

Hockenbrocht v R.M. Resources

2013 NY Slip Op 31533(U)

July 9, 2013

Sup Ct, New York County

Docket Number: 113530/11

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden
Justice

PART 11

Index Number : 113530/2011
HOCKENBROCHT, LISA
vs.
R.M. RESOURCES, R.M.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

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

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 decided in accordance with the annexed Memorandum Decision + Order.

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

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 9, 2013

_____, J.S.C.

- 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
NEW YORK COUNTY, IAS PART 11

-----X
LISA HOCKENBROCHT,

Index No.:113530/11

Plaintiff,

-against-

R.M. RESOURCES, R.M. RESOURCES, INC., SCOTT
RECHLER RULAND-110 ASSOCIATES L.P., M.S. VENTURE
CORP., BETTER RULAND ROAD ASSOCIATES REALTY
CORP., BETTER RULAND, INC., RECHLER RECKON
ASSOCIATES REALTY CORP., RECHLER EQUITY
PARTNERS LLC and COSTCO WHOLESALE CORPORATION,

FILED

JUL 16 2013

Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN A. MADDEN, J.:

In this personal injury action, defendants Costco Wholesale Corporation (“Costco”) and R.M. Resources (“RMR”) move, and defendants Scott Rechler, Ruland-110 Associates, L.P., M.S. Venture Corp., Better Ruland Road Associates, L.P., Best Ruland, Inc., Gregg Rechler, Reckson Associates Realty Corp. and Rechler Equity Partners LLC (together “the cross movants”) cross move, for summary judgment dismissing the complaint against them. Plaintiff opposes the motion and the cross motion, except insofar as she concedes that her claims against her employer, Costco, are barred by the Workers’ Compensation Law.

BACKGROUND

This action arises out of a “slip and fall” incident that occurred on February 16, 2009, when plaintiff, while employed by Costco, fell on a patch of ice on the sidewalk outside the Costco Warehouse in Melville, New York (“the property”), on her way to work. Two photographs of the accident area shows two pipes embedded in an asphalt sidewalk on the side of the Costco store, and a damaged sidewalk area surrounding the pipe. RMR owns the property which it leased to Costco. The cross movants own various interests in RMR

Pursuant to a lease agreement dated February 17, 1994 (“the Lease”), a copy of which is attached to the moving papers, Costco, as tenant, agreed “to construct the [P]roject as a retail and wholesale warehouse together with parking and other facilities.” Section 5.01. In addition, Costco agreed that “at its sole costs and expense [to]...take good care of [the property] [and to] keep and maintain the same in good and safe order and condition, and make all repairs therein and thereon, interior and exterior, structural and non-structural, ordinary and extraordinary, and unforeseen and foreseen, necessary to keep the same in good and safe order and condition, howsoever the necessity or desirability therefor may occur, and whether or not necessitated by wear and tear, obsolescence or defects, latent or otherwise.” Section 5.08. In addition, Costco agreed, under section 5.08.1 “at its own cost and expense keep [the property] clean and free of dirt, snow, ice, rubbish, and obstructions.” RMR reserved the right, upon reasonable notice to Costco, to inspect the property. Section 11.01.

On January 18, 2012, plaintiff moved by order to show cause for the immediate deposition of a witness from Costco, asserting that without such deposition plaintiff would be unable to identify a witness against which she had a cause of action, indicating in her order to show cause that RMR is an out-of-possession owner. In its interim order dated January 28, 2012, the court directed that the general manager of the Costco store where plaintiff was employed be deposed and directed Costco to produce any documents in its possession with respect to any “construction work, maintenance or repair of the area where plaintiff fell for three years prior and six months subsequent to the date of the accident.”

In compliance with the order, Costco produced for deposition its general manager, Michael Bartoldus, who began working at the property in May 2006. Mr. Bartoldus testified that he “couldn’t figure out why there was ice on the concrete where [plaintiff] fell....” Bartoldus dep. at 12. Mr. Bartoldus testified that upon reviewing photographs of the area where plaintiff

fell that the pipes in the photograph were irrigation and electrical pipes. He explained the irrigation pipe was used to irrigate the landscape,¹ and that the electrical pipe was used for a camera on the wall. When asked if any one other than Costco used these pipes he responded no. Mr. Bartoldus also did not know who put the pipes there. However, he testified that Costco was responsible for maintaining the pipes at the time of the accident, and that he was not aware of anyone or any entity other than Costco that did work in the area where plaintiff fell. In addition, he testified that a search for the records from 2005 until August 2009 did not reveal any construction, repair or maintenance records for the area. He also denied that he ever had any dealings with RMR and testified that he was not aware of anyone from RMR doing any repairs on the property.

