

Quinn v City of New York

2010 NY Slip Op 32279(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 105872/07

Judge: Barbara Jaffe

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

-----X
KATHLEEN QUINN,

Plaintiff,

-against-

THE CITY OF NEW YORK, 980 MADISON LLC,
MICHAEL KORS, L.L.C., MICHAEL KORS (USA)
INC., MICHAEL KORS, INC., MICHAEL KORS
STORES L.L.C., 974 MADISON AVENUE,
COMPANY, INC., 974 MADISON AVENUE
COMPANY, L.P. and MALATESTA PALADINO, INC.,

Defendants.
-----X

980 MADISON L.L.C.,

Third-Party Plaintiff,

-against-

MALATESTA PALADINO, INC.,

Third-Party Defendant.
-----X

BARBARA JAFFE, JSC:

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Index No. 105872/07

Motion Subm: 7/27/10
Motion Seq. No.: 002
Calendar No.: 123

DECISION AND ORDER

Third-Party Index No.
590220/09

FILED
AUG 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion dated May 13, 2010, defendant City moves pursuant to CPLR 3211

and 3212 for an order summarily dismissing the complaint and any cross-claims against it. By notice of cross-motion dated June 14, 2010, defendants Michael Kors, L.L.C., Michael Kors (USA) Inc., Michael Kors Inc., and Michael Kors Stores, L.L.C. (collectively, Michael Kors) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross-claims against them. Plaintiff opposes Michael Kors's motion and, by notice of cross-motion dated June 16, 2010, moves pursuant to CPLR 3217(b) for an order permitting her to discontinue the action against City.

I. PERTINENT BACKGROUND

On or about September 10, 1999, defendant 974 Madison Avenue Company, L.P. leased to Michael Kors the ground floor and basement of the premises located at 974-980 Madison Avenue in Manhattan ("the premises). (Affirmation of Eric A. Schnittman, Esq., dated June 14, 2010 [Schnittman Aff.], Exh. A). A diagram annexed to the lease reflects that the sidewalk in front of the premises is not part of the demised premises. (*Id.*).

Pursuant to paragraph four of the lease, Michael Kors is responsible for taking good care of the sidewalks adjacent to the demised premises and making all non-structural repairs thereto when needed to preserve them in good working order and condition, except for reasonable wear and tear and damage from the elements. A supplemental rider to the lease clarifies that Michael Kors's responsibility to take good care of the sidewalks does not include an obligation to "repair or replace unless the necessity for such repair and replacement was caused by [Michael Kors], its employees, invitees, agents or contractors." (*Id.*).

On July 19, 2006, plaintiff was allegedly injured when she tripped and fell on the sidewalk in front of the premises. (Affirmation of Lynn Leopold, ACC, dated May 13, 2010

[Leopold Aff.], Exh. A). On or about May 15, 2007, plaintiff served her summons and complaint, on or about June 7, 2007 City served its answer, and on or about July 24, 2007 Michael Kors served its answer with cross-claims. (*Id.*, Exhs. B, C, D).

On October 8, 2008, plaintiff testified at a deposition that on July 19, 2006, she was walking on East 76th Street east toward Madison Avenue when she fell, that large slabs on the sidewalk were broken and uneven, that there was a five to six inch height differential between two slabs on the pavement which caused her to fall, and that she did not fall on the curb or the tree well. (*Id.*, Exh. L).

On January 20, 2009, Joseph McFadden, a property manager for the building at 974-980 Madison Avenue, testified at a deposition that during the two years prior to and including July 2006, he received no complaints relating to the condition of the sidewalk in front of the premises, that the building owner is responsible for cleaning the sidewalk and removing snow, that he was unaware of any repairs made to the sidewalk between 2004 and 2006, that he never noticed any defects on the sidewalk, that co-defendant/third-party defendant Malatesta Paladino, Inc. (Malatesta) was the general contractor in charge of repairing the sidewalk, and that he made no complaints to Michael Kors about the sidewalk. (Affirmation of Ann R. Johnson, Esq., dated June 23, 2010 [Johnson Aff.], Exh. A).

