

Casale v Central Parking Sys. of N.Y., Inc.

2011 NY Slip Op 33916(U)

September 13, 2011

Sup Ct, Bronx County

Docket Number: 305041-09

Judge: Kibbie F. Payne

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
OF THE BRONX COUNTY: PART 1

SEP 21 2011

-----X
NANCY CASALE,

Plaintiffs,

Index No. 305041-09

-against-

Decision/Order

CENTRAL PARKING SYSTEM OF NEW YORK, INC.,
YANKEE PARKING GARAGE CORP., 85 EAST
158TH STREET LLC, KINNEY PARKING SYSTEM,
INC., KINNEY PARKING SYSTEM, INC., AND
KINNEY PARKING OF THE BRONX, INC.,

Defendants.

-----X
85 EAST 158 STREET LLC,

Third-Party Plaintiff,

-against-

85-87 GARAGE CORP.,

Third-Party Defendant.

-----X
KIBBIE F. PAYNE, J.:

In this action seeking damages for personal injuries, defendants Central Parking System of New York, Inc; Kinney Parking System, Inc; Kinney Parking, Inc; and Kinney Parking of the Bronx, Inc move for summary dismissal of the complaint, arguing that the above entities bear no relationship to the garage where the plaintiff's slip-and-fall occurred. Plaintiff Nancy Casale opposes the application, arguing that the defendants failed to plead lack of control over the garage as an affirmative

defense and additionally arguing that defendants' evidence should be precluded as a sanction for failing to produce a deposition witness¹.

At the outset, the court notes that the moving defendants were not required to plead lack of ownership or management the garage as an affirmative defense; this amounts to mere denial of the allegations contained in the complaint, and the plaintiff bears the burden of proof on these allegations (see CPLR § 3018 [b]). Moreover, the defendants have demonstrated good cause for seeking accelerated judgment more than 120 days after the filing of the note of issue (see CPLR 3212 [a]; Brill v City of New York, 2 N.Y.3d 648). The plaintiff admits to having improperly certified this action for trial while disclosure remained outstanding, and the defendants should not be penalized for awaiting its completion before seeking summary judgment.

Here, the defendants met their prima facie burden of establishing entitlement to judgment as a matter of law. Movant proffered the affidavit of its vice president, Hector Chavalier who, with personal knowledge of its operations, disclaims defendants' ownership or management of the garage. In opposition, the plaintiff failed to demonstrate the existence of any triable issue of fact or to raise any bonafide question of

¹The court declines to consider plaintiff's improper sur-reply and the new arguments raised therein.

credibility concerning defendants' representations (*Zuckerman v City of New York*, 49 NY2d 557; *Nelson v Lundy*, 298 Ad2d 689, 690). Plaintiff's speculation that the moving defendants may have had some relationship with the garage is, without more, devoid of probative value. See *Shapiro v Health Ins Plan of Greater NY*, 7 NY2d 56, 63 quoting *Bank for Savings v Rellim Constr Co*, 285 NY 708 ("[A] motion for summary judgment may not be defeated by charges based upon surmise, conjecture and suspicion").

Finally, plaintiff's argument that the moving defendants should be precluded from submitting the affidavit of their vice president, Hector Chavalier, citing their failure produce a deposition witness, is unavailing. In response to plaintiff's discovery demands, the moving defendants denied employing any witness who personally observed of plaintiff's slip-and-fall. Their response is further confirmed by the unrebutted evidence demonstrating the absence of any connection between these defendants and the accident. The compliance conference order of May 5, 2010 cannot be read to compel production of a witness by a party lacking a basis for personal knowledge, nor to require production of a witness for the sole the purpose of recording the above disclaimer.

ORDERED the application for summary judgment is granted and the complaint is dismissed as against defendants Central Parking System of New York, Inc; Kinney Parking System, Inc; Kinney Parking, Inc; and Kinney Parking of the Bronx, Inc. The clerk is directed to sever and enter judgment accordingly.

Dated:

13 Sept 2011



KIBBIE F. PAYNE
J.S.C.