Keita v City of New York
2014 NY Slip Op 32678(U)
September 24, 2014
Supreme Court, Bronx County
Docket Number: 305454/09
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 305454/09
Motion Calendar No. 18,19
Motion Date: 7/28/14

ALIMA KEITA

Plaintiff(s),

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and PARKING SYSTEMS PLUS, INC.,

Defendant(s).

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court,

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and PARKING SYSTEMS PLUS, INC.,

Third-Party Plaintiffs

-against-

INTERNAL INTELLIGENCE SERVICES and BEAU DIETL & ASSOCIATES

Third-Party Defendants

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Third-Party Defendant Beau Security & Investigations, Inc. d/b/a/ Beau Dietl & Associates s/h/a Internal Intelligence Services and Beau Dietl & Associates (hereinafter collectively referred to as "Dietl") move pursuant to C.P.L.R.§ 3211 (a)(7) dismissing the plaintiff's complaint and the

third-party plaintiff complaint for the failure to state a cause of action; pursuant to C.P.L.R. 3212 for an Order granting summary judgment and dismissing the plaintiff's complaint and the third-party complaint; for an Order dismissing the third-party complaint on the grounds that it is barred by the Workers Compensation Law 11 & 29(6).

Defendants/Third-Party Plaintiffs The City of New York, New York City Department of Transportation and Parking Systems Plus, Inc. (hereinafter referred to as "The City") move this Court pursuant to C.P.L.R. 3212 granting summary judgment in favor of defendants The City and dismissing the plaintiffs complaint.

Plaintiff submitted written opposition to both motions. For purpose of disposition, both motions are consolidated and decided as follows:

Plaintiff commenced this action seeking damages for injuries allegedly sustained on January 5, 2009, as the result of a slip and fall on the premises located at 3510 Jerome Avenue, Bronx, NY., a municipal parking garage owned and operated by defendants The City. Plaintiff was an employee of Bueu Dietl & Associates working as a security guard patrolling the subject premises.

It has long been held that summary judgment is a drastic remedy, the procedural of a trial which should only be granted when the evidence presented leaves no material issue of fact unresolved. see Andre v. Pomeroy, 35 N.Y.2d 361 (1974). Consequently, it has also been long settled that the court's function on such a motion is issue finding rather than issue determination Sillman v Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Zuckerman v City of New York, 49 N.Y.2d 557 (1980).

Plaintiff testified that she was employed by Internal Intelligence as a security officer working at the Jerome Avenue Municipal Parking lot for approximately a year and a half. She patrolled the entire garage, including the roof. On the date of the accident, she was taking the stairwell after exiting the roof, which she described as an open stairwell and not very well lit. Plaintiff testified that it was snowing and that the weather was very cold and freezing. It had snowed the day before.

As she came down the stairwell, she slipped and fell backwards on the stairs. After her fall, she noticed her uniform was yet. She then observed snow melting from the roof and dripping down on to the stairs. Plaintiff testified that the staircase in which she fell was mainly used by the Department of Transportation employees. Prior to her fall she had conversations with the employees about the dripping conditions from the roof, however she had not complained to any Internal Intelligence or Deitl personnel about the conditions. She did not observe any porters or maintenance men shoveling snow that day but observed them shoveling on the day prior to the accident.

Michael Pettruzzelli testified that he is the Vice President of Operations for Parking Systems Plus and has done so for the past 14 years. He was aware of a contract between the City and Parking Systems. Parking systems employed managers and porters for the subject premises. There were three porters assigned to the facility. These porters were managed by the maintenance department of Parking Systems and were responsible for snow removal, cleaning and maintaining the stairs. He further testified that generally in removing snow and ice from the stairs, the porters used among other things, shovels and ice melt. Mr. Petruzzelli testified that the stairwells had diamond or metal plating on each step with metal handrails. He further testified that Parking Systems had received complaints regarding snow and ice on the stairs from patrons and the Department of Transportation [Inspectors]. He does not recall receiving such complaints on the date of the plaintiffs accident but as a result of the snow fall at Christmas prior. The DOT Inspectors inspect upon complaint and return after a complaint has been lodged to ensure that the complained of condition is rectified. Parking systems also contracted with Internal Intelligence Services for security guard services.

John Cutter testified that in January 2009 he was the President of Dietl which provides uniform patrol security to parking lots in the New York City area. Internal Intelligence assets were purchased out of bankruptcy by Dietl in November 2007. The Internal Intelligence employees then transferred to Beau Dietl, including the field supervisors/captains and security. Dietl serviced the municipal garage at 3510 Jerome Avenue taking over for Internal Intelligence. Dietl security guards were not required to report on weather conditions at their assigned location. However, Mr. Cutter had no specific information on the subject location or the employees therein.

Sheldon Baptiste testified that in 2009 he was a field supervisor for Internal Intelligence and later defendant Dietl. The security guards were required to patrol the garages every thirty minutes.

After the plaintiff's accident, Mr. Baptiste went to the staircase in which she alleges she fell and observed snow and ice but no ice on the stairs. In his report, he indicated that he went up the staircase at 04:00 on 1/6/09 and did not observe any ice and noted such in his report. Mr. Baptiste also testified that he observed a lot snow on the roof. Mr. Baptiste indicated that if he encountered snow or ice at a specific facility he would inform a Parking Systems Plus employee during the 6am and 10pm work day or make a note for the porter outside of working hours.

