

Morales v Turner Constr. Corp.

2011 NY Slip Op 31098(U)

April 18, 2011

Sup Ct, Nassau County

Docket Number: 022067-09

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
DIANA MORALES and GREGORY JACKSON,

Plaintiffs,

-against-

**TURNER CONSTRUCTION CORP, BOTTO
MECHANICAL CORPORATION'S DIGIACOMO
& SON, INC,**

Defendants.

-----x

TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 022067-09

MOTION SEQ. NO:5,6

SUBMIT DATE:03/08/11

The following papers having been read on this motion:

Notice of Motion.....1
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Notice of Cross Motion.....6
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The defendant, S. DiGiacomo & Son, Inc., move pursuant to CPLR §3212, for an order dismissing the plaintiffs' complaint, together with any and all cross-claims asserted against them (Sequence #005).

Defendants, Turner Construction Corp. and Botto Mechanical Corporation, cross-move pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiffs' complaint, together with any and all cross-claims as are asserted against them (Sequence #006).

On October 28, 2006, the plaintiff allegedly slipped and fell while descending the steps in the East Parking Garage, which is located on the premises of St. Francis Hospital, by which the plaintiff was then employed (*see* Conti Affirmation in Support at Exhs. A, B). Defendant, S. DiGiacomo & Son, Inc. [hereinafter DiGiacomo & Son], is a New York City based general construction company, which the plaintiffs allege "was responsible for construction, renovation,

alteration and repair” of the stairwell upon which Ms. Morales slipped and sustained her injuries (*id.* at Exh. A at ¶14). The plaintiffs further allege that defendants, Turner Construction Corp. and Botto Mechanical Corporation, respectively “had a duty to perform the construction, renovation, alteration and repair” at the stairwell upon which Ms. Morales slipped and fell (*id.* at ¶¶15,16).

As to the particular circumstances of the subject accident, Ms. Morales alleges that on the “staircase in the employees’ parking garage * * * between levels green and yellow” she tripped and fell “due to the presence of water and/or liquids on the steps, inadequate handrails, inadequate lighting, improper step geometry and lack of anti-skid resistant material on steps” (*see* Lombardo Affirmation in Support at Exh. B at ¶5; *see also* Conti Affirmation in Support at Exh. B at ¶22). In a Supplemental Verified Bill of Particulars, the plaintiff more specifically identified the site of her accident by stating that “[t]he stairway landing at which the accident occurred is located adjacent to the stairwell door in the employees parking garage which is labeled ‘Stairwell W Level 2 Exit’” (*see* Lombardo Affirmation in Support at Exh. F at ¶5).

On October 28, 2009, the plaintiff commenced the underlying action to recover damages for the personal injuries she purportedly sustained (*see* Conti Affirmation in Support at Exh. A). The complaint also includes a cause of action asserted by the plaintiff’s spouse for loss of consortium, services and society (*id.*). The instant applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the application interposed by defendant, DiGiacomo & Son, Inc. In support of the within application, counsel for the defendant argues that said defendant did not perform any aspect of either the design or construction of the stairwell upon which the plaintiff slipped and accordingly the within action must be dismissed (*see* Defendant’s Memorandum in Support at p.4). Counsel additionally posits, that as the defendant owed no duty to the plaintiffs herein, the within action must be dismissed (*id.* at pp. 4-9).

Counsel provides the affidavit of Stephen DiGiacomo, who has served as the President of the defendant corporation for more than eight years, and who avers that in said capacity he is involved with “the negotiation and execution of contracts for construction projects” (*see* Conti Affirmation in Support at Exh. F at ¶¶1,2). Mr. DiGiacomo states that “predicated upon my personal knowledge as well as my review of the company records which are maintained by DiGiacomo in the

ordinary course of business, * * * that DiGiacomo did not perform any aspect of the design or construction of the stairwell in the East Garage, was not on the premises on October 28, 2006, and has no connection to the alleged conditions concerning the presence of water on the steps” (*id.* at ¶4).

In opposing the instant application, counsel contends that the plaintiff has not been provided with the opportunity to conduct any depositions and accordingly the defendant’s instant application is premature and should be denied (*see* Wehrheim Affirmation in Opposition at ¶¶4,5,9). Counsel additionally argues that as the plaintiffs’ expert is expected to testify as to the negligence of the named defendants herein, there exist material questions of fact and accordingly summary judgment is inappropriate (*id.* at ¶6). In so arguing, counsel makes particular reference to the “Plaintiffs’ Expert Exchange”, which both identifies Robert L. Schwartzberg, P.E., as an expert witness, as well as sets forth the substance of his expected trial testimony (*id.*; *see also* Exh. A). Counsel for the plaintiff further provides a significant amount of documents from St. Francis Hospital, which is in fact a single exhibit containing 136 pages, the substance of which purportedly demonstrates that there were “leaks * * * emanating from the entire length of the joint between the new and existing garage” (*id.* at ¶8). Counsel posits that given there was water leaking in areas other than the East Garage, the assertion by Mr. DiGiacomo that the moving defendant “did not perform any aspect of the design or construction of the stairwell in the East Garage”, is not dispositive of the matters herein raised (*id.*)

In Reply, counsel for the moving defendant provides a Reply Affidavit from Mr. DiGiacomo, who avers, *inter alia*, that based upon his personal knowledge and review of the company records “DiGiacomo did not perform any aspect of the design or construction of the garage adjoining the East Garage or the joint between the two structures” (*see* DiGiacomo Reply Affidavit at ¶4).

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395[1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant’s favor (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065

[1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgriditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247 [1980]).

As noted above, the within action is predicated upon the negligence of the named defendants herein. In order to establish a *prima facie* case of negligence, it is incumbent upon the plaintiff to establish the following: the defendant owed the plaintiff a duty of care; the defendant breached the duty, and; the defendant's breach was a substantial factor in bringing about the events which caused the injury sustained by the plaintiff (*Deridian V Felix Contracting Corp.*, 51 NY2d 308 [1980]; *Schlinder v Ahearn*, 69 AD3d 837 [2d Dept 2010]; *Engelhart v County of Orange*, 16 AD3d 369 [2d Dept 2005]). In the absence of a duty owed to the plaintiff by the defendant, there can be no breach, and accordingly no liability can be imposed upon the defendant (*Schlinder v Ahearn*, 69 AD3d 837 [2d Dept 2010], *supra*; *Engelhart v County of Orange*, 16 AD3d 369 [2d Dept 2005], *supra*; *see also Pulka v Edelman*, 40 NY2d 781 [1976]).

Further, with respect to premise liability, as a general proposition, "liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control or special use of that property" and where none of these factors exist "a party cannot be held liable for injuries caused by the allegedly dangerous condition" (*Grover v Mastic Beach Property Owners Ass'n*, 53 AD3d 729 [2d Dept 2008]; *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845 [2d Dept 2010]; *Kydd v Daarta Realty Corp.*, 60 AD3d 997 [2d Dept 2009]; *Soto v City of New York*, 244 AD2d 544 [2d Dept 1997]).

In the instant matter, the Court has reviewed the record and upon said review finds that the

defendant has demonstrated its entitlement to judgment as a matter of law (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395[1957], *supra*). Here, the affidavit of Mr. DiGiacomo is competent evidence, which establishes that the moving defendant was not present on the date of the subject accident and did not perform any aspect of the design or construction work with respect to either “the stairwell in the East Garage” or “the garage adjoining the East Garage or the joint between the two structures” (*Soto v City of New York*, 244 AD2d 544 [2d Dept 1997], *supra*; *Klar v A.J. Pengo Const. Corp.*, 266 AD2d 434 [2d Dept 1999]; *Hovi v City of New York*, 226 AD2d 430 2d Dept 1996]; *Baker v Punancy*, 37 AD3d 504 [2d Dept 2007]). Further, the record herein is devoid of evidence as to any special use of the premises by the defendant, or that the defendant owned, occupied or controlled same (*Grover v Mastic Beach Property Owners Ass’n*, 53 AD3d 729 [2d Dept 2008], *supra*).

In opposition to the defendant’s *prima facie* showing, the plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). Initially, the “Plaintiff’s Expert Exchange”, is authored by plaintiffs’ counsel and is unaccompanied by any affidavit from Mr. Schwartzberg. Accordingly, same is insufficient to rebut the defendant’s *prima facie* showing (*id.*). Additionally, as the documents from St. Francis Hospital are unsworn same are equally inadmissible and thus insufficient to oppose the defendants’ instant application (*Abrahamsen v Brockway Glass Co., Inc.*, 156 AD2d 615 [2d Dept 1989]; *Lukin v Bruce*, 256 AD2d 388 [2d Dept 1998]; *see also Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]).

Moreover, the Court is not persuaded by the assertion that the within application should be denied pending additional discovery. “While a determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent, ‘[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence’” (*Williams v D & J School Bus, Inc.*, 69 AD3d 617 [2d Dept 2010] quoting *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614[2d Dept 1999]; *Pina v Merolla*, 34 AD3d 663 [2d Dept 2006]; *Lambert v Bracco*, 18 AD3d 619 [2d Dept 2005]; *Anne Koplick Designs Inc., v Lite*, 76 AD3d 535 [2d Dept 2010]). The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the

motion” (*Pina v Merolla*, 34 AD3d 663 [2d Dept 2006], *supra*; *Williams v D & J School Bus, Inc.*, 69 Ad3d 617 [2d Dept 2010], *supra*). In the matter *sub judice*, in arguing that the within application is premature, counsel for the plaintiffs has failed to set forth any evidentiary basis for the relief herein requested and merely states that “[w]ithout discovery and depositions of the relevant parties, it will be impossible to determine the many issues relevant to the instant litigation” (*id.*).

Therefore, based upon the foregoing, the application interposed by defendant, S. DiGiacomo & Son, for an order granting summary judgment dismissing the plaintiffs’ complaint, together with any and all cross-claims asserted against them, is hereby GRANTED (Sequence #005).

The Court now addresses the application interposed by defendants, Turner Construction Corp. and Botto Mechanical Corporation. In support thereof, counsel for the moving defendants contends that neither Turner Construction Corp. [hereinafter Turner] nor Botto Mechanical Corporation [hereinafter Botto] performed any construction, maintenance, renovation and/or repair with respect to the subject stairwell or the East Garage (*see* Lombardo Affirmation in Support at ¶¶7,8,11,12, 22,23,24,27,33,36; *see also* Exhs. E, G, H). Counsel further contends that inasmuch as the moving defendants were not involved in the construction, maintenance or repair of the subject stairwell, they did not owe a duty to the plaintiff warranting dismissal of the within action (*see* Lombardo Affirmation in Support at ¶¶33,34,38,39)

Counsel provides the affidavits from Mr. Carlo DiSilvestro and Mr. McAlvin, who are respectively employed by Turner and Botto (*id.* at Exhs. G, H). Mr. DiSilvestro, “was the Project Executive for Turner Construction for the project involves [sic] at St. Francis Hospital” (*id.* at Exh. H at ¶1). He states that “Turner Construction, as the Construction Manager, entered into a written contract whereby the scope of work included the construction of a new five story underground parking garage, a Plaza, a new addition to an existing utility plant, an elevator addition, erection of the St. Elizabeth building and a new three story wing to the existing hospital” (*id.* at ¶4). Mr. DiSilvestro further states that “based upon my personal knowledge, including but not limited to my pre-construction inspections of the property, Turner and/or its subcontractors merely created doorway openings in the stairwell so as to connect the new underground garage to the pre-existing stairwell in the East Garage” (*id.* ¶5). He further states that “Turner and/or its subcontractors did not perform any maintenance and/or repair of the subject stairwell at the stairwell door and labeled ‘Stairwell W

Level 2 Exit' ” (*id.* at ¶5).

Mr. McAlvin states that he is “the project manager for Botto * * * and [has] served as a project manager for Botto for the past nineteen years” (*see* Lomabardo Affirmation in Support at Exh. G at ¶1). Mr. McAlvin states that “Botto was involved in a project to construct a new garage whereby Turner * * * was the Construction Manager for the project” and where “Botto performed work on the new West Garage, which was constructed west of the East Garage” (*id.* at ¶3). Mr. McAlvin avers that based upon his “personal knowledge as well as [his] review of the company records maintained by Botto in the ordinary course of business, Botto did not perform any construction, maintenance, renovation and/or repair of the subject stairwell and/or East Garage particularly adjacent to the stairwell door and labeled ‘Stairwell W Level 2 Exit’” and that the “scope of Botto’s work on this project was limited to the West Garage” (*id.* at ¶5).

In opposing the instant application, counsel for the plaintiffs again argues that as depositions have yet to be conducted, the application should be denied (*see* Wehrheim Affirmation in Opposition at ¶3,4,11). Counsel further posits that notwithstanding the assertions set forth by Turner, the documents from St. Francis Hospital annexed to the plaintiffs’ opposing papers clearly demonstrate that said defendant “was not only hired to perform work on the East Garage, but also entered into contracts and invoices for work on the garage as general contractor” (*id.* at ¶5). Counsel argues that due to this apparent discrepancy between Turner’s supporting affidavits and the documents from St. Francis Hospital, this Court should not give any credence to the totality of the defendants’ contentions as are proffered herein (*id.*).

