Sosa v Automotive Realty Corp.
2014 NY Slip Op 34048(U)
November 14, 2014
Supreme Court, Bronx County
Docket Number: 23146/2013E
Judge: Lizbeth González
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)
--X
Bienvenida Sosa,

Plaintiff,

DECISION and ORDER
Index No 23146/2013E

-against-

Automotive Realty Corp., "John Doe Corporation", and Pioneer Food Stores, Inc.,

Defendants.
--X

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits..1
Notice of Cross-Motion and annexed Exhibits and Affidavits..2
Affirmation and Affidavit in Opposition and annexed Exhibits..3
Reply Affirmation...4

Plaintiff Sosa claims that she sustained serious injuries as a result of the defendants' negligence. On 9/5/10, Ms. Sosa was allegedly walking through the parking lot of a Pioneer Supermarket heading toward its entrance when a defective condition caused her to slip and fall. The supermarket, owned by the defendants, is located at 2870 Webster Avenue in Bronx County.

Defendant Automotive Realty Corp. ("Automotive Realty") moves to dismiss the plaintiff's claim pursuant to CPLR 3211(a)(1) on the ground that it did not own the subject premises at the time of the plaintiff's accident.

Plaintiff Sosa cross-moves to:

1. Consolidate Action No. 1 and Action No. 2 pursuant to CPLR 602;
2. Preclude defendant Automotive Realty from deposing plaintiff Sosa;
3. Award the plaintiff costs for having to commence a second lawsuit;
4. Direct the appearance of David Rose, an officer of defendant Automotive Realty; and
5. Direct the exchange of discovery.

Defendant Automotive Realty opposes the plaintiff's cross-motion.

Procedural History

The plaintiff commenced an action under Index No 21249/11 against defendants Bedford Boulevard Food Corp., The New York Botanical Garden ("Botanical Garden"), Automotive Realty

[* 2]

Corp. and AFS Holding Corp. after allegedly slipping and falling on their property. Defendant Automotive Realty moved to dismiss the claim against it on the ground that it transferred title and interest to the property prior to the plaintiff's incident. By Order dated 9/24/12, Judge Alexander Hunter granted the defendant's motion without prejudice and stated the following in pertinent part:

> Plaintiff submits papers in partial opposition wherein she acknowledges that the deed indicates the transfer of ownership from Automotive to the New York Botanical Garden. However, plaintiff requests that if this court is inclined to dismiss the complaint as against Automotive at this time, that it be without prejudice as Automotive entered into leases which will be the subject of discovery and it is unclear exactly what discovery may uncover.
>
> Accordingly...the motion by Automotive to dismiss plaintiff's amended complaint against it is granted without prejudice.

Plaintiff Sosa subsequently commenced this action ("Action No. 2") under Index No. 23146/13E, naming Automotive Realty Corp. and adding "John Doe Corporation" and Pioneer Food Stores, Inc. as co-defendants.

Similar to its defense in the first action, defendant Automotive Realty moves to dismiss the plaintiff's complaint on the same ground that it did not own the subject premises when the plaintiff allegedly slipped and fell.

DISCUSSION

A party may move for judgment dismissing one or more causes of action asserted against it on the ground that its defense is founded upon documentary evidence. (CPLR 3211[a][1].) Such a motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145 [1st Dept 2013] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 326 [2002].)

It is undisputed that defendant Automotive Realty did not own the subject premises at the time of the plaintiff's accident.

In her cross-motion, plaintiff Sosa seeks to consolidate Action No. 1 and Action No. 2. Ms. Sosa maintains that while Automotive may have transferred the subject premises to The New York Botanical Garden, it conveniently omits the fact that it serves as the Botanical Garden's managing agent. To that end, Denis O'Connor, Botanical Garden's in-house counsel, testified during his 8/22/13 deposition that Automotive Realty's responsibilities as the agent includes but are not limited

to, managing the property, accepting and depositing rents from the tenants of the subject premises and paying the property's real estate taxes. Significantly, Mr. O'Connor testified that because Automotive is the "main recipient, the initial recipient of complaints," David Rose, an Automotive officer who served as a conduit "between New York Botanical Garden and Bedford Boulevard, should know who repaired the defective condition that caused the plaintiff's fall.

