

McGinley v Mystic West Realty Corp.

2013 NY Slip Op 30051(U)

January 7, 2013

Sup Ct, New York County

Docket Number: 111278/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JENICE MCGINLEY and JAMES MCGINLEY,
Plaintiffs,

INDEX NO. 111278/09

-against-

MOTION SEQ. NO. 003

MYSTIC WEST REALTY CORP. d/b/a ROSIE
O'GRADY'S, TREL RESTAURANT INC. d/b/a ROSIE
O'GRADY'S, APPLE CORE HOTELS, INC. d/b/a
COMFORT INN, THE CHURCH OF ST. MARY
THE VIRGIN EPISCOPAL CHURCH, TIMES
SQUARE DISTRICT MANAGEMENT ASSOCIATION,
INC., and TIMES SQUARE DISTRICT MANAGEMENT
ASSOCIATION., d/b/a TIMES SQUARE ALLIANCE

FILED

JAN 15 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

The following papers, numbered 1 to 6 were read on this motion by defendants Mystic West Realty Corp., d/b/a Rosie O'Grady's and Trel Restaurant Inc. for summary judgment.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2, 3, 4, 5

Replying Affidavits (Reply Memo) _____

6

Cross-Motion: Yes No

Motion sequences 003 and 004 are consolidated for purposes of disposition. This is an action to recover damages for personal injuries suffered by Jenice McGinley (plaintiff), as the result of a slip and fall accident on the sidewalk abutting the premises located at 145 West 46th Street in Manhattan. Plaintiff claims that she slipped on a foreign liquid substance caused by leaking garbage bags that had been left on the sidewalk by the defendants. The complaint alleges that the defendants were negligent in their maintenance of the sidewalk adjacent to their respective premises and/or caused and created a defective condition by depositing leaky garbage bags in the area where the plaintiff fell. Plaintiff's husband, James McGinley, asserts a derivative claim for loss of consortium.

In motion sequence 003, defendants Mystic West Realty Corp., d/b/a Rosie O'Grady's and Trel Restaurant Inc., move for an order granting summary judgment and dismissing the complaint and all cross-claims asserted against them. In motion sequence 004, defendant The Church of St. Mary The Virgin Episcopal Church (Church), moves pursuant to CPLR 2211, for an order granting leave to renew and/or reargue this Court's decision and order, dated December 27, 2010, which granted defendant Apple Core Hotels, Inc., d/b/a Comfort Inn's (Apple Core) motion for summary judgment dismissing the complaint and all cross-claims asserted against it, and upon reargument, denying the motion for summary judgment.

Motion sequence 003

In motion sequence 003, defendants Mystic West Realty Corp. and Trel Restaurant Inc., (moving defendants) move for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claim asserted against them. The moving defendants own and/or operate and maintain a restaurant located at 149 West 46th Street. In support of their motion, moving defendants point to the allegations in plaintiff's Bill of Particulars (BP) which claim that the accident occurred down the block, in front of the property at 145 West 46th Street, owned by the codefendant Church. The moving defendants argue that plaintiff has no viable claim against them because the alleged accident did not occur on the sidewalk abutting any premises owned or occupied by the moving defendants but rather, occurred on the sidewalk in front of the Church.

In support of their motion, moving defendants submit an affidavit from Noel Leydon (Leydon) the General Manager of Mystic West Realty Corp. Leydon attests that the moving defendants did not and have not assumed any duties with regard to the removal of garbage from the 145 West 46th Street property, nor did they pile or store their own garbage or garbage bags in the area identified by the plaintiff as the location of his accident. Leydon further attests that the moving defendants have never performed any work in the area of the alleged accident

and played no role whatsoever in determining the manner in which garbage and garbage bags were kept or stored in front of the 145 West 46th Street premises.

In opposition to the motion, the Church, plaintiff, and the recently impleaded Time Square District Management Association argue that summary judgment is premature as discovery is outstanding, and that the restaurant's leaking trash bags could have caused the accident. The Church has submitted two affidavits in opposition to the summary judgment motion. The first affidavit is from the rector of the Church, Reverend Stephen Gerth (Reverend Gerth), who has been employed at the church since 1999. Reverend Gerth attests that he has been advised by his employees on numerous occasions that the restaurant owned by the moving defendants, which adjoins the Church on its west side, has repeatedly placed its garbage on the sidewalk in front of the Church. Reverend Gerth's affidavit also states that the alleged date of plaintiff's accident happened to coincide with a visit to the Church by its Presiding Bishop. In anticipation of that visit, Reverend Gerth claims the Church meticulously prepared to make sure that its facilities were in their best condition and appearance and he is certain that the Church did not place or leave any garbage bags in front of its property on that date.

The second affidavit is from the Church's porter, Mario Martinez (Martinez), who has been employed by the Church since before the plaintiff's accident and does not speak English. The affidavit is accompanied by an attested translator affidavit of Dulce Ramos, a professional translator, which states that the Martinez Affidavit has been translated from Spanish to English and attests to the accuracy of the translation. In his affidavit, Martinez attests that he has personally observed garbage from the restaurant placed on the sidewalk in front of the Church and claims that Church employees have complained to the restaurant about their garbage. Martinez also describes the Church's routine procedures for the disposal of its garbage. According to Mr. Martinez, the garbage is picked up on Monday, Wednesday and Friday

mornings and that after the Monday morning pickup, the Church does not place any new garbage bags onto the sidewalk until Tuesday afternoon. Since the accident took place on Tuesday morning, Mr. Martinez suggests that there could not have been any garbage bags placed by the Church on the sidewalk at the time of the plaintiff's accident.

