

Infante v Mehrara

2013 NY Slip Op 33037(U)

November 25, 2013

Supreme Court, Queens County

Docket Number: 17666/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

MINERVA INFANTE,

Plaintiff,

-against-

DAVID MEHRARA and THE CITY OF NEW
YORK,

Defendants.

DAVID MEHRARA,
Third-Party Plaintiff,

-against-

ENVOIS DE VALORES LA NACIONAL CORP.,
Third-Party Defendant.

Index No. 17666/11

Motion
Date September 30, 2013

Motion
Cal. No. 76 and 77

Motion
Sequence No. 5 and 6

	<u>Papers Numbered</u>
Notice of Motion #76-Affidavits-Exhibits...	1-4
Opposition.....	5-9
Notice of Motion #77-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-10
Cross Motion.....	11-16
Opposition.....	17-21
Reply.....	22-24

Upon the foregoing papers it is ordered that this motion by third-party defendant, Envios De Valores La Nacional Corp. ("Envios") for an order pursuant to CPLR 3212 granting it summary judgment and dismissing the third-party summons and complaint commenced against it by third-party defendant, David Mehrara as no triable issues of fact exist for a jury to determine; and motion by plaintiff, Minerva Infante seeking leave to amend the Summons and Complaint to add 97th and Roosevelt

Realty Corporation and Envios De Valores La Nacional Corporation as direct defendants and precluding the defendant David Mehrara and third-party defendant, Envios from offering testimony or evidence at trial for their failure to appear for depositions are hereby joined solely for purposes of disposition of the instant motions and are hereby decided as follows:

The underlying action arises out of an accident occurring on September 11, 2010 when plaintiff, Minerva Infante was allegedly caused to trip and fall on an uneven portion of sidewalk located next to the premises of 96-15 Roosevelt Avenue, Corona, New York. Plaintiff maintains that she sustained serious personal injuries due to the negligence of defendant, David Mehrara, which defendant admittedly owns the premises located at 96-15 Roosevelt Avenue, Corona, New York. Third-party defendant, Envios, is a tenant in the premises.

That branch of plaintiff, Minerva Infante's motion seeking leave to amend the Summons and Complaint to add 97th and Roosevelt Realty Corporation and Envios De Valores La Nacional Corporation as direct defendants is granted.

It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; Wirhouski v. Armoured Car & Courier Serv., 221 AD2d 523 [2d Dept 1995]). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (Branch v. Abraham & Strauss Dept. Store, 220 AD2d 474 [2d Dept 1995]).

The Court has discretion to add 97th and Roosevelt Realty Corporation and Envios as direct defendants to the action. CPLR Section 1003: Nonjoinder and misjoinder of parties states in relevant part, that "[p]arties may be added at any stage of the action by leave of court. . ." While a motion to add a party must be made on notice to everyone who is already a party, notice need not be given to the party sought to be added (David D. Siegel, New York Civil Practice, [4th ed. 2005] § 138, at 236-238; see, CPLR 1003). Plaintiff demonstrated that 97th and Roosevelt Realty Corporation and Envios should be joined as direct defendants in this action, as it is alleged that 97th and Roosevelt Realty Corporation is the landlord and Envios is the tenant who is allegedly responsible under a lease for the maintenance of the sidewalk abutting the premises.

Accordingly, that branch of the motion is granted to the

extent that plaintiff is granted permission to add 97th and Roosevelt Realty Corporation and Envios De Valores La Nacional Corporation as direct defendants by the filing and service upon all parties of a Supplemental Summons and Amended Complaint (see, Connell v. Hayden, 83 AD2d 30 [2d Dept 1981]) together with a copy of this order and notice of entry within thirty (30) days from the date of entry of this order.

That branch of defendant/third-party plaintiff, David Mehrara's cross motion seeking summary judgment dismissing plaintiff's Complaint against him is hereby granted.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (see id).

Defendant established a prima facie case that plaintiff's claims against him should be dismissed because he was an out-of-possession landlord who did not retain control of the premises and was not contractually obligated to perform maintenance and repairs. It is well-established law that an out-of-possession landowner is generally not liable for injuries occurring on its premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (see, Brewster v. Five Towns Health Care Realty Corp., 59 AD3d 483 [2d Dept 2009]; Chapman v. Silber, 97 NY2d 9 [2001]; Putnam v. Stout, 38 NY2d 607 [1976]). The determinative factor in premises liability cases is control (see, Siegel v. Hofstra University, 154 AD2d 449 [2d Dept 1989]). An out-of-possession landlord may be held liable for a third-party's injuries on the premises based on the theory of constructive notice where the landlord reserved the right to enter the premises pursuant to the terms of a lease for the purposes of inspection, maintenance, and repair and where a specific statutory violation exists (Briggs v. County Wide Realty Equities, Ltd., 276 AD2d 456 [2d Dept 2000]; Spencer v. Schwarzman, LLC, 309 AD2d 852 [2d Dept 2003]).

In support of the motion, defendant presents, inter alia: the examination before trial transcript testimony of defendant, Mehrara himself, wherein he testified inter alia, that: at the time of the accident, he co-owned the property located at 96-15 Roosevelt Avenue, Corona, New York with his wife and sons, he entered into a written lease with Envios, the lease was entered by and between 97 and Roosevelt Realty Corp., a corporate entity that he owns with his sons, and Envios, he rarely visited the premises at Roosevelt Avenue, he or his sons would go every so often solely for the purposes of collecting rent, the responsibility to maintain and repair the premises, including the sidewalk upon which plaintiff tripped lies with Envios, the last time he, through 97 and Roosevelt Realty Corp. performed repairs to the sidewalk was in 1990, it was the tenant's responsibility to maintain and repair the premises and it was also the tenant's responsibility to maintain and repair the sidewalks, and he thought the condition of the sidewalk on the 97th Street side of the building was "good" and he did not recall seeing any holes, depressions, cracks or defects in the five years which preceded the accident; and a copy of the 1998 Lease which indicates that the tenant Envios was responsible for the maintenance and repair of the premises, whether structural or nonstructural.

In opposition, plaintiff fails to raise a triable issue of fact. In opposition, plaintiff merely submits a brief attorney's affirmation that fails to raise any issues of fact.

As there are not triable issues of fact, that branch of David Mehrara's cross motion for summary judgment dismissing plaintiff's Complaint as against him is granted and plaintiff's Complaint is dismissed as against defendant David Mehrara.

As plaintiff's Complaint is dismissed as against defendant David Mehrara, that branch of defendant David Mehrara's cross motion seeking summary judgment against third-party defendant Envios de Valores La Nacional Corp. for contractual and common-law indemnification is hereby rendered moot.

Third-party defendant, Envios' motion for an order pursuant to CPLR 3212 granting it summary judgment and dismissing the third-party summons and complaint commenced against it by third-party plaintiff, David Mehrara as no triable issues of fact exist for a jury to determine, which third-party complaint sounds in contractual indemnification, common law indemnification, contribution, and breach of contract for failure to obtain insurance is rendered moot as the plaintiff's action has been dismissed as against defendant, David Mehrara.

That branch of plaintiff, Minerva Infante's motion seeking an order precluding defendant David Mehrara from offering testimony or evidence at trial for his failure to appear for deposition is rendered moot as the plaintiff's action has been dismissed as against defendant, David Mehrara.

That branch of plaintiff, Minerva Infante's motion seeking an order precluding Envios from offering testimony or evidence at trial for their failure to appear for deposition is rendered moot as the record reveals that the said deposition was completed on August 5, 2013.

That branch of plaintiff, Minerva Infante's motion seeking an order precluding Envios for failure to provide any basic discovery such as insurance/witness/statements/photos/accident reports/3101(d) as directed in a Stipulation dated February 12, 2013 is hereby denied as plaintiff has not established a prima facie case for same. Said Stipulation does not direct the production of any of the aforementioned discovery documents by Envios.

This constitutes the decision and order of the Court.

Dated: November 25, 2013

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Howard G. Lane, J.S.C.