

**Poggiali v Sterling Equities , Inc.**

2011 NY Slip Op 30328(U)

January 28, 2011

Sup Ct, Nassau County

Docket Number: 018087/10

Judge: Jeffrey S. Brown

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X **TRIAL/IAS PART 21**  
CHRISTOPHER POGGIALI,

**Plaintiffs,**

- against -

STERLING EQUITIES, INC., STERLING METS, L.P.,  
and ARAMARK CORPORATION,

**Index No.018087/10  
Mot. Seq. # 2  
Mot. Date 12/3/10  
Submit Date 1/21/11**

**Defendants.**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Cross Motion (Exhibits Annexed).....	1,2
Answering Affidavit .....	2
Reply Affidavit.....	3

Defendants Sterling Equities, Inc. and Sterling Mets, LP move for an order pursuant to CPLR §§3211(a)(1) and (a)(7) to dismiss all claims and cross-claims asserted against them. Defendants, Sterling Equities, Inc. and Sterling Mets, LP, also move for an order pursuant to CPLR §3211(c) for summary judgment in their favor. Plaintiff, Christopher Poggiali, cross-moves for an order permitting him to amend his summons and complaint to add a defendant Queens Ballpark Co., LLC.

In this personal injury action, plaintiff, while attending a New York Mets baseball game on April 5, 2010 at Citi Field in Flushing, Queens, allegedly tripped and fell thereby causing him

injury. Defendant argues that based on the attached documentary evidence, neither Sterling Mets nor Sterling Equities owns, operates, maintains or controls the Citi Field stadium. As a result, neither entity owes a duty to the plaintiff and cannot be held negligent as a matter of law.

In support of this application, the movant attaches an affidavit from Suzanne Lucchi, the Senior Director for Ballpark Operations for Queens Ballpark Co., LLC. On April 5, 2010, the affiant held this title. Prior to the time the New York Mets began playing at Citi Field, she was the Director for Stadium Operations for Sterling Mets, LP. As Senior Director of Ballpark Operations for Queens Ballpark, she has personal knowledge of Queens Ballpark's duties, responsibilities, and operations with regard to Citi Field. Based upon her previous position, she also has personal knowledge of Sterling Mets' lack of duty and responsibilities with regard to Citi Field.

At no time on, before or after April 5, 2010 did Sterling Mets, LP own, operate, maintain, manage, inspect, supervise, repair or control any portion of Citi Field. Attached to Ms. Lucchi's affidavit is a "true and accurate" copy of the stadium lease agreement between the New York City Industrial Development Agency, as landlord, and Queens Ballpark, LLC, as tenant.

Also, in support of this application, is an affidavit from Gregory Nero, Esq., the General counsel of Sterling Equities, Inc., who on April 5, 2010 had personal knowledge of Sterling Equities' duties, responsibilities and operations. To the best of his knowledge, at no time on, before or after April 5, 2010 did Sterling Equities own, operate, manage, inspect, supervise, repair or control any portion of Citi Field.

The lease agreement in relevant part, Article 9.01 entitled "Tenants Operation of the Premises" provides as follows:

“(a) Generally. From and after the date of Substantial Completion and during the Term, Tenant [Queens Ballpark], as agent for Landlord [Industrial Development Agency] shall be responsible for operating and maintaining the Premises. During all Team Events and all other Stadium Events, Tenant [Queens Ballpark] shall operate the Premises as a (subject to ordinary wear and tear) first class state-of-the-art professional sports facility and in a safe, clean and reputable manner, and in compliance with this Lease Agreement, and with all Requirements.”

Defendants’ Sterling Mets and Sterling Equities, therefore, contend that Queens Ballpark was the entity that was responsible for the operation of Citi Field, and not Sterling Mets or Sterling Equities.

In opposition to the motion, plaintiff argues that any such motion to dismiss or a motion for summary judgment is premature and that defendants’ affidavits are self serving and without discovery, plaintiff is prejudiced and unable to oppose this motion. Counsel for plaintiff states that attached to his affirmation is a document from Sterling Equities’ website which in essence states that Sterling Equities is the owner of the New York Mets baseball team. Additionally, counsel attaches pages from “Bloomberg Business Week” and “Hoovers” which states that Sterling Mets owns and operates the New York Mets baseball franchise.

In support of his cross-motion, plaintiff points to the lease agreement attached to defendants Sterling Equity and Sterling Mets’ moving papers. Plaintiff’s proposed amended summons and amended complaint are attached to his cross-motion.

