

Campbell v York 72 Assoc., LLC

2010 NY Slip Op 32775(U)

October 4, 2010

Supreme Court, Kings County

Docket Number: 21026/05

Judge: Gerard H. Rosenberg

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At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of October, 2010.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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ROBERT E. CAMPBELL, as Temporary Guardian of ESTER WOLKOWITZ,

Plaintiff(s),

-against-

YORK 72 ASSOCIATES, LLC, MACKLOWE MANAGEMENT CO, INC. and HAYM SALOMON HOME FOR NURSING AND REHABILITATION d/b/a WE CARE PARTNERSHIP and SYNITA S. PENUMALLA, M.D.,

Defendant(s).

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DECISION & ORDER

Index No. 21026/05

Cal. No. 2009-006837T

Motion Seq. No. 006

The following papers numbered 1 to 8 read on this motion.

	Papers Numbered
Notice(s) of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 3
Affirmation(s) in Opposition and Exhibits Annexed _____	4 - 5
Reply Affirmation(s) and Exhibits Annexed _____	6 - 8

Upon the foregoing papers, and upon oral argument, defendant York 72 Associates, LLC (York) and Macklowe Management Co., Inc. (Macklowe) move pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint.

Background

This is an action alleging negligence and medical malpractice. It is alleged that the plaintiff was injured on April 12, 2005 as she was walking through a revolving door in premises

located at 515 East 72nd Street, New York, New York (the premises).¹ York is the owner of those premises, and Macklowe is the managing agent. The Verified Complaint as to York and Macklowe alleges that the plaintiff was caused to fall “as a result of the negligence of the Defendants and with no negligence on the part of the Plaintiff contributing thereto.” The Verified Bill of Particulars alleges that the defendants were negligent and careless and failed to exercise due care: “in the manner method and mode that said agents, servants and/or employees were moving, turning said revolving door causing plaintiff to fall”; in not properly maintaining, repairing, inspecting said revolving door”; and “in causing door to be in a state of disrepair constituting a hazard and danger to persons such as plaintiff herein.” In addition, plaintiff alleges that the defendants were further negligent “in failing to properly train and instruct [their] agents, servants and or employees in regard to the use of said revolving door in assisting individuals such as plaintiff herein.”

The evidence establishes that the plaintiff was born on April 15, 1929, therefore making her just three days shy of her 76th birthday on the date of this incident. At the time plaintiff was deposed on May 7, 2008 she had no recollection of this event. She identified her son Steve Wolkowitz as a witness, but an attempt to locate him at the address which she provided - 1029 East 59th Street, Brooklyn, New York - was unavailing, as a judicial subpoena was returned to movants’ attorney with the marking “moved, left no forward address.”

The moving defendants were deposed through the testimony of Mr. Gewan Budhu, who indicated that at the time of the accident he was employed as a porter who worked as the

¹ Following this incident plaintiff was treated at non-party New York Presbyterian Hospital, and then was transferred to defendant Haym Salomon Home for Nursing and Rehabilitation where she allegedly sustained additional injuries.

doorman during the on-duty doorman's lunch. His duties included turning the revolving door to assist people exiting and entering the building. Mr. Budhu testified that he would turn the revolving door more slowly and gently to assist an older person walking through the door. With respect to the plaintiff, he testified that he observed her enter the revolving door and, because she was elderly, he turned the door for her very slowly. According to Mr. Budhu, he had made only half a turn of the door when the plaintiff attempted to exit. However, since the door had not yet reached the opening, plaintiff walked into the circular enclosure of the door, striking her head and falling to the floor between the revolving door wings.

Movants also submit an affidavit from Mr. Edin Mujovic, the property manager for the premises at the time of the accident. His affidavit indicates that any complaints regarding the revolving door would have been made to him, and that he would have been made aware of any problems with the door. He states that in the event of a complaint or problem relating to the door he would have contacted Door Automation Corp., a vendor that provided maintenance for the doors at the premises. The last time prior to the date of plaintiff's accident Door Automation Corp. was summoned to the premises was in December 2004, either in reference to the revolving door or to a swinging door. Mr. Mujovic states that he is not aware of any complaints made regarding the subject revolving door which were not addressed and resolved prior to April 12, 2005, nor of any problems regarding the revolving door which existed on that date.

In the motion for summary judgment movants contend that summary judgment is warranted because plaintiff is unable to specify any defect in the revolving door, plaintiff has no recollection as to how the accident occurred, and plaintiff has not provided a valid address for the identified witness, her son Steve. Movants also contend that plaintiff has failed to identify,

prior to filing the note of issue, any liability expert, and has failed to establish that a defective condition existed, or that defendants had actual or constructive notice of a defective condition.

Plaintiff's Opposition

In a response to Demand for Witness Information dated May 15, 2007 plaintiff's counsel had stated that Steve Wolkowitz resided at 1029 East 59th Street, Brooklyn, New York. After a Judicial Subpoena was returned as undeliverable, as noted above, movants' counsel served another Demand for Steve Wolkowitz's address dated November 13, 2008. After plaintiff filed the Note of Issue on May 21, 2009, movants made the instant motion for summary judgment on July 17, 2009, and in the attorney's affirmation it is stated that "[t]o date, plaintiff has still not provided a correct and/or updated address for Mr. Wolkowitz."

Plaintiff's opposition to the summary judgment motion includes an affidavit from Steve Wolkowitz. In this affidavit Steve Wolkowitz gives his address as 2060 Bergen Avenue in Brooklyn, and plaintiff's counsel states that "[t]he investigator plaintiff employed to find [Wolkowitz] only recently managed to contact him and obtain this address given his recent relocation." In his affidavit Steve Wolkowitz states that he was with his mother on April 12, 2005, and he entered the building through the revolving door, followed by his mother. Wolkowitz observed the door being pushed by a uniformed employee of the building, and states that his mother walks slowly and was struck by the door while it was being pushed by the employee. He further states that his mother did not cause the accident, did not walk into the door or any stationary object, and was not pushing the door when the accident occurred. Instead, Wolkowitz alleges that he observed the building employee push the door too quickly, so that it contacted his mother and caused her to lose her balance and fall. With respect to his address,

Wolkowitz states that he presently resides at 2060 Bergen Avenue, Brooklyn, New York, and previously resided at 1029 East 59th Street, Brooklyn, New York. He states that he only recently moved to his present address.

Defendants' Reply Affirmation

In reply, movants allege that plaintiff has failed to raise a question of material fact sufficient to defeat the motion. Movants claim that plaintiff has no recollection of the accident and has provided no proof that the door was defective or that any negligence on the part of the moving defendants caused the plaintiff to fall. With respect to Steve Wolkowitz's affidavit, which might provide evidence of negligence on the part of the defendants, movants urge the court to not consider it, for two reasons. First, movants claim that it is a self-serving affidavit designed solely to avoid the consequence of plaintiff's deposition testimony that she has no recollection of the accident. Second, movants assert that a valid address had not previously been provided despite movant's requests prior to the filing of the note of issue, and further, movants assert that the address contained in Steve Wolkowitz's affidavit is still incorrect. In support of the latter allegation movants submit affidavits from two private investigators which indicate that their attempts to locate Steve Wolkowitz at 2060 Bergen Avenue, Brooklyn, New York were unsuccessful. In fact, a visit to those premises produced statements from two separate residents of that address that Steve Wolkowitz does not reside there.

Approximately two weeks following submission of this motion, the court received correspondence from plaintiff's counsel indicating that counsel discovered two days after argument of the motion that Steve Wolkowitz's correct address is 2068 (not 2060) Bergen Avenue, and that a typographical error was to blame for this mistake. Plaintiff's counsel advised

counsel for York and Wolkowitz of this development by letter dated February 11, 2010, and offered to produce Steve Wolkowitz for a non-party deposition on February 24, 2010. Plaintiff indicated that movants' failure to appear for that deposition would constitute a waiver of movants' right to depose this witness. By letter dated February 23, 2010 movants indicated that they would not proceed with this deposition while the instant summary judgment motion is pending.

However, the deposition was conducted on June 8, 2010, and the court, which had held disposition of this motion in abeyance pending the deposition of Steve Wolkowitz, was recently provided with a transcript of the deposition. Neither movants nor the plaintiff have chosen to submit any additional papers to the Court following this deposition.

In his deposition testimony Steve Wolkowitz states that he often brought his mother to the premises in question in order for her to visit a physician.² While on previous occasions he walked his mother through a regular, hinged door which was to the side of the revolving door, on April 12, 2005 they were advised by a person in a uniform who was outside the premises that the hinged door was locked and they were to use the revolving door. Mr. Wolkowitz entered the revolving door first, followed by his mother. Steve Wolkowitz testified that there was a second uniformed man whose job it was to rotate the revolving door, and that Steve Wolkowitz did not himself push or touch the revolving door. The revolving door was turned by the uniformed man, and Steve Wolkowitz entered the premises without incident.

When he turned to wait for his mother to come out of the revolving door he observed the

² He also testified that his address is 206 Bergen Avenue, which is different than the address given in his affidavit of 2060 Bergen Avenue, and different from the address of 2068 Bergen Avenue offered by plaintiff's counsel.

man turning the revolving door “and the back piece of the rotating door hit my mother and she went down” (page 31, lines 21-25). This occurred while his mother was still within the revolving door, and he explained that there was a door in front of her and a door behind her, and that she was touched by “the back part” (33:8-12). The plaintiff fell and the revolving door stopped spinning because she was in the way (35:17-25). She was unable to get up and began screaming, and an ambulance was summoned. It appears that Esther Wolkowitz fractured her left hip in this incident, and during her subsequent care for this injury suffered a fracture of her right hip at one of the co-defendant’s facilities.

Discussion

Summary judgment is a drastic remedy which should not be granted when there is any significant doubt as to the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320). On such a motion, the court is not to determine credibility, but whether a factual issue exists (*Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338). The party moving for summary judgment “bears the initial burden of making a prima facie case showing its entitlement to judgment as a matter of law” (*Holtz v Niagra Mohawk Power Corp.*, 147 AD2d 857, 858). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d851). Once such a showing has been established, however, the “burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact” (*Alvarez v Prospect Hosp.*, *supra*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). General conclusory statements, expressions of hope or unsubstantiated allegations are insufficient to defeat the motion (*Frank Corp. v Federal Ins. Co.*, 70 NY2d 966; *Zuckerman v*

City of New York, id.). The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610).

In this case, the defendants have established their prima facie entitlement to summary judgment through the deposition of Mr. Budhu, who was turning the revolving door, and the affidavit from Mr. Mujovic, the property manager. Juxtaposed against this evidentiary offering by the movants is the plaintiff's submissions, which create a triable issue of fact whether the plaintiff was caused to fall by uniformed persons who allegedly directed the plaintiff into the revolving door and then proceeded to knock her down with the revolving door. These conflicting submissions create triable questions of fact, as they present issues of credibility which must be resolved by the trier of fact.

Accordingly, the motion for summary judgment is denied, as are any issues raised in the motion papers which are not specifically addressed herein.

This constitutes the decision and order of the court.

E N T E R,


HON. GERARD H. ROSENBERG
J. S. C.