

**Santos v Nations 47 Parking, LLC**

2016 NY Slip Op 30317(U)

February 23, 2016

Supreme Court, New York County

Docket Number: 152222/14

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

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JOANNE V. SANTOS,

Plaintiff,

-against-

NATIONS 47 PARKING, LLC, et al.,

Defendants.  
----- X

SHERRY KLEIN HEITLER, J.:

Index No. 152222/14  
Motion Seq. 003

**DECISION & ORDER**

In this personal injury action, defendant Icon Parking Systems, LLC (“Icon”) moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims against it on the ground that it bears no responsibility for plaintiff’s injuries. Plaintiff Joanne V. Santos (“Plaintiff”) opposes on the ground that discovery is not complete and cross-moves for an order extending the time to file the note of issue and certificate of readiness in this case. For the reasons set forth below, Icon’s motion is denied and Plaintiff’s cross-motion is granted.

Defendant Nations 47 Parking, LLC (“Nations 47”) operates an Icon branded parking garage with an entrance located at 245 East 47<sup>th</sup> Street in Manhattan (“Premises”) pursuant to a June 30, 2008 lease agreement with the defendant landlord, Plaza Tower, LLC (“Plaza Tower”). The accident that is the subject of this action occurred on December 23, 2013. As alleged in Plaintiff’s amended verified complaint<sup>1</sup> and verified bill of particulars<sup>2</sup>, Ms. Santos slipped and fell on stairs inside the Premises and sustained serious physical injuries due to the defendants’

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<sup>1</sup> See NYSCEF Doc. 93.

<sup>2</sup> Affirmation of Mary Frances Marino, Esq. dated December 4, 2015 (“Marino Affirmation”), Exhibit J.

negligence.

Plaintiff was deposed on July 23, 2015 in accordance with a stipulation among the parties which was "So-Ordered" by the court on July 14, 2015. At a September 21, 2015 compliance conference, the court directed that the deposition of a Nations 47 representative take place on September 22, 2015 and that Icon and Plaza Tower representatives be deposed on October 13, 2015.<sup>3</sup> The Nations 47 and Plaza Tower depositions went forward as scheduled. Icon's deposition did not.

On October 12, 2015, the day before the scheduled deposition, Icon emailed Plaintiff an affidavit by David Mercado, Icon's Chief Financial Officer, in which he avers that as of December 23, 2013 "ICON PARKING SYSTEMS, LLC, was used solely as a brand name," and that Icon had no "responsibilities with regard to the operation, maintenance or repair of the subject parking garage . . . ."<sup>4</sup> The affidavit was accompanied by a request that Plaintiff waive Icon's deposition. Plaintiff declined to do so and counsel exchanged emails in which they agreed to reschedule the deposition for December 8, 2015 at 2:00PM at Icon's counsel's office.<sup>5</sup>

Notwithstanding their agreement, on December 5, 2015 Icon moved for summary judgment and a stay of discovery pending disposition of the motion. Annexed to Icon's motion is a "Supplemental Affidavit" by Mr. Mercado,<sup>6</sup> which, according to Icon, "establishes that ICON is only a brand name and had nothing to do with the ownership, operation, maintenance,

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<sup>3</sup> Maragno Affirmation, Exhibit L.  
<sup>4</sup> See affidavit of David Mercado, sworn to October 12, 2015, ¶¶ 7, 9, a copy of which is annexed as Exhibit J to the Marino Affirmation.  
<sup>5</sup> Maragno Affirmation, Exhibit M.  
<sup>6</sup> Supplemental Affidavit of David Mercado, sworn to December 4, 2015, ¶¶ 14-15, 17, a copy of which is annexed as Exhibit S to the Marino Affirmation.

control and/or supervision of NATIONS 47's parking garage at 245 East 47<sup>th</sup> Street, New York, New York, on or before the plaintiff's subject December 23, 2013 accident . . . ."<sup>7</sup>

At a discovery conference on December 7, 2015, the court suggested that the parties should go forward with Mr. Mercado's deposition and gave Icon the opportunity to withdraw its motion without prejudice to renew upon the completion of discovery. Mr. Mercado was deposed as Icon's representative on December 8, 2015 and December 15, 2015.<sup>8</sup> By letter dated December 17, 2015, Icon advised that it wanted to go forward with its motion, and both the motion and cross-motion were submitted following oral argument on January 25, 2016.

### DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013)). The moving papers "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.

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<sup>7</sup> Marino Affirmation, ¶ 22.

<sup>8</sup> Copies of Mr. Mercado's deposition transcripts are submitted as Exhibits P and Q to the Maragno Affirmation ("Deposition").

\* 4]

The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.” CPLR 3212(b). The “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez*, 68 NY2d at 324; *Winegrad v NYU Med. Center*, 64 NY2d 851, 853 (1985).

Icon’s motion rests solely on conclusory statements alleged by Mr. Mercado without providing any documentary evidence to support such statements. As a matter of law, therefore, Icon has not satisfied its *prima facie* burden. See *JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 384 (2005) (“A conclusory affidavit . . . does not establish the proponent’s prima facie burden”); *DiSalvo v A.O. Smith Water Products*, 123 AD3d 498 (1st Dept 2014) (“the affidavit was conclusory and without specific factual basis, and thus did not establish the prima facie burden of a proponent of a motion for summary judgment); see also *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *Clarke v 6485 & 6495 Broadway Apt. Inc.*, 122 AD3d 494, 495 (1st Dept 2014); *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 434 (2d Dept 2009); *Nelson v Bestway Coach Express*, 36 AD3d 488, 489 (1st Dept 2007). Accordingly Icon’s motion must be denied without the need to consider Plaintiff’s opposition papers. *Alvarez*, 68 NY2d at 324.

In any event, and for purposes of this motion only, Mr. Mercado’s deposition raises material questions about the inner-workings of Icon and its related companies. As some examples, while Mr. Mercado claims that Icon is merely a repository for trademarks and copyrights, he could not testify as to Icon’s intended purpose or where or when it was incorporated (Deposition pp. 37, 57):

Q . . . Are there other companies named Icon?

A Quite a few.

Q We'll go with Icon Parking Systems, LLC. Does this company have any employees?

A It does not.

Q What was the purpose of its incorporation?

A I don't know.

Q Where was it incorporated?

A I don't know. I'd have to look it up.

Q Do you know when it was incorporated?

A I don't.

\* \* \* \*

Q . . . Icon Parking Systems, LLC, is that company the owner of the Icon brand; is that correct to say?

A It holds the trademarks and copyrights for Icon.

Q So that's one of the purposes of the company; is that correct?

A I believe so.

Q Is there any other purpose for the company?

A I'm not aware of any other purpose.

Mr. Mercado also credibly testified that he could not trace the links connecting Icon's over 200 related companies without consulting a chart. However, no such chart was produced at his examination, and it is unclear whether one has since been disclosed to the other parties to this action (Deposition p. 103):

Q If you are able to, I don't [sic] if you are without consulting some type of chart, are you able to trace the, I guess, the links between Nations 47 Parking LLC and its holding company?

A. Not without consulting a chart.

MS. ROBBINS: At some point in time perhaps I'll request if there is such a chart or some clarification as to the relationship between the entities from counsel and then she can respond as appropriate at that time.

\* 6]

What is clear is that there are other individuals besides Mr. Mercado who have a better familiarity with the Icon organization and the issues relevant to this case (Deposition pp. 77, 90-94, 95-96, 104-05, 113-14):

Q Did Icon Parking Systems, LLC carry any liability insurance in December of 2013?

A Any liability insurance?

Q Any liability. Did they have any type of liability insurance?

A Yes.

Q And did they have any liability insurance which named an Icon parking facility as an additional insured?

A I don't know.

\* \* \* \*

Q Do you have any knowledge as to the presence of any agreements between Nations 47 and Plaza Tower LLC that required Nations 47 to procure liability insurance for the operation of that garage?

A I don't.

Q Who would have that information, if anyone?

A It would be somebody in our lease procurement or new business area.

Q And is that in the lease procurement area for Nations 47 or some other entity?

A It would be some other -- it's an interesting question 'cause I'm thinking about who actually did the lease.

Q Take your time and think about it if you need to.

A 'Cause I believe Mr. Lobe executed that lease. . . . I believe Mr. Lobe, but let me check the signature page.

Q Sure.

A So Mr. Lobe as CEO for Nations 47. . . .

Q So he would be the person that would have knowledge, if any, regarding the presence of any agreements requiring the procurement of insurance?

A That is correct. . . .

Q Would any other information be contained in the general ledger with respect to the particular insurance procurements; for example, the entity for which insurance was procured, the insurance carrier with whom the insurance was procured or anything of that nature?

