Ginsburg v First Ave. Condominium
2016 NY Slip Op 31660(U)
September 2, 2016
Supreme Court, New York County
Docket Number: 156793/14
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Edmead **Justice** **PART** 35

Ginsburg

-v-

First Avenue Condominium, et al.

INDEX NO. 156793/14

MOTION DATE _____

MOTION SEQ. NO. 001

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

Background Facts

This is a personal injury action stemming from Plaintiff Bernice Ginsburg's alleged slip-and-fall on December 15, 2012 on the sidewalk abutting the condominium located at 359 East 68th Street, New York, New York (the "Premises") and known as First Avenue Condominium (the "Condominium"). Her husband, Plaintiff Leo Ginsburg (collectively "Plaintiffs"), asserts an action for loss of consortium. The Defendants are the Condominium and its managing agent Veritas Property Management, LLC, ("Veritas", collectively the "Condo Defendants"), who answered together, and Yang, Yu Ming Memorial R.E. Inc. 1999 ("Yang"), the owner of a commercial unit on the ground floor of the Condominium.

Yang moves, pursuant to CPLR 3211(a)(7), to dismiss the Complaint for failure to state a cause of action. Yang argues that it owes no duty to Plaintiffs because the owner of an individual condominium unit is not an "owner" responsible for sidewalk maintenance. Yang also submits the transcript of John Wang, the son of Yang's principal who managed day-to-day operations (*Exh C*), to demonstrate that no special use or other involvement with the subject sidewalk is evident from the record, and the Condominium Offering Plan (*Exh D*) as evidence that the Condominium's Board of Managers is responsible for sidewalk maintenance.

In opposition, the Condo Defendants submit Yang's lease with non-party Wok n' Roll, a restaurant occupying Yang's commercial unit (*Exh A*). The Condo Defendants argue that an issue of fact exists because the provisions of the lease and the lease's rider shift the burden of sidewalk maintenance from Yang, as landlord, to Wok n' Roll, as tenant, thus implicitly acknowledging that Yang initially bore the responsibility for sidewalk maintenance.

Plaintiffs submitted no opposition.

Dated: _____ _____, **J.S.C.**

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

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**

In reply, Yang characterizes the Condo Defendants' discussion of the Wok n' Roll lease as a red herring, arguing that Yang could not contractually shift a duty that it did not have.

Discussion

As an initial matter, this motion will be treated as one for summary judgment (CPLR 3212), not a motion to dismiss for failure to state a cause of action (CPLR 3211). CPLR 3211(c) provides, in pertinent part, that

> upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.

There are three exceptions to the notice requirement: (1) where the action in question involves no issue of fact, but only issues of law which are fully acknowledged and argued by the parties; (2) where the parties specifically request the motion be treated as one for summary judgment; and (3) where the parties deliberately lay bare their proof and make it clear they are charting a summary judgment course (*Wiesen v New York Univ.*, 304 AD2d 459, 459–60 [1st Dept 2003]).

As discussed in detail below, this motion turns on a question of law, not fact: whether a an individual condominium unit owner has a duty to maintain a public sidewalk. Additionally, that the parties "clearly invited the motion court" to resolve this issue *via* summary judgment is evidenced by the parties' submission of documentary evidence and citations to case law utilizing the summary judgment standard, arguments against summary judgment in the Condo Defendants' opposition papers, and characterization of this motion as one for summary judgment in a stipulation, signed by all parties, adjourning the motion (*NYSCEF 30*; CPLR 3211[c], *see California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 155-56 [1st Dept 2012] ("while the parties are largely free to choose how to proceed, they are bound by the consequences attendant upon the exercise of that prerogative," *citing Mihlovan v Grozavu*, 72 NY2d 506, 534 NYS2d 656, 531 NE2d 288 [1988] *and Sean M. v City of N.Y.*, 20 AD3d 146, 150 [1st Dept 2005]). Accordingly, it is appropriate here to apply the standard for summary judgment.

Where a defendant is the proponent of a motion for summary judgment, the defendant must sufficiently establish that the "cause of action ... has no merit" (CPLR 3212[b]) such that the court should, as a matter of law, direct judgment in the defendant's favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to

summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose" (*Kosovsky v Park South Tenants Corp.*, 45 Misc3d 1216(A), 2014 WL 5859387 [Sup Ct NY County 2014] citing *Zuckerman*, 49 NY2d at 562).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv den*, 24 NY3d 917 [2015] citing *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS.2d 53 [1st Dept 2012]).

New York City Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]). However, as argued by Yang, a statute imposing obligations or liabilities upon the "owner" of real property does not give rise to a claim against the owners of individual condominium units where the claim arises from the common elements or concerns a duty not connected with any individual unit (*Jerdonek v 41 W. 72 LLC*, 36 NYS3d 17, 21 [1st Dept 2016], *citing Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 944 NYS2d 126 [1st Dept 2012] [rejecting a claim against the owner of an individual condominium unit for violating Administrative Code of City of N.Y. § 7–210, which imposes obligations on "the owner of real property abutting any sidewalk"]; *see also Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 970 NYS2d 186 [1st Dept 2013], *appeal dismissed* 22 NY3d 979, 979 NYS2d 551, 2 NE3d 918 [2013], *lv dismissed in part, den in part* 24 NY3d 1079, 1 NYS3d 3, 25 NE3d 340 [2014] [*following Araujo*]).[1]

There is also evidence in the record supporting summary judgment: the Condominium Offering Plan[2] defines "the cost of snow removal from, and maintenance of, the sidewalks, arcades (if any), plaza (if any), planted area (if any), etc. and public walks" as a "common expense"—in other words, an expense borne by the Condominium (*Exh D* at p. 53 [3]; *see Fayolle v E. W. Manhattan Portfolio L.P.*, 108 AD3d 476 [1st Dept 2013] [action properly dismissed because condominium declaration and bylaws place responsibility for the common elements with

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[1] Importantly, the result would be the same under the CPLR 3211(a)(7) standard. Even accepting the facts alleged in the complaint to be true, the pleading fails to state a cause of action upon which relief can be granted because individual condominium unit owners have no duty to maintain the sidewalks (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]; *Nonnon v City of N.Y.*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

[2] Though the Plan states that "the commercial units are not being offered for sale," the parties do not submit any evidence contradicting Yang's ownership, or the Plan's inapplicability to said ownership.

[3] Only the cover page and pages 49-53 of the document are in the record.

the condominium's board, which maintained the sidewalk]).

Accordingly, Yang has demonstrated, as a matter of law, entitlement to summary judgment.

Responding to the shifted burden, the Condo Defendants fail to factually or legally rebut Yang's argument, or create any issue of fact. To the extent that the Condo Defendants argue that the lease between Yang and Wok n' Roll implicitly acknowledges Yang's duty to maintain the sidewalks by shifting said duty to Wok n' Roll, that argument is contradicted by the discussion above; that is, Yang did not have any duty, and therefore could not have delegated one. Moreover, any duty-shifting provisions would be germane only to indemnification cross-claims between Yang and Wok n' Roll (which have not been made), not to Yang or Wok n' Roll's duty to third parties such as Plaintiffs (*see Collado*, 81 AD3d at 542). Finally, while the Condo Defendants are correct in noting that summary judgment is a "drastic remedy," they fail to cite to any authority, binding or otherwise, that renders it unwarranted here.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Yang, Yu Ming Memorial R.E. Inc. 1999 ("Yang") to dismiss the Complaint of Plaintiffs Bernice Ginsburg and Leo Ginsburg is hereby granted and said Complaint is severed and dismissed in its entirety as against said Defendant, with costs and disbursements to said Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

ORDERED that counsel for Defendant Yang shall, within 20 days, 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; and it is further

ORDERED that upon receipt of a copy of this order, the Clerk shall amend the caption to reflect the dismissal of the complaint against Defendant Yang.

This constitutes the decision and order of the Court.

Dated 9/2/16 **ENTER:** _____, J.S.C.

HON. CAROL R. EDMEAD

J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**