

Calderon v City of New York

2011 NY Slip Op 32596(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 104572/08

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. *Justice*

PART 5

Index Number : 104572/2008
CALDERON, MARIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
CAL # 18

INDEX NO. 104572108
MOTION DATE 7/26/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 18

this motion to/for summary judgment

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/11
OCT 04 2011

2
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.

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 5

-----X
 MARIA CALDERON,

Index No. 104572/08

Plaintiff,

Argued: 7/26/11

Motion Seq. No.: 002

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, THE GEORGE UNITS,
 LLC., EILAT MANAGEMENT GROUP, RACHEL
 BRIDGE CORP. and AVI DISHI,

FILED

OCT 05 2011

Defendants.
 -----X

NEW YORK
 COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For plaintiff:

Bruce S. Resnick, Esq.
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 Brooklyn, NY 11236
 718-241-6460

For defendant Dishi:

Adrienne Yaron, Esq.
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By notice of motion dated April 13, 2011, defendant Avi Dishi moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against him. Plaintiff opposes.

I. BACKGROUND

On December 29, 2007, at approximately 5:30 p.m., plaintiff tripped and fell on raised metal pieces embedded in the sidewalk adjacent to 1365 St. Nicholas Avenue in Manhattan, allegedly sustaining physical injuries as a result. (Affirmation of Adrienne Yaron, Esq., dated April 13, 2011 [Yaron Aff.], Exhs. A, C).

Court records reflect that on March 28, 2008, plaintiff commenced the instant suit with the filing of a summons and complaint, asserting negligence claims against defendants City and The George Units, LLC. Subsequently, she amended the complaint twice, first on May 2, 2008

to add Eilat Management Group as defendant, and then on March 29, 2010 to add Rachel Bridge Corporation and Dishy as defendants. Dishy joined issue with service of his answer on May 4, 2010. (*Id.*, Exh. A).

In her verified bill of particulars dated May 24, 2010, plaintiff describes the location of her accident as the sidewalk adjacent to the building “approximately 10 feet north of West 178th Street” (*Id.*, Exh. C).

An examination before trial (EBT) of plaintiff was held on December 2, 2010, during which she testified that she was walking north on the sidewalk adjacent to the building from West 178th Street to West 179th Street, as she was planning to cross St. Nicholas Avenue at its intersection with West 179th Street, when she tripped on pieces of metal protruding from the sidewalk. (*Id.*, Exh. D). When presented with a photograph of the building and the adjacent sidewalk, which was taken facing southwest, toward West 178th Street, and which depicts a Pretty Girl storefront and a yellow line running along the sidewalk perpendicular to the building, north of the store entrance, she testified that it accurately depicted the sidewalk as it existed on the day of her accident, and indicated the location of her fall by circling a portion of the sidewalk north of the yellow line. (*Id.*).

During an EBT held on December 9, 2010, Benito Pallerano, the superintendent for 1365 St. Nicholas Avenue, testified that the building has two commercial spaces on the ground floor that face St. Nicholas Avenue and that his employer, Rachel Bridge Corporation, is responsible for maintaining and repairing the sidewalks adjacent to the building and contracts with an outside contractor to perform such repairs. (*Id.*, Exh. F).

On January 10, 2011, an EBT of Dishy was held, during which he testified that he leases

one of the two commercial spaces on the ground floor of 1365 St. Nicholas Avenue and operates the Pretty Girl store in the space. (*Id.*, Exh. E). When presented with a photograph of the building and adjacent sidewalk, which was taken facing north and which shows the yellow line, he testified that the boundary line of his leased premises is one or two feet closer to West 178th Street, or south of the line, and when shown the photograph on which plaintiff circled the accident location, he testified that it is beyond the boundary line. (*Id.*).

Dishi served plaintiff and co-defendants with the instant motion on April 13, 2011, annexing thereto, *inter alia*, the transcripts of plaintiff's, Dishi's, and Pallerano's EBTs and the photographs on which plaintiff and Dishi identified the accident location and the boundary of the leased premises, respectively. (*Id.*, Exhs. D, E, F).

