Although the defendant argued that she was an out-of-possession landlord, under these circumstances, this did not constitute a defense (cf. Cook v. Consolidated Edison Co. of New York, Inc., 51 A.D.3d at 448, 859 N.Y.S.2d 117). Thus, the defendant failed to demonstrate her prima facie entitlement to judgment as a matter of law. Accordingly, the Supreme Court properly denied her motion for summary judgment (see Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Here, as in James v. Blackmon, supra, Wil-Cor was silent as to the Administrative Code, and thus "failed to provide any evidence showing that [it] properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries."

Accordingly, the motion for summary judgment is denied insofar as sought in favor of defendant Wil-Cor, the acknowledged owner of the premises. The motion is granted, insofar as

sought in favor of defendant Tully, which has no apparent ownership interest in the property, and the complaint is dismissed as to it.

Plaintiffs' cross motion too must be granted. They cross move for partial summary judgment in their favor based upon their contention that, pursuant to NYC Administrative Code § 7-210, defendants, as owners of the property abutting the sidewalk where the December 15, 2007 accident took place, owed plaintiff a non-delegable duty of care, as a matter of law, to maintain said sidewalk in a reasonable safe condition and that said duty existed notwithstanding the fact that they may have been out-of-possession owners at the time of the accident. Section 7-210(a) of the Code provides that "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition;" and subdivision (b) imposes liability "for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." Subdivision (b) further provides:

> Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

Section 7-210 of the Code clearly imposes upon the owners of property abutting the public sidewalk the affirmative duty to maintain the sidewalk, including removal of snow and ice, and makes the owner liable in tort for injuries arising out of its breach of this duty. As the abutting landowner, this ordinance expressly imposes liability on defendant Wil-Cor for its failure to maintain the sidewalk in a safe condition, by its negligent failure to remove the snow or ice upon which plaintiff fell. See, Smalley v. Bemben, 12 N.Y.3d 751 (2009); Smirnova v. City of New York, 64 A.D.3d 641 (2nd Dept. 2009). In opposition, defendants raised no triable issue of fact. Instead, they rely upon a misinterpretation of section 7-210, and contend, based upon that misinterpretation, that "movants/defendants do not own the sidewalk they transferred any alleged duty to the third-party defendant who accepted such duty pursuant to the lease attached to the original."

Based upon the foregoing, the motion for summary judgment is denied insofar as sought in favor of defendant Wil-Cor; the motion is granted insofar as sought in favor of defendant Tully, and the complaint is dismissed as to it; and plaintiffs' cross motion for partial summary judgment is granted.

Dated: January 10, 2010

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J.S.C.