

Garcia v 164 Broadway Assoc., LLC

2014 NY Slip Op 30290(U)

January 29, 2014

Sup Ct, New York County

Docket Number: 112027/11

Judge: Louis B. York

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 112027/2011
GARCIA, HONORINA
vs
164 BROADWAY ASSOCIATES
Sequence Number : 001
COMPEL

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

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

MOTION IS DECIDED BY THE COURT
WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
FEB 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/29/14

Lly
LOUIS B. YORK
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
COUNTY OF NEW YORK: PART 2

-----X
HONORINA GARCIA,

Plaintiff,

-against-

Index No.: 112027/11

164 BROADWAY ASSOCIATES, LLC. and SDG
MANAGEMENT CORP.

FILED

Defendants.

FEB 03 2014

-----X

**NEW YORK
COUNTY CLERK'S OFFICE**

YORK, J.:

In this action, in which plaintiff Honorina Garcia alleges personal injuries as a result of a stove which tipped over on her in her apartment, defendants 164 Broadway Associates, LLC (164 Broadway) and SDG Management Corp. (SDG), move, pursuant to CPLR 3124 and CPLR 3126, to compel plaintiff to permit a second inspection of the stove by defendants' expert. Defendants argue that if plaintiff fails to permit the second inspection of the stove, she should be precluded at trial from offering any evidence as to damages and liability.

On July 25, 2011, plaintiff allegedly sustained burns caused by the stove in her apartment located at 3920 Broadway, New York, New York. Plaintiff filed a complaint on October 21, 2011, against defendant 164 Broadway, the owner of the premises, and SDG, the manager of the apartment building. The allegations in plaintiff's complaint include that defendants were negligent as they failed to maintain, inspect, and repair the stove.

Defendants' counsel maintains that through communications with plaintiff's counsel, they learned that plaintiff was utilizing the stove in her apartment when her clothing allegedly got

caught in the oven door, that the oven door was not closing properly, and that the stove was not level. Defendants' counsel argues that, because the stove was in plaintiff's kitchen and continued to be regularly utilized, he sought to conduct an inspection of the stove while the alleged conditions remained the same.

On January 25, 2012, defendants' mechanical engineer expert, Frank Schwalje (Schwalje), conducted an inspection of plaintiff's kitchen and stove. Defendants maintain that Schwalje based his inspection on the allegations which had been asserted by plaintiff, specifically that the oven door was not properly closing, and that the stove was not level. Defendants contend that at the time when the inspection took place, the bill of particulars had not been served, and plaintiff's deposition had not yet taken place.

On January 26, 2012, plaintiff served a verified bill or particulars, alleging that plaintiff was burned as a result of the dangerous and defective condition of the oven, that defendants were negligent in maintaining the stove, that they failed to repair the oven door, and that the floor was not leveled underneath the stove. Plaintiff's deposition took place on August 29, 2012, at which plaintiff testified that a block under the stove fell out, causing the oven to tip and spill hot oil. Defendants maintain that plaintiff's deposition was the first occasion in which plaintiff alleged that defendants were negligent by placing a block under the stove for leveling purposes.

Defendants' counsel contends that once discovery was complete, it became apparent that a second expert inspection was necessary to address the new allegations and facts which had developed since the first inspection. However, defendants argue that they refrained from noticing a further inspection because mediation sessions were scheduled. On September 6, 2013, defendants' counsel notified plaintiff's counsel that a further inspection of the stove was

necessary. On September 12, 2013, plaintiff's counsel advised defendants that he would not consent to such inspection.

Plaintiff contends that the request for a second inspection of the stove must be denied because plaintiff filed the note of issue on December 6, 2012, over a year ago, and that defendants were aware, as early as August 29, 2012, that plaintiff was alleging that a block fell out from underneath the stove and caused her accident. Plaintiff maintains that photographs were taken at the first inspection in which wood blocks placed under the stove are noticeable. Plaintiff argues that the request to conduct a post-note of issue inspection also violates the October 24, 2012 order of this court, which states that “[a]ny party having disclosure problems must contact the Part to arrange a status conference with the judge . . . [f]ailure to do so before the last day for discovery will result in the waiver of all further discovery.” (Damashek affirm., exhibit G).

Unless a party demonstrates unusual or unanticipated circumstances, disclosure proceedings may not take place after the note of issue has been filed. *See* Uniform Rules for Trial Cts [22 NYCRR] § 202.21 (d); *Orr v Yun*, 74 AD3d 473, 473 (1st Dept 2010) (holding that “[t]he circumstances presented do not warrant allowing plaintiff to conduct additional discovery over three months after the filing of the note of issue.”); *Sklarz v Crabtree*, 35 AD3d 260, 260 (1st Dept 2006) (holding that post-note of issue discovery was properly denied because “of the absence of unusual or unanticipated circumstances warranting such relief.”).

Here, defendants fail to demonstrate that “unusual” or “unanticipated circumstances” prevented them from requesting a further inspection of the stove until September 6, 2013, over a year after the August 29, 2012 deposition of plaintiff in which plaintiff testified that a block fell out from under the stove. Although defendants maintain that plaintiff's allegations changed from

an accident involving an oven door to involving a block under a stove, defendants were aware of this change since plaintiff's deposition. Furthermore, the second inspection of the stove was requested almost nine months after the note of issue was filed on December 6, 2012, and after the mediation process had commenced.

Therefore, because defendants fail to meet their burden and demonstrate that "unusual" or "unanticipated circumstances" exist for such late post-note of issue discovery, defendants' motion must be denied.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendants 164 Broadway Associates, LLC, and SDG Management Corp's motion to compel a further inspection of plaintiff Honorina Garcia's stove is denied.

Dated: 1/29/14

ENTER:

Ley
J.S.C.

FILED
FEB 03 2014
NEW YORK
COUNTY CLERKS OFFICE