Defendant Aramark Corporation is not opposing the cross-motion to add Queens Ballpark as a direct defendant. By stipulation dated December 21, 2010 plaintiff and this co-defendant agreed to amend the caption of the amended summons and amended complaint by adding

defendant Aramark Sports and Entertainment Services, LLC and removing Aramark Corporation.

Aramark Sports and Queens Ballpark entered into two contracts: 1) Amended and Restated Sublease dated as of July 12, 2010, but effective as of May 24, 2007 and 2) Usage Agreement Dated as of May 24, 2007. Each contains a similar clause with respect to Portable Concession Services. Section 4.8 in the Amended and Restated Sublease provides in relevant part:

“In addition to any other approvals required pursuant to this Article 4 each of the matters set forth in this Section 4.8 shall be subject to the written consent of SMLP, such consent not to be unreasonably withheld, conditioned or delayed. Sublandlord [Queens Ballpark] shall cooperate in good faith with Subtenant [Aramark Sports] to develop procedures (including, without limitation a time frame) for seeking SMLP consent to matters covered by this Section 4.8.”

One of the matters set forth is “(b) Specific locations of concession stands for the rendering of Premises concession Services as well as the location of restaurants and team stores.”

According to the contract, SMLP stands for Sterling Mets, L.P., a Delaware limited partnership.

Defendant Aramark argues based upon the “plain reading” of the contract between it and Queens Ballpark, Sterling Mets has a duty to oversee and consent to certain operations at Citi Field which includes the specific locations of concession stands throughout the stadium.

The court notes that Sterling Mets is not a signatory to these contracts. The court also notes that counsel have entered into a confidentiality agreement with respect to the two aforesaid contracts.

Defendants Sterling Equities and Sterling Mets moved for an order dismissing the complaint pursuant to CPLR §3211(a)(7). In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the allegations in the complaint should be

only where, even viewing the allegations as true, the facts do not fit within any cognizable legal theory ( *id.* at 87-88, *see Kuzmin v Nevsky*, 74 AD3d 896; *Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 441; *Hartman v. Morganstern*, 28 A.D.3d 423, 424). The sole criteria under this subdivision is whether the pleadings state a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (*Gugenheimer v Ginzburg*, 43 NY2d 268) . This pleading which sounds in negligence states a cause of action.

In addition, the aforesaid defendants are moving pursuant to CPLR §3211(a)(1) based upon documentary evidence. Further, they are moving pursuant to CPLR 3211(c) to treat this motion as one for summary judgment.

“A party seeking to dismiss pursuant to CPLR 3211(a)(1) on the ground that its defense is based on documentary evidence must submit documentary evidence that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim” (*Galvan v 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743; *Elow v. Svenningsen*, 58 A.D.3d 674, 675; *see Leon v. Martinez*, 84 N.Y.2d 83, 88; *Martin v. New York Hosp. Med. Ctr. of Queens*, 34 A.D.3d 650).

Further, CPLR Section 3211(c) provides in relevant part:

“Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.”

Pursuant to CPLR 3211(c), a party can have its motion treated as one for summary judgment, even prior to joinder, either by charting a summary judgment course or by requesting such treatment. Thus, a defendant who desires an expedited determination could have first moved to dismiss pursuant to CPLR 3211(a) and then requested that the court convert that motion to one for summary judgment under CPLR 3211(c) prior to serving an answer, since all of the papers they chose to rely on were available prior to the commencement of this action ( *see Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508; *Yule v. New York Chiropractic Coll.*, 43 A.D.3d 540, 541; *Bowes v. Healy*, 40 A.D.3d 566; *Love v. Morrow & Co.*, 193 A.D.2d 586). Alternatively, the defendants could have answered and then moved for summary judgment pursuant to CPLR 3212 without waiting for any discovery. A court's election to treat a pre-answer motion to dismiss as a motion for summary judgment generally requires adequate notice to the parties (*see* CPLR 3211[c]). The Court of Appeals in the case of *Mihlovan v Grozavu*, 72 NY2d 506, concluded that the unilateral actions of a party in seeking summary judgment on a CPLR 3211(a)(7) motion cannot constitute "adequate notice" to the other party in compliance with the requirement of CPLR 3211(c). However, where, as here, a specific request for summary judgment was made and the parties " 'deliberately chart[ed] a summary judgment course' " (*Mihlovan v. Grozavu*, 72 N.Y.2d 506, 508, quoting *Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 320), the court was authorized to treat a branch of the defendant's motion as one for summary judgment (*Burnside 711, LLC v Nassau Regional Off-track Betting*, 67 AD3d 718).