RMR argues that as an out-of-possession owner, it cannot be held liable to plaintiff since, under the Lease, Costco agreed to be responsible for maintenance and repair of the property. RMR also notes that Mr. Bartoldus testified that Costco was solely responsible for maintaining the property, including the sidewalk and pipes at issue.

With respect to the cross motion, the cross movants argue that they had no connection to the property at the time of the accident, and that there is no basis upon which they can be held liable as they did not have any ownership interest in or direct connection to the property upon which the accident occurred. The cross movants rely on the affidavit of Benjamin Zimmerman, in which he states that he is the comptroller/controller of defendants RMR and Rechler Equity Partners. According to Mr. Zimmerman, RMR, which is one of the moving parties rather than

¹Mr. Bartoldus identified an irrigation maintenance company that worked at the property at the time of the accident, and testified that certain records relating to the repair of sprinklers and valves had been located. However, he also denied that the repairs pertained to the area of the accident or that the irrigation maintenance company had any responsibility for the area where the pipes and asphalt are shown in the photographs.

the cross moving parties, was formed with the single purpose of owning the land entitlement to construct the Costco at issue and is the owner of the property. He states that RMR did not maintain custody or control of the property or contribute to the property's day-to-day operations. He also states that at the time of plaintiff's fall, defendant Ruland-110 Associates L.P. owned 25% of RMR and had invested in RMR for the sole purpose of building the subject Costco, and that MS Ventures, which had no connection to the property, owns Ruland-110 Associates L.P. He states that defendant Better Ruland Road Associates L.P. owned 75% of RMR and, while it had such an ownership interest, had no involvement at the property in issue. He further states that defendant Gregg Rechler was a 25% investor in Better Ruland Inc., which was a general partner in Better Ruland Road Associates, but did not have any involvement in the property. Additionally, Mr. Zimmerman maintains that "[t]here is no such entity as R.M. Resources, Inc." Zimmerman Aff. at ¶7.

In opposition, plaintiff argues that RMR and the cross movants are potentially liable to her despite their status as out-of-possession landlords, based on the provision of the Lease granting RMR the right to inspect the property upon reasonable notice to Costco, if it had actual or constructive notice of a dangerous condition. Plaintiff also argues that there are triable issues of fact as to whether RMR created or constructed an instrumentality, such as the irrigation pipe and electrical pipes or the pavement upon which plaintiff fell, which caused or contributed to the plaintiff's injuries. Alternatively, plaintiff argues that the motion is premature as she has not had an opportunity to obtain the depositions of any of the parties, except for Costco, and that Costco's representative was unable to identify the contractor(s) that installed the pipes at issue and/or removed portion of the walkway where she fell, and he did not have relevant repair records for the area.

DISCUSSION

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

“An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to reenter in order to inspect or repair, and the defective condition is ‘a significant structural or design defect that is contrary to a specific statutory safety provision.’” Ross v. Betty G. Reader Revocable Trust, 86 A.D.3d 419, 420 (1st Dept 2011), quoting Babich v. R.G.T. Rest. Corp., 75 A.D. 3d 439, 440 (1st Dept 2010). Here, RMR and the cross movants have made a prima facie showing entitling them to summary judgment based on the Lease and the testimony of Costco’s general manager demonstrating that Costco, rather than RMR, was in physical possession of the property since 1994, and that RMR had no obligation to make repairs or maintain the premises.

Moreover, plaintiff has not controverted this showing. While under the Lease RMR reserved the right to reenter and inspect, plaintiff points to no evidence suggesting that the allegedly defective condition involved a violation of any specific statutory safety provision. Moreover, Costco’s general manager testified that he had no dealings with anyone from RMR and there is no evidence that RMR affirmatively created the condition or had any notice of it. See Torres v. West Street Realty Co., 21 A.D.3d 718 (1st Dep’t 2005).

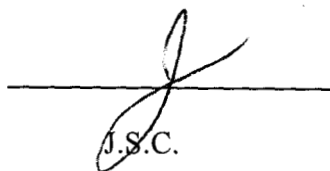
Next, it cannot be said that the summary judgment motion is premature as plaintiff fails to identify any discovery that would lead to evidence giving rise to potential liability of RJM or the cross movants. Garnett v. Fox, Horan & Camerini, LLP, 39 Misc.3d 1211(A) (Sup. Ct. N.Y. County 2013)(“a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.”), quoting Ruture & Sons Constr. Co. v. Petrocelli Constr., 257 A.D.2d 614 (2nd Dep’t 1999). In this connection, while plaintiff seeks discovery regarding any repair of the irrigation pipe and the asphalt adjacent thereto, Costco’s general manager testified that no such records exist. In any event, as Costco has been in possession of the property since 1994 and there is no evidence that RJM or the cross movants had any role at the property at or near the time of the accident, any such records would be insufficient to provide a basis for their liability to plaintiff.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: July 9, 2013


J.S.C.

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK