

Levin v Mercedes-Benz Manhattan, Inc.

2014 NY Slip Op 31252(U)

May 13, 2014

Supreme Court, New York County

Docket Number: 108182/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

KENNETH LEVIN and AVIVA LEVIN,

Plaintiff,

-against-

MERCEDES-BENZ MANHATTAN, INC.,
Defendant.

INDEX NO. 108182/11

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2,3

Replying Affidavits 4

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

MAY 15 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/13/14

Donna M. Mills

**J.S.C.
DONNA M. MILLS, J.S.C.**

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58**

KENNETH LEVIN and AVIVA LEVIN,

Plaintiffs,

- against -

MERCEDES-BENZ MANHATTAN, INC.,

Defendant.

MERCEDES-BENZ MANHATTAN, INC.,

Third-Party Plaintiff,

- against -

**RYTEC CORP. and WEST CONN OVERHEAD
DOOR CO.,**

Third-Party Defendants.

MERCEDES-BENZ MANHATTAN, INC.,

Second Third-Party Plaintiff,

- against -

DOORS, INC.,

Second Third-Party Defendant.

**INDEX NO.
108182/11**

DECISION/ORDER

FILED

MAY 15 2014

**COUNTY CLERK'S OFFICE
NEW YORK**

DONNA M. MILLS, J.:

This proceeding involves an alleged incident that occurred on August 30, 2010, wherein the Plaintiff, Kenneth Levin, alleges he was struck by a service area garage door while talking to a service technician to drop off his vehicle for service at the premises owned, leased and/or operated by the Defendant/Third-Party Plaintiff, Mercedes-Benz Manhattan, Inc., ("Mercedes").

The Plaintiffs, Kenneth Levin and Aviva Levin, allege in their complaint that the

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Defendant/Third-Party Plaintiff, Mercedes, was careless and negligent in their failure to use, keep and maintain a garage door thereat in a safe and proper manner and condition. Mercedes, alleged in its Third-Party Complaint that Third-Party Defendant, Ryttec, Corp., ("Ryttec") maintained and repaired the overhead garage door. Mercedes further alleges that it contracted with Ryttec to sell the subject overhead door.

Ryttec now moves for an Order pursuant to CPLR § 3212, dismissing the Third-Party Complaint and all cross-claims against it on the grounds that Ryttec is not liable for the alleged injuries and/or damages complained of by the Plaintiff, nor liable to the Mercedes and/or Third-Party Defendants, West Conn Overhead Door Co., or Doors, Inc.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (*Vamattam v Thomas*, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, 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 (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (*Rotuba Extruders*

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v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In support of its motion for summary judgment, Ryttec relies on the affidavit of Diane Ambroziak, Manager of Administration of Ryttec Corp. Based on Ryttec's records, she asserts that the door in question which struck the plaintiff, was ordered by Herbert Construction for installation at the Mercedes Benz facility, and that it was shipped on May 16, 1991 to Herbert Construction Co. She further states that Ryttec did not contract with Mercedes for the sale of the overhead door, they did not install the door, and did not agree to maintain or repair the doors at the premises.

In opposition to the summary judgment motion, Mercedes argues that the affidavit of Diane Ambrosiak is contradicted by the affidavit of its Facilities Manager, Claude Robb, wherein he alleges that Ryttec, among others, has had access to the overhead doors at the Mercedes facility where the plaintiff alleges the occurrence to have occurred, for the purpose of their maintenance and repair. This Court finds that Mr. Robb's contention is conclusory. It is clear that the opponent of a properly made summary judgment motion cannot simply rely on conclusory assertions, but must present evidentiary facts sufficient to raise a triable issue of fact (*Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 264, 401 N.Y.S.2d 176, 372 N.E.2d 12).

Mercedes also contends that summary judgment is premature in light of the fact that discovery is in its preliminary stages. "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 AD3d 769, 770 [2010]; see

CPLR 3212[f]. “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*Baron v Incorporated Vil. Of Freeport*, 143 AD2d 792, 793 [1988]). The defendant’s “ ‘mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered’ by further discovery is an insufficient basis for denying the motion” (*Woodard v Thomas*, 77 AD3d 738, 740 [2010]).

In this action, Mercedes “failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the Haider defendant (*Boorstein v 1261 48th St. Condominium*, 96 AD3d 703, 704 [2012]; see CPLR 3212 [f]).

Accordingly, it is

ORDERED that third-party defendant, Rytec’s motion for summary judgment is granted and the third-party claims and cross-claims against Rytec are dismissed as against said party, with costs and disbursements to said party as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of said party; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are

directed to mark the court's records to reflect the change in the caption herein.

Dated: 5/13/14

ENTER:

DM

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
MAY 15 2014
COUNTY CLERK'S OFFICE
NEW YORK