- A No, the premium charged entity and any lost claims paid.
- Q And who, if anybody, would have knowledge of that information that I just indicated, whether it be the name of the insurance carrier from which the insurance was procured or the name of the entity for whom insurance was procured, Mr. Lobe?
- A Mr. Lobe.
- Q Is Mr. Lobe still the CEO of Nations 47?
- A He is not. . . .
- Q Can you tell me when Mr. Lobe ceased being the Chief --
- A Executive Officer.
- Q Yes, thank you.
- A September 30, 2014.
- Q And did somebody else replace him in that position?
- A Yes.
- Q Who is that?
- A Mr. Jerry Skilett.

\* \* \* \*

- Q Do you have any knowledge as to the presence of any agreements between Icon Parking Systems, LLC and Plaza Tower LLC in effect back in December of 2013 that required Icon Parking Systems, LLC to procure liability insurance for the operation of the garage?
- A I have no such knowledge. . . .
- Q Who, if anybody, would have that knowledge?
- A I don't know.
- Q Is there a CEO of Icon Parking Systems, LLC presently?
- A Presently, I don't know.
- Q What about back in December of 2013.
- A I believe it was Mr. Lobe.
- Q If anyone were to have such knowledge as to presence of agreements between Icon Parking Systems, LLC and Plaza Tower LLC, would that be Mr. Lobe, as far as you know?
- A It would be a good place to go.

\* \* \* \*

Q Do you have any knowledge as to the presence of any agreements between Macquarie New York Parking 2 LLC<sup>9</sup> and Plaza Tower that required Macquarie New York Parking 2 LLC to procure liability insurance for the operation of the garage?

A I have no such knowledge.

Q Who would know, if anybody?

A Mr. Lobe might now [sic].

\* \* \* \*

Q Do you know if there was any written agreement that required Macquarie New York Parking 2 LLC to procure insurance naming Plaza Tower LLC as an insured?

A I'm not aware of such an agreement.

Q Who, if anybody, would know?

A Mr. Lobe.

Q He was the CEO of Macquarie New York Parking 2 LLC, correct?

A That's correct, MNYP2.

Clearly Mr. Loeb<sup>10</sup> and Mr. Skilett are more appropriate deposition witnesses.<sup>11</sup> It is worth inquiring into their knowledge of the agreements that existed between the entity parties as of the date of the accident and whether Icon or any of its parent or subsidiary companies have liability insurance policies which name Nations 47 or Plaza Tower as additional insureds.<sup>12</sup> In fact, Plaintiff has served a discovery demand for Mr. Loeb's last known address so that he can be subpoenaed.<sup>13</sup>

In sum, Mr. Mercado's testimony does not resolve all material issues of fact in Icon's

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<sup>9</sup> According to Mr. Mercado, at the time of the accident Macquarie New York Parking 2 LLC sat atop the roughly 200 entity corporate structure which included Icon as a subsidiary (Deposition pp. 103-04, 116).

<sup>10</sup> Mr. Loeb is referred to as Mr. Lobe throughout the deposition transcript.

<sup>11</sup> Deposition p. 94.

<sup>12</sup> Deposition pp. 90-91, 96, 105-06,

<sup>13</sup> Maragno Affirmation, Exhibit R.

favor and Plaintiff should be permitted to continue the discovery process. Additional disclosure should include, but not necessarily be limited to, the deposition of someone who has detailed knowledge of Icon's role within the larger corporate structure and the production of any relevant agreements, including insurance contracts. See CPLR 3101(a); *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006).

Accordingly, it is hereby

ORDERED that Icon Parking Systems, LLC's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motion to extend the time to file the note of issue and certificate of readiness is granted; and it is further

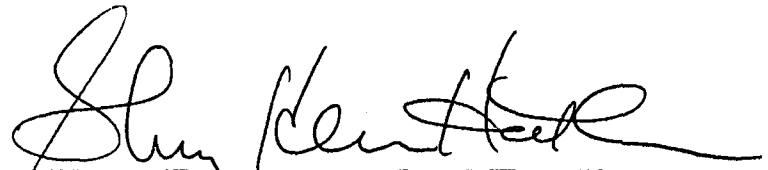
ORDERED that the parties are directed to complete discovery by April 15, 2016; and it is further

ORDERED that Plaintiff is directed to file the note of issue and certificate of readiness on or before April 15, 2016; and it is further

ORDERED that the parties appear for a compliance conference in Part 30 at 60 Centre Street, Room 412, New York, NY, 10016 on March 21, 2016 at 9:30AM.

This constitutes the decision and order of the court.

DATED: 2-23-16

  
SHERRY KLEIN HEITLER, J.S.C.