

Vasquez v City of New York

2011 NY Slip Op 32010(U)

July 15, 2011

Sup Ct, NY County

Docket Number: 104281/2009

Judge: Barbara Jaffe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jaffe BARBARA JAFFE
S.C.

PART _____

Index Number : 104281/2009
 VASQUEZ, DALILA
 vs.
 CITY OF NEW YORK
 SEQUENCE NUMBER : 003
 DISMISS
 CAL # 148

INDEX NO. 104281/09
 MOTION DATE 5/10/11
 MOTION SEQ. NO. 003
 MOTION CAL. NO. 148

this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2,3
4,5

FILED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 7/15/11
JUL 15 2011

[Signature]
BARBARA JAFFE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X
DALILA VASQUEZ, an infant by her mother and natural
guardian, CYNTHIA DUFFY, and CYNTHIA DUFFY,

Plaintiffs,
-against-

Index No.: 104281/2009
Motion Date: 5/10/11
Motion Seq. No.: 003
Motion Cal. No.: 148

THE CITY OF NEW YORK, HUMAN RESOURCES
ADMINISTRATION, DEPARTMENT OF HOMELESS
SERVICES, STADIUM FAMILY CENTER, and DEEGAN
MOTEL CORP.,

Defendants.

-----X
BARBARA JAFFE, J.S.C.:

For plaintiffs:
Alison R. Keenan, Esq.
Burns & Harris, Esqs.
233 Broadway, Suite 900
New York, NY 10279
212-393-1000

For Deegan:
Amy J. Curley, Esq.
Law Offices of Alan I. Lamer
555 Taxter Road
Elmsford, NY 10523
914-785-5300

NEW YORK
COUNTY CLERK'S OFFICE
For City defendants
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-44-6851

FILED

JUL 19 2011

By notice of motion dated November 12, 2010, defendant City, on behalf of itself and the Human Resources Administration Department of Homeless Services (collectively City), moves pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiffs' claims and all cross claims against it. Plaintiff and defendant Deegan Motel Corporation (Deegan) oppose.

I. BACKGROUND

In February of 2008, plaintiffs moved into the Stadium Family Center, a homeless shelter located at 1260 Sedgwick Avenue, Bronx, New York. (Affirmation of Peter C. Lucas, ACC, dated Nov. 12, 2010 [Lucas Aff.], Exh. G). On September 28, 2008, infant plaintiff tripped and fell, and as a result, a door closed on her left middle finger, severing its tip. (*Id.*, Exhs. A, B).

On November 6, 2008, plaintiffs served defendants with a notice of claim dated October

31, 2008. (*Id.*, Exh. A). On March 27, 2009, plaintiffs commenced the instant action by filing a summons and complaint, asserting claims for negligent ownership, operation, and maintenance of the subject premises. (*Id.*, Exh. B). City and Stadium Family Center joined issue by serving their answers on April 13, 2009 and April 16, 2009, respectively. (*Id.*, Exhs. C, D). On April 13, 2010, a preliminary conference was held and a case scheduling order was executed, and on August 3, 2010, a compliance conference was held. (*Id.*, Exh. H). City was deposed on September 29, 2010, when City's title examiner testified that Deegan owns the property where infant plaintiff was injured. (*Id.*).

On December 17, 2010, plaintiffs' motion to amend their complaint to name Deegan as defendant was granted (*id.*, Exh. D), and on January 21, 2011, a supplemental summons and amended complaint naming Deegan as defendant was filed.

Depositions of plaintiffs, Stadium Family Center, and Deegan have yet to be conducted, and no paper discovery has been completed aside from City's production of title search documents. (Affirmation of Alison R. Keenan, Esq. in Opposition, dated Jan. 27, 2011 [Keenan Aff. in Opp.]).

By affidavit dated July 9, 2010, David Schloss, Senior Title Examiner with the New York City Law Department, stated that he conducted a title search for the subject premises and determined that Deegan owned it the day of the accident. (*Id.*, Exh. I).

II. CONTENTIONS

Relying on Schloss's affidavit, City denies owning, operating, maintaining or controlling the premises or the homeless shelter located thereon and thus argues that it cannot be held liable for plaintiffs' injuries. (*Id.*). It also denies that its motion is premature, as plaintiff and its co-

defendants have failed to demonstrate that further discovery will yield evidence warranting denial of the motion. (*Id.*).

In opposition, plaintiffs maintain that further discover is necessary to determine whether City was involved in the operation and maintenance of the homeless shelter. (Keenan Aff. in Opp.).

In opposition, Deegan contends that City has failed to prove that it had no role in the operation of the shelter and complains that it has not had an opportunity to engage in discovery to ascertain whether City or its Human Resources Administration Department of Homeless Services were involved in it. (Affirmation of Amy J. Curley, Esq. in Opposition, dated Apr. 26, 2011).

In reply, City argues that neither plaintiffs nor Deegan have raised triable issues of fact, as they only speculate as to whether City was involved in the shelter. (Affirmation of Peter C. Lucas, ACC in Reply, dated Jan. 27, 2011 [Lucas Aff. in Reply]; Affirmation of Peter C. Lucas, ACC in Response to Deegan Motel Corp., dated May 5, 2011 [Lucas Aff. in Reply to Deegan]). Moreover, it maintains that plaintiffs' claims arise out of the operation, maintenance, or control of the subject premises and thus, it is irrelevant even if City helped operate the shelter. (Lucas Aff. in Reply; Lucas Aff. in Reply to Deegan).

III. 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.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers.

(*Winegrad*, 64 NY2d at 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The opposing party must “lay bare” its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d at 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 summary judgment motion may be denied as premature when “facts essential to justify opposition may exist but cannot then be stated.” (CPLR 3212[f]). “This is especially so when the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.” (*Gardner v Cason, Inc.*, 82 AD3d 930 [2d Dept 2011]; *James v Aircraft Serv. Intl. Group*, 2011 NY Slip Op 4206 [2d Dept 2011]; *Nicholson v Bader*, 83 AD3d 802 [2d Dept 2011]; see also *Bartee v D & S Fire Protection Corp.*, 79 AD3d 508 [1st Dept 2010]).

To establish a *prima facie* case of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). Liability for a

dangerous condition on property is “predicated upon occupancy, ownership, control, or special use of such premises. The existence of one of more of these elements is sufficient to give rise to a duty of care.” (*Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]; *Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 820 [2d Dept 2008]; *Riddell v Brown*, 32 AD3d 1212, 1213 [4th Dept 2006]).

Here, although City provides admissible and probative evidence demonstrating that it did not own the subject premises at the time of the accident, it offers no evidence as to the control of the premises and the homeless shelter operating thereon and has thus failed to negate, *prima facie*, an essential element of plaintiffs’ negligence claims. (See *Abdellatif v Khoukaz*, 21 AD3d 1278 [4th Dept 2005] [defendant’s motion for summary judgment denied although she provided proof that she did not own premises, as she provided no proof that she did not control them]; *Arce v 1681 Realty Holding Corp.*, 276 AD2d 328 [1st Dept 2000] [same]).

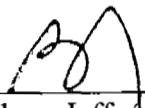
Moreover, the motion is premature, as depositions of Stadium Family Center and plaintiffs have yet to be conducted, and Deegan, recently named as defendant, has not had a reasonable opportunity to obtain disclosure from City or Stadium Family Center regarding their respective roles in the operation of the homeless shelter and control of the building. (See *Gardner*, 82 AD3d at 930 [summary judgment motion premature where no depositions had been taken and party opposing motion did not have an opportunity to seek disclosure]; *James*, 2011 NY Slip Op 4206 [summary judgment motion filed prior to exchange of discovery denied as premature]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003] [defendant’s summary judgment motion premature where plaintiff has yet to depose it and it had yet to respond to plaintiff’s discovery requests]; *Senken v Eklund*, 150 AD2d 671 [2d Dept 1989]

[summary judgment premature where depositions of key witnesses had not been conducted]).

Accordingly, it is hereby

ORDERED, that the City of New York's motion to dismiss is denied with leave to renew.

ENTER:



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

DATED: July 15, 2011
New York, New York

JUL 15 2011

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE