Dredger v Sutton & Edwards, Inc.
2013 NY Slip Op 32780(U)
February 6, 2013
Sup Ct, Nassau County
Docket Number: 8602/12
Judge: Thomas P. Phelan
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ELENA DREDGER and HENRY DREDGER,

Plaintiff(s),

-against-

SUTTON & EDWARDS, INC., ARMAND REGATEIRO CONTRACTORS, LTD., and PINE DRIVE CONSTRUCTION, LLC., and ARMAND REGATEIRO, individually

Defendant(s).

ORIGINAL RETURN DATE: 12/12/12
SUBMISSION DATE: 01/30/13
Index No. 8602/12

MOTION SEQUENCE ##001, 002

The following papers read on this motion:

Notice of Motion..	1
Notice of Cross Motion and Affirmation in Opposition....................................	2

Defendant, Sutton & Edwards, Inc. ("Sutton & Edwards"), moves for summary judgment dismissing the complaint against it. Plaintiffs oppose the motion and cross move for an order granting a stay of this action pending the decision of a motion to consolidate in a related action.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324 [1986]).

This action was brought by plaintiffs to recover damages alleged to have been sustained when plaintiff Elena Dredger slipped and fell in the parking lot located at 114 Old Country Road, Mineola, New York. It is alleged that defendant, Sutton & Edwards, operated, managed, maintained and controlled the subject premises.

Defendant Sutton & Edwards submits that it is not a proper party as it did not own, occupy, manage, control or use the subject premises. Based upon the Exclusive Leasing Agreement and the affidavit of Herbert Agin, Chief Executive Officer of Sutton & Edwards, it is submitted that defendant Sutton & Edwards was merely the exclusive rental agent for the subject premises and that Sutton & Edwards Management LLC is the property manager. In light of the foregoing, defendant Sutton & Edwards maintains that it did not owe a duty of care to plaintiffs.

Defendant Sutton & Edwards has made a *prima facie* showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it did not owe a duty to plaintiff. Once the initial burden has been met, the burden then shifts to plaintiff to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition plaintiffs submit copies of paid invoices from Armand Regateiro to Sutton & Edwards with regard to the parking lot of the subject premises. Counsel for plaintiffs notes that there is no denotation of "Inc." or "Managament, LLC" after Sutton & Edwards and submits that the Exclusive Leasing Agreement refers to a Management Agreement between Owner and "Sutton & Edwards." Plaintiffs have raised a triable issue of fact as to whether defendant Sutton & Edwards managed the premises.

Moreover, plaintiffs submit that the motion is premature since there has been

virtually no discovery contending that there are a number of items in the exclusive possession of defendant Sutton & Edwards which will determine whether or not it is a proper party. Plaintiffs "established that [they] did not have an adequate opportunity to conduct discovery into these issues, some of which are exclusively in the knowledge of the [defendant, Sutton & Edwards] (citations omitted)" (*Colon v. Manhattan & Bronx Surface Transit Operating Auth.*, 35 AD3d 515, 517 [2d Dept. 2006]).

Based upon all of the foregoing, defendant's Sutton & Edwards motion to dismiss is denied. The cross motion for a stay is also denied.

This decision constitutes the order of the court.

Dated: February 6, 2013

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

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