In opposition to the plaintiff's cross-motion, defendant Automotive Realty proffers two agreements and David Rose's affidavit.

Defendant Automotive Realty does not dispute that it serves as Botanical Garden's property manager but contends that it is indemnified as the agent. It proffers a lease agreement and a "First Amendment to the Lease" describing Automotive Realty Corporation as owner and AFS Holding Corp. as tenant but these documents are not dispositive. Automotive Realty proffers a Property Management Agreement and references paragraph 11 of the Agreement wherein the Botanical Garden (Owner) agrees to release, indemnify and defend Automotive (Agent) from and against all claims, disputes, losses, liabilities and suits relating to property, property damage and personal injuries. Paragraph 15 states that Automotive Realty agrees to those same terms relative to the Botanical Garden in connection with any gross negligence or willful malfeasance of Agent or its employees. Paragraph 2.28 describes the responsibilities assumed by Automotive Realty as agent:

> ***To recommend to Owner*, *where Agent deems it appropriate***, programs for the rehabilitation, remodeling, ***repairs*** and marketing ***of the Property***. (Emphasis added.)

By affidavit dated 10/12/13, David Rose states that he is an officer of defendant Automotive Realty. He asserts that Automotive Realty is an offsite property manager; it neither owns, operates, maintains nor controls the premises; and it is not engaged in any type of repair work. Although Mr. Rose avers that Automotive Realty had no knowledge of the defective condition, he does not address Mr. O'Connor's testimony that Automotive received complaints and is accordingly aware of who requested the repair of the defective condition that caused the plaintiff's fall.

Defendant Automotive Realty contends that Action No. 1 and Action No. 2 should not be consolidated since discovery is complete in Action No. 1 and ready for trial whereas discovery has not commenced in Action No. 2.

CONCLUSION

The defendant moves to dismiss the plaintiff's claim pursuant to CPLR 3211(a)(1) and proffers documentary evidence to establish that it did not own the subject premises at the time of the

plaintiff's accident.

It is well settled that such a dismissal is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. (*Leon v Martinez*, 84 NY2d 83 [1994]; *Foster v Kovner*, 44 AD3d 23 [1st Dept 2007].) Here, while Automotive Realty established that it did not own the subject property at the time of plaintiff's accident, the Property Management Agreement between The New York Botanical Garden and Automotive describing it as the subject property's manager fails to conclusively establish a defense that absolves Automotive from liability.

Based on the foregoing, defendant Automotive Realty's motion is denied. After reviewing the case's procedural history, the plaintiff's cross-motion is granted to the extent that the two actions shall be consolidated since there are common issues of law and fact. Upon payment of requisite fees, if any, the Clerk is directed to consolidate Action No. 1 (21249/2011) and Action No. 2 (23146/2013E) for all purposes under the following caption[1]:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)
---X
Bienvenida Sosa,

Plaintiff,

Index No 21249/2011E

-against-

Bedford Boulevard Food Corp. and The New York Botanical Garden, Automotive Realty Corp., and AFS Holding Corp.,

Defendants.
---X
Bienvenida Sosa,

Plaintiff,

-against-

Index No 23146/2013E

Automotive Realty Corp., "John Doe Corporation", and Pioneer Food Stores, Inc.,

Defendants.
---X

Notwithstanding Automotive's questionable silence in the initial action with respect to its role as managing agent, the plaintiff's cross-motion to preclude the defendant from deposing her is

[1] Movant did not submit a proposed caption.

[* 5]

denied since the first action against Automotive was dismissed on 9/24/12 prior to her 8/8/13 deposition. Plaintiff Sosa and David Rose shall be deposed within 60 days at a mutually agreed upon date, time and location. All remaining discovery shall be exchanged within the same 60 day period subject to preclusion. Costs in the amount of $500.00 are awarded to the plaintiff.

The plaintiff shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: November 14, 2014

So ordered,

Hon. Lizbeth González, JSC