

Pascal v Port Auth. of NY & NJ
2011 NY Slip Op 33852(U)
June 23, 2011
Sup Ct, Bronx County
Docket Number: 306558/10
Judge: Jr., Kenneth L. Thompson
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JUN 27 2011 Dismissed v. Port Authority
WJ/MS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
SANDRA PASCAL,

Index No. 306558/10

Plaintiffs,

DECISION/ORDER

-against-

Present:
HON. KENNETH L. THOMPSON, Jr.

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY and DELTA AIR LINES, INC.,

Defendant.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY (Port Authority) motion for an Order pursuant to CPLR § 3212¹ dismissing the Complaint is granted.

Facts

Plaintiff alleges that she "was injured on August 9, 2009, when [she] stepped off a Delta shuttle planes at gate 6 of the Delta Marine Air Terminal at Laguardia Airport. The jetway was about six inches lower [than] the plane doorway causing [her] to fall and sustain serious injuries." (S. Pascal Aff. at ¶ 3.) The Port Authority is now moving to

¹ The Court is converting Defendant's request to one for summary judgment despite the mandates contained in CPLR § 3211(c). Although Defendant's motion was brought pursuant to CPLR § 3211(a)(7), Plaintiff's opposes the motion as if it was for summary judgment. (See Pl. Aff. Opp. at ¶¶ 7-11.) Therefore, the Court finds that both parties have deliberately charted a summary judgment course. See Mihlovan v. Grozavu, 72 N.Y.2d 506, 508 (finding error with conversion where the parties did not "submit[] facts and arguments clearly indicating that they were deliberately charting a summary judgment course") (citations omitted); see also Four Seasons Hotels v. Vinnik, 127 A.D.2d 310, 320 (stating that an exception to CPLR § 3211(c) arises "when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course").

dismiss the Complaint on the grounds that it is an out-of-possession landlord not liable for Plaintiff injuries.

Plaintiff alleges that the Port Authority owned, operated, managed, maintained, controlled, supervised and inspected the lands and premises at issue in this case. (S&C at ¶¶ 7 & 8.) And that her injuries were due to the Port Authority's negligence, carelessness and recklessness in its supervision, inspection, operation, direct, ownership, maintenance, management, repair, and control of these premises. (Id. at ¶ 11.)

Summary Judgment Standard

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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324.

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

CPLR § 3212(f).

Liability/duty

“Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to

the injured party. Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 138. Although "[l]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property," Minott v. City of NY, 230 A.D.2d 719, 720. (citations omitted), "[i]t is well settled that an out-of-possession lessor is not liable for injuries that occur on the premises unless the lessor has retained control, or is contractually obligated to repair unsafe conditions," Pirillo v. Long Island R.R., 208 A.D.2d 818.

Out-of-Possession Landlord

An out-of-possession landlord is not liable for injuries that occur on the premises after the transfer of possession and control to a tenant unless the landlord (1) is contractually obligated to repair the premises or (2) has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision.

Reichberg v. Lemel, 29 A.D.3d 664, 665.

Port Authority Evidence

The Port Authority proffered the Affidavit of Virginia Elliott who averred that "[t]he Port Authority did not own, use, operate, control or maintain any jet bridges used by Delta in connection with flight operations at LaGuardia Airport in August 2009." (V. Elliott Aff. at ¶ 9.) The Port Authority also proffered the Lease between it and Defendant DELTA AIR LINES, INC. (Delta) which states that Delta "shall relieve the Port Authority from all responsibility for all repair, rebuilding and maintenance whatsoever in the premises, whether such repair, rebuilding or maintenance be ordinary or extraordinary, partial or entire, inside or outside, foreseen or unforeseen, structural or otherwise, and without limiting the generality of the foregoing" (Def. Aff. Supp. at Ex. D., at §

10(a.) And that the "Port Authority ... shall have the right at all reasonable times to enter upon the premises for purpose of inspecting same, for observing the performance by [Delta] of its obligations under this Agreement" (Id. at ¶ 17(a).)

The Court finds that the Port Authority has met its burden of showing entitlement to judgment as a matter of Law based on the above proffers. It further finds that Plaintiff has failed to raise a triable issue of fact, such to deny the Port Authority's request.

Plaintiff's Opposition

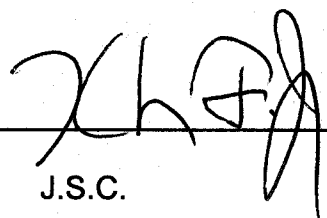
Plaintiff argues that the Court should disregard the Lease because it "terminated three years before the subject occurrence." (Pl. Aff. Opp. at ¶ 5.) Ms. Patterson avers, however, that the proffered lease "has been amended several times since 1980 to extend its term and to adjust rental rates paid by tenants. Sections 10 and 17 have not been amended since the original execution of the lease and were in effect on the August 9, 2009 alleged date of the incident on this personal injury action." (F. Patterson Aff. at ¶ 7.)

Plaintiff also contends that the Court should ignore Mr. Elliot's affidavit because her statement in paragraph 6 "fails to state who operated the jet bridges and rails to identify the maintenance vendor." (Pl. Aff. Opp. at ¶ 6.) (emphasis in Opposition). Ms. Elliot averred in paragraph 9 of her Affidavit, however, that "[t]he Port Authority did not own, use, operate, control or maintain any jet bridges used by Delta in connection with flight operations at LaGuardia Airport in August 2009." (V. Elliot Aff. at ¶ 9.) The Court further finds that the identity of the vendor who maintained the jet bridge at issue is irrelevant to the issue of whether the Port Authority is entitled to summary judgment under the facts of this matter.

Finally, Plaintiff posits that summary judgment is premature given that there has been no discovery conducted in this matter. This argument is of no moment since Plaintiff has "failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence." Hanover Ins. Co. v Prakin, 81 A.D.3d 778, 780. Indeed, "[t]he hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery [is] an insufficient basis to deny the motion." Essex Ins. Co. v Michael Cunningham Carpentry, 74 A.D.3d 733, 734.

The foregoing shall constitute the decision and order of this Court.

Dated: June 23 2011



J.S.C.
KENNETH L. THOMPSON, JR.