

Noboa-Jaquez v Town Sports Intl., LLC

2012 NY Slip Op 31380(U)

May 21, 2012

Supreme Court, New York County

Docket Number: 116744/2009

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
J.S.C.
Justice

PART 19

Index Number : 116744/2009
NOBOA-JAQUEZ, SOFIA
vs.
TOWN SPORTS INTERNATIONAL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

~~is~~ decided per the memorandum decision dated 5/21/12
~~which~~ disposes of motion sequence(s) no. 002

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

FILED

MAY 23 2012

NEW YORK
COUNTY CLERK'S OFFICE
Saliann Scarpulla J.S.C.

SALIANN SCARPULLA
J.S.C.

Dated: 5/21/12

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
SOFIA NOBOA-JAQUEZ,

Plaintiff,

- against-

Index No.: 116744/2009
Submission Date: 01/04/2012

TOWN SPORTS INTERNATIONAL, LLC., d/b/a
NEW YORK SPORTS CLUB,

Defendant.

----- X

For Plaintiff:
Robert Schacht, P.C.
Studio Legale
1001 Clove Road
Staten Island, NY 10301

For Defendant:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
3 Gannett Drive
White Plains, NY 10604-3407

FILED

Papers considered in review of this motion for summary judgment:

Aff in Support	1
Aff in Opp and in Support of Cross Motion	2
Reply Aff and in Opp to Cross Motion	3

MAY 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Town Sports International, LLC., d/b/a New York Sports Club ("NYSC") moves for summary judgment dismissing the complaint. Plaintiff Sofia Noboa-Jaquez ("Noboa-Jaquez") cross-moves to strike NYSC's answer and for summary judgment because of NYSC's alleged failure to provide discovery.

This action arises out of injuries Noboa-Jaquez allegedly sustained on July 15, 2009 at a NYSC gym after slipping and falling in the gym's shower area. Noboa-Jaquez alleges that NYSC was negligent in allowing soapy water to accumulate on the floor adjacent to the showers.

On June 8, 2011, Noboa-Jaquez filed the note of issue, certifying that all necessary discovery was complete. On July 25, 2011, NYSC moved to vacate the note of issue and extend the Court's 60-day deadline for filing summary judgment motions. NYSC maintained that it was entitled to a second IME to determine the extent of Noboa-Vazquez's injuries. On September 14, 2011, the Court directed the parties to schedule the second IME but denied NYSC's motion to vacate the note of issue and to extend the summary judgment motion deadline.

On August 12, 2011, NYSC filed this motion for summary judgment, arguing that the Court should dismiss the complaint because NYSC did not have notice of, or create, the allegedly dangerous condition. NYSC further argues that Noboa-Jaquez assumed any risk of walking on the slippery floor because the condition was open and obvious.

In opposition, Noboa-Jaquez argues that the Court should deny NYSC's motion because NYSC filed the motion after the 60-day deadline. Noboa-Jaquez further argues that there are issues of fact as to whether NYSC had constructive notice of the condition, and whether the risk was open and obvious. In its cross-motion, Noboa-Jaquez maintains that the Court should strike NYSC's answer and affirmative defenses because NYSC has

failed to comply with several discovery demands Noboa-Jaquez made before she filed the note of issue.

In its reply, NYSC argues that the deadline to file its summary judgment motion was extended five days because Noboa-Jaquez served the notice of filing of the note of issue by mail. NYSC maintains that, in any event, there was good cause for the delay because the handling attorney had a family emergency which forced him to be out of the office for five days before the deadline, and because NYSC was unable to verify when Noboa-Vazquez filed the note of issue. In opposition to Noboa-Vazquez's cross-motion, NYSC argues that it has complied with all discovery demands.

Discussion

Under CPLR § 3212(a), the Court may set a deadline to file summary judgment motions of no less than 30 days and no more than 120 days after the filing of the note of issue. A court may only consider untimely motions if the movant has shown "good cause" for the delay. *Brill v. City of New York*, 2 N.Y.3d 648, 652 (2004).

Here, it is undisputed that NYSC filed this motion outside the Court's 60-day deadline. NYSC argues that is entitled to a five-day extension under CPLR § 2103(b) because Noboa-Jaquez served notice of the note of issue filing by mail. However, 2103(b) "is inapplicable to the making of a summary judgment motion, for which the period prescribed by CPLR § 3212(a) is measured by the service of a paper but by the

filing of the note of issue.” *Group IX, Inc. v. Next Print. & Design Inc.*, 77 A.D.3d 530, 530 (1st Dept. 2010).

Further, NYSC has failed to show good cause for the late filing. The attorney representing NYSC in this matter affirms that he had a family emergency that forced him to be out of the office from August 3, 2001 to August 8, 2011. However, this accounts for only five days of the 60 days available to file the motion, and NYSC made no attempt to contact the Court to request an extension. Though the attorney affirms that he was unable to verify the note of issue filing date because the date did not appear online, nowhere does he contest receipt of the notice of filing of the note of issue, which presumably listed the filing date, nor does he mention any attempts to contact Noboa-Jaquez to determine the filing date.¹

Lastly, NYSC’s filing a motion to strike the note of issue does not excuse its late filing of this motion, as the outstanding discovery related to damages, not liability, and this summary judgment motion is based entirely on the issue of NYSC’s liability. *See Diaz v. Altman*, 298 A.D.2d 126 (1st Dept. 2002); *Hernandez v. 620 W. 189th Ltd. P’ship*, 7 Misc.3d 198, 201 (Sup. Ct. N.Y. County 2005). Accordingly, the Court denies NYSC’s summary judgment motion as untimely.

¹Defendant alleges reliance on *Szabo v. XYZ, Two Way Radio Taxi Ass’n*, 267 A.D.2d 134 (1st Dept. 1999) and *Luciano v. Apple Maint. & Servs.*, 289 A.D.2d 90 (1st Dept. 2001) in believing that it was entitled to a five-day deadline extension. As these decisions had already been overruled when Noboa-Jaquez filed the note of issue, *see Group IX, Inc.*, 77 A.D.3d at 530, they do not excuse NYSC’s untimely motion.

The Court also denies Noboa-Vazquez's cross-motion to strike the answer based on NYSC's alleged failure to comply with discovery demands. Noboa-Vazquez filed the note of issue on June 7, 2011, certifying that discovery was complete. Accordingly, she may not now seek further discovery, let alone attempt to strike NYSC's answer, based on discovery requested before she filed the note of issue. *See Madison v. Sama*, 92 A.D.3d 607, 607 (1st Dept. 2012).

In accordance with the foregoing, it is hereby

ORDERED that the summary judgment motion by defendant Town Sports International LLC., d/b/a New York Sports Club is denied; and is further

ORDERED that the motion by plaintiff Sofia Noboa-Jaquez for an order striking defendant's answer and granting Sofia Noboa-Jaquez permission to proceed to an inquest on damages, an order of preclusion against defendant, and an order dismissing defendant's affirmative defenses and granting summary judgment, is denied.

This constitutes the decision and order of the Court.

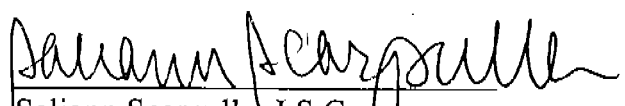
FILED

Dated: New York, New York
May 23, 2012

MAY 23 2012

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Saliann Scarpulla, J.S.C.