In reply, moving defendants maintain that the opposition by the Church fails to create an issue of fact and that summary judgment should be granted. They dismiss the affidavit of Reverend Gerth as mere hearsay unsubstantiated by any evidence. They also claim that the affidavit of Martinez is defective because it does not include a statement from the translator that she accurately translated the affidavit from English to Spanish for the benefit of Martinez. Additionally, the moving defendants claim that the affidavit of Dulce Ramos, who represents herself as a professional translator, is insufficient to authenticate Martinez's affidavit as it merely indicates that she "faithfully translated the attached statement of Mario Martinez" but fails to include a copy of the original statement she translated into English. Finally, the moving defendants argue that even if the court accepts Martinez's affidavit as properly submitted, it is insufficient to defeat the summary judgment motion.

Motion sequence 004

In motion sequence 004, the Church moves, pursuant to CPLR 2211, for an order granting leave to renew and/or reargue this court's decision and order, dated December 27, 2010, which granted Apple Core's motion for summary judgment dismissing the complaint and all cross-claims asserted against it, and upon reargument, denying Apple Core's motion.

STANDARDS

Summary Judgment

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 eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.* 10 NY3d 733, 735, rearg denied

10 NY3d 885 [2008]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). 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. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]).

Reargument

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; see *Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

DISCUSSION

The Court find that the moving defendants in motion sequence 003 have satisfied their initial burden for summary judgment through the submission of their motion, plaintiffs' BP, plaintiff's photographs of the Church's pile of trash bags placed in front of the Church, and an

affidavit from their general manager establishing that the subject slip and fall did not occur either on the sidewalk abutting their premises, or as a result of a leak from the restaurant's garbage bags. This is sufficient to shift the burden to the plaintiff and/or the codefendant Church, of demonstrating the existence of questions of fact (*see Raghu v The New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010]).

In opposition to the motion, the Church has submitted affidavits from Reverend Garth and Martinez, which raise triable issues of fact as to the role of the restaurant in placing garbage on the sidewalk in front of 145 West 46th Street. Both affidavits state that there have been numerous occasions where the restaurant, which adjoins the Church on its west side, has been observed placing garbage on the sidewalk in front of the Church. Specifically, Martinez's affidavit states both that he has personally observed the restaurant placing garbage in front of the Church and that he is aware of complaints made by the Church to the restaurant concerning its garbage.

Furthermore, both affidavits maintain that the Church did not place garbage on the sidewalk on the morning in question. Reverend Garth's affidavit states with certainty that no garbage would have been left or placed on the sidewalk on the day of the subject accident. Additionally, Martinez, whose responsibilities included garbage removal and sidewalk cleaning, notes that the garbage removal procedures have not changed since he started working at the Church. He maintains that in order to be ready for pickup the next morning, garbage bags from the Church would be placed on the sidewalk on Tuesday and Thursday afternoons. Therefore, on Tuesday morning, the time of the plaintiff's accident, there would have been no garbage from the Church on the sidewalk. Mr. Martinez also maintains that the sidewalk in front of the Church was swept clean every morning and hosed down twice a week.

The affidavits submitted by the Church, from persons with knowledge of the Church's cleaning, maintenance and garbage removal procedures, are sufficient to rebut the prima facie

showing made by the moving defendants. The moving defendants incorrectly argue that Martinez's affidavit does not comply with CPLR 2101(b). That provision deals with authenticating and translating documents that are in a language other than English. Here, the Church has not filed any foreign language documents and, contrary to the moving defendant's arguments, the affidavit by the translator attesting to her qualifications and the faithfulness of her translation, is sufficient to authenticate Mr. Martinez's statement for the purpose of opposing summary judgment (see CPLR 2101[b]; see also *National Puerto Rican Day Parade, Inc. v Casa Publications, Inc.*, 79 AD3d 592, 594 [1st Dept 2010]). To the extent the moving defendants are suggesting that Mr. Martinez might not have understood the contents of his affidavit, this is a credibility issue that is not resolvable on a motion for summary judgment (see *Kasowitz, Benson, Torres & Friedman, LLP v Reade*, 98 AD3d 403, 413 [1st Dept 2012]). Accordingly, in motion sequence 003, the motion for summary judgment is denied.

The Church's motion for reargument is also denied. The Church has not demonstrated that this Court overlooked or misapprehended any matters of fact or law which would have changed the determination of the prior motion (see CPLR 2221[d][2]). Nor does the Church put forth any new evidence that would change the court's prior determination. Accordingly, in motion sequence 004, the motion to renew and/or reargue is denied.

CONCLUSION

Accordingly, it is

ORDERED that the defendants Mystic West Realty Corp., d/b/a Rosie O'Grady's and Trel Restaurant, Inc., d/b/a Rosie O'Grady's motion for summary judgment pursuant to CPLR 3212, Motion Sequence 003, is denied; and it is further,

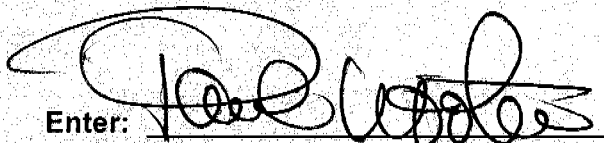
ORDERED that the Church of St. Mary The Virgin Episcopal Church (Church), motion pursuant to CPLR 2211, Motion Sequence 004, for an order granting leave to renew and/or reargue this Court's decision and order, dated December 27, 2010, which granted defendant

Apple Core Hotels, Inc., d/b/a Comfort Inn's motion for summary judgment dismissing the complaint and all cross-claims asserted against it, and upon reargument, denying the motion for summary judgment is denied; and it is further,

ORDERED that counsel for plaintiffs is directed to serve a copy of this Order with Notice of Entry upon all parties; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on February 27, 2013 at 11:00 a.m., at 60 Centre Street, Room 341, Part 7.

Dated: 1/7/13

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

FILED
JAN 15 2013
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