It is well settled that a "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 demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d

[\* 7]

320, 324 [1986] ). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” ( *Chance v. Felder*, 33 AD3d 645, 645-646 [2d Dept., 2006]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980] ). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” ( *Fleming v. Graham*, 34 AD3d 525 [2d Dept., 2006], quoting, *Barker v. Briarcliff School Dist.*, 205 A.D.2d 652, 653 [2d Dept., 1994] [internal quotation marks omitted]; *Messina v Deblasi*, 29 Misc3d 1219[A]).

In support of this motion, defendants’ Sterling Equities and Sterling Mets submit affidavits by someone with personal knowledge of the facts which state that each defendant neither owns, operates, manages, inspects, supervises, repairs or controls any part of Citi Field. Further, they submit a contract which reveals that non-party Queens Ballpark, LLC has such responsibilities for Citi Field. The defendants, therefore, satisfied their entitlement to a judgment as a matter of law.

The evidence presented by the plaintiff in opposition to the defendants' motion for summary judgment dismissing the complaint failed to raise a triable issue of fact. The only submission made by the plaintiff in opposition to the motion for summary judgment was the bare affirmation of his attorney, which was not based on personal knowledge, and therefore, was without evidentiary value ( *Zuckerman v. City of New York*, 49 N.Y.2d 557; *Carpluk v. Friedman*, 269 A.D.2d 349; *Sloan v. Schoen*, 251 A.D.2d 319; *Feratovic v Lun Wah, Inc.*, 284 AD2d 368). Nor are the documents downloaded from the internet, standing alone, of evidentiary value. Hearsay evidence may be considered to defeat a motion for summary judgment, as long as it is

not the only evidence submitted or the sole factual basis for denying summary judgment (*see Rivera v. GT Acquisition 1 Corp.*, 72 AD3d 525 [1st Dept 2010]; *Guzman v. L.M.P. Realty Corp.*, 262 A.D.2d 99, 100 [1st Dept 1999]). Not only are these documents the sole evidence submitted, but more importantly, they do not stand for the premise plaintiff wishes to proffer.

The internet documents indicate that Sterling Equities has an ownership interest in the New York Mets baseball team and Sterling Mets owns and operates the New York Mets baseball franchise.

No reference is made to ownership, operation, or control of any portion of Citi Field.

Furthermore, co-defendant Aramark's argument is without merit. The moving defendants are not signatories of the contract in question. More importantly, there is no credible evidence as to where the alleged accident occurred, and the requirement of Sterling Mets' consent to the locations of the concession stands, by itself, does not create an issue of fact under these circumstances.

Therefore, the motion for summary judgment by defendants Sterling Equities and Sterling Mets dismissing the causes of action and cross-claims against it is **GRANTED**.

The cross-motion to permit plaintiff to amend his summons and complaint and to add defendant Queens Ballpark Company, LLC, is **GRANTED**. Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party (*see CPLR 3025[b]*; *Vista Props., LLC v. Rockland Ear, Nose & Throat Assoc. P.C.*, 60 A.D.3d 846, 847; *Bennett v. Long Is. Jewish Med. Ctr.*, 51 A.D.3d 959, 960-961; *Pellegrini v. Richmond County Ambulance Serv. Inc.*, 48 A.D.3d 436, 437; *Comsewogue Union Free School Dist. v. Allied-Trent Roofing Sys., Inc.*, 15 A.D.3d 523, 524).

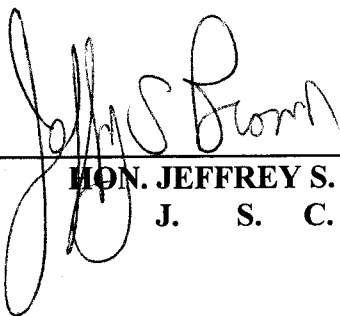
The proposed amended summons and complaint attached to the cross-movant's

application is deemed served upon service of a copy of this order upon all counsel for defendants who have appeared in this action. Leave is given to plaintiff to serve the proposed defendant Queens Ballpark Co., LLC.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: January 28, 2011

ENTER:

  
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**ENTERED**  
FEB 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE