

Robinson v Drury Enters., Inc.

2010 NY Slip Op 33303(U)

November 24, 2010

Supreme Court, New York County

Docket Number: 108254/09

Judge: Judith J. Gische

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SCANNED ON 12/12/01
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 108254/2009

ROBINSON, SONYA

vs

DRURY ENTERPRISES, INC.

Sequence Number : 001

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

FILED

NOV 01 2009

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Nov 24, 2010

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

SONYA ROBINSON,
Plaintiff,

-against-

DRURY ENTERPRISES, INC.,
Defendant.
-----X

Decision and Order

Index No.: 108254/09

Motion seq.: 001

FILED

Present:
Hon. Judith J. Gische

J.S.C. 2610

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Metropolitan and Gotham n/m (3212) w/DP affirm, exhs . . .	1
High-Rise opp w/MEB affirm, exhs	2
Metropolitan and Gotham reply w/DP affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH J. GISCHE, J.S.C.:

This is a personal injury action. Drury Enterprises, Inc. (Drury) now moves, pursuant to CPLR 3212, for summary judgment in its favor. Since issue has been joined, summary judgment relief is available (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]). The court's decision and order is as follows:

Arguments

On June 16, 2006, plaintiff Sonya Robinson tripped and fell in a stairwell in a building located at 49 West 27th Street in

Manhattan, sustaining injuries. At the time of the accident, Drury leased the third floor of the building, as well as "portions of the second floor and basement" from non-party Radio Wave, LLC (Radio Wave) (Lease Agreement between Radio Wave and Drury, Fourth Amendment, at 1). Plaintiff alleges that she tripped on the stairwell between the third and fourth floors of the building as a result of wear and tear on the stairs, as well as the absence of a handrail.

In addition to this action, plaintiff also commenced another action against Radio Wave in Bronx County (*Sonya Robinson v Radio Wave Co., LLC.*,¹ Index No. 23125/06) (the Bronx action). Radio Wave implied Drury as a third-party defendant in that case. Plaintiff has moved in the Bronx County action to consolidate that action with the one at bar.

Discussion

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297,

¹ The lead defendant in the Bronx action Radio Wave Co., LLC., should not be confused with Radio Wave, LLC, another defendant.

302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

In order to establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006], citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928]); *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept 1996], *affd* 89 NY2d 824 [1996]). As to duty in this context, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]).

In support of its motion, Drury submits its lease with Radio Wave, which states, in relevant part, that the "[o]wner shall maintain in good working order and repair . . . the public portions of the building interior and the building." Drury

contends that the stairwell is a public portion of the building's interior, and, therefore, Radio Wave was responsible for maintaining it. While no depositions have been taken in this action, Drury submits testimony from various depositions in the Bronx action, including that of Radio Wave's superintendent, Josh Hubi, to show that Radio Wave maintained the stairs (Hubi Deposition, at 2-21). Drury argues that, as it had no responsibility to maintain the stairwell, it has no duty to plaintiff, and is entitled to summary judgment dismissing the complaint.

In opposition, plaintiff cites a recent Second Department decision for the proposition that "[a] tenant may be held liable for negligently allowing the leased premises to become dangerous, and such potential for liability exists independently of the terms of the lease" (*Giannattasio v Han Suk Kang*, 57 AD3d 728, 729 [2d Dept 2008] [internal quotations and citation omitted]). Based on the principle articulated in *Giannattasio*, plaintiff argues that Drury has failed to make out a prima facie case of entitlement to summary judgment, since Drury may still be liable despite having no responsibility to maintain the stairwell under the lease. Plaintiff has not submitted any evidence in opposition showing that plaintiff exercised control over the

steps where she fell.

In reply, Drury contends that plaintiff has misapplied *Giannattasio*, since that case refers to premises which are leased, and it did not lease the stairwell on which plaintiff fell.

Drury makes a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that it only leased the entire third floor, as well as portions of the second floor, and the basement. It did not lease the interior stairs of the building where plaintiff claims to have fallen. It has shown that Radio Wave maintained control of the interior stairwell. Plaintiff fails to rebut Drury's showing by providing any evidence that Drury occupied or controlled the interior stairwell of the building. Finally, Drury is correct that *Giannattasio* is inapposite to the present facts, as Drury did not lease or otherwise control the stairwell.

Conclusion

Based on the foregoing, it is

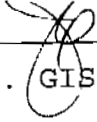
ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the

[*7]
submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: New York, New York
November 24, 2010

So Ordered:



Hon. JUDITH J. GISCHE,

FILED

DEC 01 2010

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COUNTY CLERK'S OFFICE