Counsel further argues that even assuming that the moving defendants have made a *prima facie* showing entitling them to summary judgment, the plaintiffs have nonetheless demonstrated the existence of triable issues of fact (*id.* at ¶8). Relevant to this point, counsel again makes reference to the aforementioned “Plaintiffs’ Expert Exchange”, and argues that the assertions therein contained raise factual questions which preclude the granting of summary judgment in favor of the moving defendants (*id.*). Counsel also again relies upon the documents from St. Francis Hospital, arguing that same coupled with the “Plaintiffs’ Expert Exchange”, raise questions of fact as to whether the moving defendants engaged in any work at the East Garage, and, if so, whether they were negligent in the completion thereof (*id.* at ¶¶9,10; *see also* Exhs A, B).

In the instant matter, having reviewed the record, the Court finds that the moving defendants have demonstrated their entitlement to judgment as a matter of law (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395[1957], *supra*). Here, the affidavits of Mr. DiSilvestro and Mr. McAlvin establish that the moving defendants were not involved with the construction of the stairwell in which the plaintiff's accident admittedly occurred (*Soto v City of New York*, 244 AD2d 544 [2d Dept 1997], *supra*; *Klar v A.J. Pengo Const. Corp.*, 266 AD2d 434 [2d Dept 1999], *supra*; *Hovi v City of New York*, 226 AD2d 430 2d Dept 1996], *supra*; *Baker v Punancy*, 37 AD3d 504 [2d Dept 2007], *supra*).

In opposition, the plaintiffs have failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). Initially, for the reasons set forth herein above, the "Plaintiffs' Expert Exchange" and the opinions therein contained are inadmissible and thus insufficient to oppose the defendants' instant application (*id.*). Additionally, based upon the rationale as set forth above, this Court is unpersuaded by the plaintiffs' assertion that the instant application should be denied pending additional discovery (*Williams v D & J School Bus, Inc.*, 69 Ad3d 617 [2d Dept 2010], *supra*). Finally, with respect to the documents from St. Francis Hospital, as noted above, same are unsworn and accordingly insufficient to raise a triable issue of fact (*Abrahamsen v Brockway Glass Co., Inc.*, 156 AD2d 615 [2d Dept 1989], *supra*; *Lukin v Bruce*, 256 AD2d 388 [2d Dept 1998], *supra*; *see also Rue v Stokes*, 191 AD2d 245 [1st Dept 1993], *supra*).

The Court notes that with respect to these documents from St. Francis Hospital, a review thereof reveals that an investigation of the subject garage was undertaken by Henshell & Buccellato, who are consulting architects. A careful reading of the resulting "Investigation & Report" indicates that the consulting architects stated the following: "In our opinion, the leaking conditions that existed are the result of a failure on the architect's part to properly detail the waterproofing system and expansion joint."

Based upon the record herein, there is no evidence that the moving defendants were involved in the architectural design of the garage containing the stairwell upon which the plaintiff tripped and fell. Thus, even assuming that the documents from St. Francis Hospital were in admissible form, the contents thereof expressly confer responsibility upon a party, other than the moving defendants, for the very conditions which are alleged to have proximately caused the plaintiff's accident, to wit: the presence of water and/or liquids on the steps (*Deridian V Felix Contracting Corp.*, 51 NY2d 308

[1980], *supra* ; *Schlinder v Ahearn*, 69 AD3d 837 [2d Dept 2010], *supra*; *Engelhart v County of Orange*, 16 AD3d 369 [2d Dept 2005], *supra*).

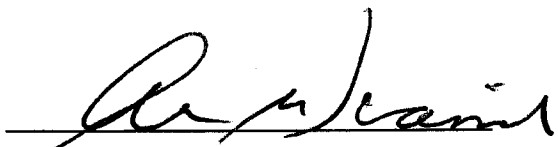
Accordingly, based upon the foregoing, the application interposed by defendants, Turner Construction Corp. and Botto Mechanical Corporation, for an order granting summary judgment and dismissing the plaintiffs' complaint, together with any and all cross-claims as are asserted against them, are hereby GRANTED (Sequence #006).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

DATED: April 18, 2011

ENTER



HON. ARTHUR M. DIAMOND

ENTERED S.C.

APR 20 2011

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