

Perez v Zumbach Sports Cars, Ltd.
2011 NY Slip Op 33442(U)
December 21, 2011
Sup Ct, NY County
Docket Number: 111103/07
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla PART 19

Index Number : 111103/2007
PEREZ, ONEIDA
vs.
ZUMBACH SPORTS CARS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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 is determined
in accordance with the accompanying
decision/order.

FILED

DEC 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/21/11

Saliann Scarpulla
SALIANN SCARPULLA

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: CIVIL TERM: PART 19

-----X
ONEIDA PEREZ,

Plaintiff,

Index No.: 111103/07

Submission Date: 8/17/11

- against-

ZUMBACH SPORTS CARS, LTD., MELVIN
FRIEDLAND, LAWRENCE FRIEDLAND AND
LARSTRAND CORPORATION,

DECISION AND ORDER

Defendants.
-----X

For Plaintiff:
Parker Waichman Alonso LLP
6 Harbor Park Drive
Port Washington, NY 11050

For Defendant Zumbach Sports Cars., Ltd.:
The Law Offices of Edward Garfinkel
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For Defendants Melvin Friedland, Lawrence Friedland
and Larstrand Corporation:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
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White Plains, NY 10604

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Papers considered in review of this motion for summary judgment and cross motion :

Notice of Motion 1
Notice of Cross Motion 2
Affs in Opp 3, 4
Replies 5, 6

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Zumbach Sports Cars, Ltd. ("Zumbach") moves for summary judgment dismissing the complaint and any cross claims asserted against it and defendants Melvin Friedland, Lawrence Friedland and Larstrand Corporation (collectively referred to as "Friedland") cross move for summary judgment dismissing the complaint insofar as asserted against them.

Plaintiff Oneida Perez ("Perez") commenced this action in or about October 2008 seeking to recover damages for injuries she sustained to her left ankle on March 19, 2007 when she slipped on an icy sidewalk adjacent to 629 West 54th Street. Defendants Melvin Friedland and Lawrence Friedland owned the building located at 629 West 54th Street, defendant Larstrand Corporation managed the building, and Zumbach leased a portion of the premises from the owners.

According to the allegations of her complaint, Perez slipped in "the area of the southwest portion at or near the third garage door in a westerly direction from the end of the building." She alleged that ice and snow were negligently removed from the area of the sidewalk where she fell. At a deposition, she specified and marked the area of her fall with an "X" on several photographs taken of the subject location.

Zumbach's president John Mender ("Mender") testified at an examination before trial that the marked area on the photographs shows "the bay to the left of our store, open bay, open door, to the left side of our entrance, and one closed bay to the right side of our entrance." He explained that the marked area was "on the front of the unloading platform, which Zumbach has nothing to do with it." He further explained that the "X" in the photograph is in front of the door used by the owner of the building. Mender explained that Zumbach did not use that area, and did not remove ice and snow in front of or adjacent to that door used by the owner, as the owner did its own snow and ice removal.

Larstrand's managing agent Peter Giga ("Giga") testified at an examination before trial that the area marked by the "X" was on the portion of the sidewalk utilized by the owner. He testified that he first heard of the accident from an employee Ismael Pena ("Pena") who did not witness the accident, but saw Perez laying on the ground after she fell. Giga explained that Pena told him that Perez did not fall in the area marked by the "X" and that Zumbach had not shoveled any portion of its sidewalk. He claims that Pena spoke to Perez and saw her on the ground between the middle garage door, which is the service area for Zumbach, and the next westerly garage door, right between the two doors. He explained that the owner was responsible for removing snow and ice from the sidewalk in front of the first and third garage doors and pursuant to its lease agreement for the premises, Zumbach was responsible for snow and ice removal from the sidewalks in front of its garage door.

Pena testified at an examination before trial that when he responded to the scene of the accident, Perez was no longer there. Pena maintained that he never saw or spoke to Perez and does not know who saw her fall. He took photographs of the scene of the accident. He was told, by someone, that Perez fell on the sidewalk in front of the furthest right hand side of the garage door leading to Zumbach's garage. He testified that it was Zumbach's responsibility to clear that portion of the sidewalk and it did not appear as if any snow had been removed from that area that day. Pena further testified that the area on

the photograph marked by the "X" was in front of the owner's garage door, and the owner removed snow and ice from that area during the time of March 2007.

Zumbach now moves for summary judgment dismissing the complaint and cross claims asserted against it, arguing that it is undisputed that the owners, and not Zumbach, were responsible for maintenance and snow removal in the area of Perez's fall.

Friedland cross moves for summary judgment dismissing the complaint insofar as asserted against it. Friedland maintains that Giga's examination before trial testimony establishes that Perez fell in front of Zumbach's property. Friedland also maintains that the photographs taken by Pena of the subject area after the accident depict Zumbach employees removing snow and ice from the area of the fall and as such, Zumbach demonstrated dominion and control over the subject area.

Friedland argues that pursuant to the lease for the premises, Zumbach was required to indemnify and hold Friedland harmless "against and from any accident, injury, or damage to any person...in or about the demised premises or any part thereof...or any sidewalk...adjacent thereto," and in fact, Friedland tendered its defense and indemnification to Zumbach, which Zumbach originally accepted. Further, Friedland was merely an out of possession landlord, and Zumbach was responsible for maintenance of the subject sidewalk.

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In opposition to both motions, Perez first argues that as owner of the premises, Friedland owes a non-delegable duty to keep the adjacent sidewalk in good repair pursuant to Administrative Code §7-210. Perez further argues that the photographs taken by Pena of the area of her fall raise an issue of fact as to the exact location of her fall, sufficient to defeat both summary judgment motions. She submits an affidavit in which she states, “the exact location of my accident on the sidewalk on West 55th Street, whether it was directly in front of the second garage or third garage or in between the two, shouldn’t make any difference. The photographs...all depict the area where my accident occurred on March 19, 2007.”

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The Court finds that Zumbach has met its burden of establishing entitlement to judgment as a matter of law. In support of its motion, Zumbach submits (1) Perez’s testimony identifying and describing the location of her fall on the sidewalk; (2) photographs marked by Perez depicting the exact location of her fall; and (3) testimony

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from Mender and Giga indicating that the area marked by Perez on the photographs was Friedland's responsibility.

Perez attempts to raise an issue of fact as to the location of her fall by submitting an affidavit and referencing the photographs taken by Pena of the area of Perez's fall. However, the photographs taken by Pena depict the exact same area presented in the photographs marked by Perez. Perez's affidavit indicating that the exact location of her fall "should not make any difference" is disingenuous and does not raise any issue of fact as to the location of her fall, as she does not specify or mark any location different from the one that she had marked in the original photograph and gave testimony about. Her affidavit only attempts to create a feigned issue of fact which is insufficient to defeat a motion for summary judgment. *See Gogos v Modell's Sporting Goods, Inc.*, 87 A.D.3d 248 (1st Dept. 2011); *Garcia-Martinez v City of New York*, 68 A.D.3d 428 (1st Dept. 2009).

The Court further finds that Friedland fails to meet its burden of establishing entitlement to judgment as a matter of law. In support of its cross motion, it argues that Perez fell on the sidewalk in front of Zumbach's premises and refers to the terms of Zumbach's lease agreement for its premises, arguing that Zumbach was responsible for maintenance of that sidewalk.

Friedland refers to Giga's testimony in which he claims that Pena told him that he saw and spoke to Perez on the date of the accident, and that he saw her laying on the unshoveled ground between the middle garage door, which is the service area for

Zumbach, and the next westerly garage door. However, Pena clearly testified that he did not speak to or see Perez on the date of the accident and any information he had about her fall was from a conversation he had with an unidentified person. Perez clearly and unequivocally identified the location of her fall and any reference to an unidentified person's opinion as to the location of her accident is insufficient to raise any material issue of fact.

As such, pursuant to the lease agreement and Giga's testimony, Zumbach was only responsible for maintenance of the sidewalk in front of its garage door and leased property. No evidence was submitted to establish that Zumbach was responsible for maintenance of any other portion of the sidewalk. To the contrary, Giga and Mender both testified that the owner was responsible for the maintenance of the sidewalk in front of its premises. Perez clearly testified and identified on a photograph that she fell on the sidewalk in front of the owner's property, not Zumbach's.

In accordance with the foregoing, it is hereby

ORDERED that defendant Zumbach Sports Cars Ltd.'s motion for summary judgment dismissing the complaint and any cross claims insofar as asserted against it is granted, and the complaint and cross claims insofar as asserted against it are dismissed; and it is further

ORDERED that defendants Melvin Friedland, Lawrence Friedland and Larstrand Corporation's cross motion for summary judgment dismissing the complaint insofar as asserted against them is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 21, 2011

ENTER:

FILED

DEC 23 2011


Saliann Scarpulla, J.S.C. NEW YORK
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