On February 19, 2009, Lee Sporn, Senior Vice President of Business Affairs, General Counsel, and Secretary for Michael Kors (USA) Inc., testified at a deposition that it was his understanding of the lease that Michael Kors is responsible for maintaining the sidewalk only if it damaged it, that to his knowledge Michael Kors made no repairs to the sidewalk between 2003 and 2006, that he does not believe that Michael Kors maintains the tree well on the sidewalk, that

he does not recall whether any complaints were made about the sidewalk's condition before July 19, 2006, and that no Michael Kors employee repaired, inspected, or cleaned the sidewalk or tree well before July 2006. (Schittman Aff., Exh. B).

On or about April 14, 2009, plaintiff served an amended complaint. On or about April 15, 2009, Michael Kors served a cross-claim against third-party defendant Malatesta, and on or about May 4, 2009, an answer with cross-claims. On or about May 6, 2009, City served an answer to the amended complaint. (*Id.*, Exhs. E, F, G).

On May 12, 2009, the complaint and any cross-claims were discontinued as against 974 Madison Avenue Company, Inc. and 974 Madison Avenue Company, L.P.

On November 3, 2009, McFadden testified at another deposition that in 2008, Malatesta was hired to repair the sidewalk in front of the premises but he does not remember that it performed any repairs to the sidewalk before 2008, and that in his view, the lease provides that Michael Kors is responsible for maintaining the sidewalk. (Johnson Aff., Exh. B). At the end of his deposition, all of the parties agreed to discontinue the complaint, cross-claims, and the third-party complaint as against Malatesta. (*Id.*).

II. ANALYSIS

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied,

regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party to demonstrate by admissible evidence the existence of a material issue of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); “unsubstantiated allegations and assertions are insufficient” (*Zuckerman*, 49 NY2d 557, 562).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff’s cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A. City’s motion

Absent the signature of all parties on the stipulation of discontinuance, and as City’s motion for summary judgment is presently under consideration, plaintiff’s action is not discontinued against City. (CPLR 3217[b] [once motion for summary judgment submitted, party may discontinue action only by filing stipulation signed by attorneys for all parties]; see eg *Scholtz v Catholic Health System of Long Island, Inc.*, 21 Misc 3d 1126[A], 2008 NY Slip Op 52236[U] [Sup Ct, Suffolk County 2008] [denying motion for discontinuance as all parties did not sign stipulation of discontinuance and motion for summary judgment had been submitted]).

Nevertheless, absent any opposition to the motion, the complaint and any cross-claims asserted by the other defendants against City are dismissed.

B. Michael Kors's motion

Relying on Sporn's deposition, Michael Kors argues that it has no obligation under the lease to repair the sidewalk on which plaintiff fell unless it damaged it, and it made no repairs to the sidewalk, nor did the sidewalk need any repairs. (Schnittman Aff.).

Plaintiff relies on McFadden's second deposition, maintaining that McFadden's belief that the lease gives Michael Kors the duty of repairing the sidewalk creates a triable issue as to Michael Kors's responsibility. (Johnson Aff.).

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]). When it is alleged that there exists a dangerous or defective condition on the premises, a duty arises from occupancy, ownership, control, or a special use of the premises. (*Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1998], *lv denied* 73 NY2d 783).

As the lease requires Michael Kors to repair the sidewalk only if it brings about a need for repair, and as Sporn testified that Michael Kors did not repair or need to repair the sidewalk before plaintiff's accident, it has established, *prima facie*, that Michael Kors had no duty to repair the sidewalk. (*See eg Bennett v Berger*, 283 AD2d 374 [1st Dept 2001] [landlord had no duty to remove snow as lease provided that lessee was responsible for removing snow, and witness testified that landlord did not attempt to remove snow]).

As the lease is clear on its face, McFadden's belief to the contrary is irrelevant. Plaintiff

has thus failed to demonstrate that any triable issues exist as to Michael Kors's liability. (*See eg Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456 [1957] [mere assertion that contract language means something to witness, where contract is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise triable issue of fact]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the City of New York's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

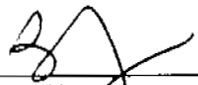
ORDERED, that defendants Michael Kors, L.L.C., Michael Kors (USA) Inc., Michael Kors Inc., and Michael Kors Stores, L.L.C.'s motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendants Michael Kors, L.L.C., Michael Kors (USA) Inc., Michael Kors Inc., and Michael Kors Stores, L.L.C. with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order

on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 23, 2010
New York, New York

AUG 23 2010

FILED
AUG 25 2010
NEW YORK
COUNTY CLERK'S OFFICE