Accompanying the transcript of plaintiff's EBT is an errata sheet and a notice of submission dated January 21, 2010, which reflects that the transcript had been sent to plaintiff for her review and indication of any errors or changes to her testimony, signature, and return within 60 days, with the proviso that the failure to do so will result in the use of the transcript as if executed. (*Id.*, Exh. D). Neither the transcript nor the errata sheet are signed. (*Id.*).

The transcript of Dishi's EBT is signed by him and notarized, and accompanying it are signed and notarized errata sheets, all signed on February 22, 2011. (*Id.*, Exh. E).

A notice of exchange, which provides that the transcript of Pallerano's EBT was sent to counsel for Rachel Bridge Corporation for Pallerano's review, indication of changes to his testimony, signature, and return within 60 days, with the proviso that it will result in the use of the transcript as if executed. (*Id.*, Exh. F).

II. CONTENTIONS

Dishi contends that he cannot be held liable for plaintiff's injuries, as the portion of sidewalk on which she tripped is beyond the boundary line of his leased premises, and he had no occupancy, control, ownership, or special use of that portion. (Defendant's Memorandum of Law).

In opposition, plaintiff argues that the EBT transcripts on which Dishi relies cannot be considered, as they are not executed nor is there any showing that they were forwarded to the deponents for their review pursuant to CPLR 3116(a). (Affirmation of Bruce S. Resnick, Esq., in Opposition, dated June 16, 2011). In any event, she claims that Dishi fails to show *prima facie* entitlement to summary judgment, absent any way determine from the photograph whether the portion of the sidewalk on which she fell is adjacent to the leased premises and, as Dishi did not annex the lease to his motion papers, it is impossible to determine whether he was responsible for repairing the adjacent sidewalk. (*Id.*).

In reply, Dishi maintains that the EBT transcripts annexed to his motion are admissible and should be considered, having proven that they were forwarded to the deponents in compliance with CPLR 3116(a). (Affirmation of Adrienne Yaron, Esq., in Reply, dated June 28, 2011). Moreover, he asserts that he has demonstrated *prima facie* entitlement to summary judgment, as his testimony reflects that the accident location is beyond the boundary of his leased premises, and that plaintiff fails to offer any evidence demonstrating the existence of triable factual issues. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of

fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. CPLR 3116(a)

CPLR 3116(a) provides that a party seeking to use a deposition must submit it to the deponent for his review, that the deponent must read it and enter any changes he wishes to make at the end, providing reasons therefor, and that the deponent must sign the deposition in front of “an officer authorized to administer an oath” and return it within 60 days or it may be used as though fully signed. The party proffering the deposition bears the burden of establishing compliance with this section, and he may not use it if he fails to do so. (*Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 453 [1st Dept 2011]).

Here, all three of the EBT transcripts on which Dishi relies are either accompanied by a notice specifying that the deponent must review it, make any changes on the errata sheet, sign it and return it within 60 days or are signed and notarized and accompanied by signed, notarized errata sheets. Dishi has thus established compliance with CPLR 3116(a).

B. Premises liability

“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control, or special use.” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). Thus, where an accident occurs beyond the boundaries of leased premises, the lessee cannot be held liable therefor. (*Kaplan v New York Mercantile Exch.*, 55 AD3d 406 [1st Dept

2008]; *Richardson v Lenox Terrace Dev. Assoc.*, 41 AD3d 108 [1st Dept 2007]).

Here, Dishy testified that the boundary of his leased premises is one or two feet south of the yellow line on the sidewalk, and plaintiff identified a portion of the sidewalk north of the yellow line as the accident location. Moreover, the photographs presented to Dishy and plaintiff at their EBTs clearly show the relative locations of the yellow line and the accident site, and thus, the boundary of Dishy's leased premises and the accident site. Therefore, the parties' contentions as to who is responsible for repairing the sidewalk need not be considered, and Dishy has established, *prima facie*, entitlement to summary judgment. As plaintiff merely speculates and provides no evidence demonstrating that there are triable factual issues as to the accident location and the boundary of the leased premises, Dishy is entitled to summary judgment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Avi Dishy's motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant Avi Dishy with costs and disbursements to Avi Dishy, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant Avi Dishy; and it is further

ORDERED, that the remainder of the action shall continue.

FILED

ENTER:

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 4, 2011
New York, New York

OCT 04 2011