Isabelo Figueora testified that he is the traffic control inspector for the Department of Transportation since 2007. His job duties included the municipal parking lots. He inspects the subject garage approximately once a week. In the December 24, 2008 report, Mr. Figueroa noted an ice condition on the roof level and that calcium chloride was required on December 23, 2008 and still on December 24, 2008. On January 5, 2009 the calcium chloride condition no loner existed. The DOT Inspection report indicates that no inspections or violations were made between December 23, 200 and January 20, 2009.

The affidavit of Beau Deitl indicates that he is the Chairman of Beau Security & Investigations d/b/a Beau Dietl & Associates which pursed the rights to provide security services under existing contracts held by Internal Intelligence. Some employees of Internal Intelligence went over to Beau Dietl while others did not. However, it did not execute any contract with Parking Systems Plus or the City of New York for uniformed security services at the municipal garage nor assumed an contractual obligation to indemnify Parking Systems.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House

Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

This Court dismisses the plaintiff's complaint and the third-party complaint as it applies to third-party defendants Beau Security & Investigations d/b/a Beau Dietl & Associates s/h/a Internal Intelligence, Inc. and Beau Dietl & Associates. It should be noted that defendant Deitl acquired the assets of Internal Intelligence pursuant to the November 13, 2007 Bankruptcy Court Order of Judge Donald Steckroth authorizing the purchase. Paragraph 9 of the November 13, 2007 decision indicates that "the Successful Offeror [Dietl] is not assuming nor shall it in any way whatsoever be liable or responsible, as successor or otherwise, for any liabilities, debts or obligations of the Debtor or any liabilities, debts or obligations in any way whatsoever relating to the Debtor's [Parking Systems Plus] operations other than those specific executory leases and ***contracts for real and personal property and employment or otherwise, that they are expressly provided for in the Amended Agreement***." (Emphasis added). No such Agreement has been provided for this Court's review. Furthermore, Internal Intelligence contracted with Parking Systems which was effective from February 3, 2006 to February 2, 2011. Although, Deitl argues that it did not in writing contract to provide services with Parking Plus or the City of New York, it provided said services to Parking Systems and the City of New York since 2007 and did such on the date of the plaintiff's accident. This is evinced by the testimony of John Cutter. While there might not have been a written contract, specifically executed between defendants The City and Dietl, the actions of the Beau Deitl from November 2007 moving forward would raise an issue of fact as to an implied-in-fact agreement that the Contract continue with Dietl assuming the liabilities and status of Internal Intelligence as party thereto. Coogi Partners LLC v. Soho Fashion, Ltd., 107 A.D3d 426 (1st Dept. 2013). However, a review of the contract under which the City seeks to hold defendant Dietl liable for contribution or indemnification, did not place any owness on Internal Intelligence to maintain the subject premises. In fact, that portion of the contract which requires such maintenance is specifically crossed out and

thus could not be imputed to defendant Dietl in any event. Furthermore, to the extent that Internal Intelligence was defunct due to bankruptcy and in as much as defendant Dietl admits that plaintiff was in fact an employee at the time of her accident, the third-party complaint is dismissed as to Internal Intelligence. See generally, Watson v Newell Industries Inc., 67 A.D.3rd 780 (3rd Dept. 2009). As indicated in the plaintiff's opposition, plaintiff has not alleged any cause of action against third-party defendants. Third-party plaintiff has failed to submit competent proof other than the speculative arguments raised in the attorney's affidavit in opposition to causally relate, inter alia the negligent training, hiring or supervision causes of action as it relates to plaintiff's slip and fall on ice on the subject premises. Nor has the City raised any triable issue of fact sufficient to rebut Dietl's prima facie entitlement to summary judgment. Based upon the foregoing, this Court need not reach the issue of Worker's Compensation applicability as this issue is now moot. As such defendant Dietl's motion is granted in its entirety.

Defendants the City have failed to meet the burden for summary judgment by establishing that it did not cause or create the hazardous condition nor did it have actual or constructive notice of the hazardous condition. Rodriguez v. New York City Housing Authority, 102 A.D.3d 407 (1st Dept. 2013). Based upon the submissions provided by the defendants The City, based upon the inspection reports of the Department of the Transportation, in addition to the testimony provided herein, there is a question of fact as to whether the defendant The City had constructive notice of the hazardous condition, to wit, the snow on the roof and stairs. However, the plaintiff's cause of action based upon statutory violations of New York City Code §§ 7-210, 7-211, 7-212 and 16-123 as well as the New York City Department of Transportation Rules and Regulations § 19-152 are dismissed without opposition and as inapplicable to the case herein.

Accordingly, it is

ORDERED that defendants The City of New York, New York City Department of Transportation and Parking Systems Plus, Inc. motion for summary judgment is granted to the extent that the cause of action alleging statutory violations New York City Code §§ 7-210, 7-211, 7-212 and 16-123 as well as the New York City Department of Transportation Rules and Regulations § 19-152 are hereby dismissed. All other portions of the City motion are denied. It is further

ORDERED that third-party defendants Beau Security & Investigations d/b/a Beau Dietl &

Associates s/h/a Internal Intelligence, Inc. and Beau Dietl & Associates motion is granted in its entirety and the third-party complaint and all claims dismissed as to Beau Security & Investigations d/b/a Beau Dietl & Associates s/h/a Internal Intelligence, Inc. and Beau Dietl & Associates only.

ORDERED that the Clerk of the Court shall mark the Court file accordingly. It is further

ORDERED that the defendants are directed to serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision of the Court.

SEP 2 4 2014

DATE

HON. WILMA GUZMAN, JSC.