

Castillo v Apple Bank for Sav.
2016 NY Slip Op 32327(U)
October 7, 2016
Supreme Court, Bronx County
Docket Number: 301852/2015
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JUANA CASTILLO,

Plaintiff(s),

Index No. 301852/2015

DECISION AND ORDER

-against-

APPLE BANK FOR SAVINGS, SOUTH
BRONX OVERALL ECONOMIC
DEVELOPMENT CORP., SOBRO
DEVELOPMENT CORP. and CITY OF
NEW YORK,

Defendant(s)

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APPLE BANK FOR SAVINGS,

Third-Party Plaintiff,

-against-

EXECUTIVE SNOW CONTROL, LLC,

Third-Party Defendant

-----X
GONZALEZ, D:

Upon the motion by Robert Andrew Von Hagen, Esq., attorney for South Bronx Overall Economic Development Corp., and SOBRO Development Corp., for an Order granting summary judgment to the defendants pursuant to CPLR §3212 since the defendant was an out of possession landlord and did not create any hazardous conditions and/or for summary judgment in favor of its cross-claims for indemnification against the co-defendant tenant, Apple Bank for Savings; along with any such other and further relief as this court deems just and proper.

The affirmation by Adam S. Ashe, Esq., attorney for the plaintiff, dated April 12, 2016.

The Reply Affirmation dated April 27, 2016. There being no opposition to the motion for summary judgment by Apple Bank for Savings.

FACTS

It is alleged the plaintiff slipped and fell on the sidewalk in front of the SOBRO's property at 370 East 149th Street, Bronx, New York on February 14, 2014 due to a snow or ice condition. Apple Bank for Savings leased the premises from SOBRO and was responsible for all snow and ice removal activities under the lease. Apple Bank for Savings had a contract with the third-party defendant, Executive Snow Control, LLC, to perform snow removal the day before the plaintiff's accident. Executive Snow Control, LLC, performed snow removal at the location in question.

SOBRO's motion submitted the affidavit of SOBRO's Vice President of Property Management, Deborah Johnson. SOBRO also submitted the applicable lease documents, the snow removal contract between Apple and Executive, as well as individual snow removal invoices from Executive billed to Apple. SOBRO demonstrated that it was an out-of-possession landlord, that did not create, nor have notice of any snow or ice condition on the sidewalk in front of the premises in question.

PROCEDURAL HISTORY

Plaintiff commenced this personal injury action, by filing and serving a Summons and Complaint dated April 21, 2015. SOBRO answered on or about June 8, 2015 and asserted a cross-claim against Apple for indemnification. Apple answered on or about May 20, 2015. On or about August 10, 2015, Apple Bank for Savings commenced a third-party action against Executive Snow Control, LLC. Executive served their third-party answer on or about September 24, 2015. Thereafter, the plaintiff amended their complaint and added Executive as a named

defendant.

DISCUSSION OF LAW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact and the right to judgment as a matter of law. *See, Alvarez v. Prospect Hospital*, 68 N.Y. 2d 320, 508 N.Y.S. 2d 923 (1986). Once the movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *See, Zuckerman v. City of New York*, 49 N.Y. 2d 557, 404 N.E. 2d 718, 427 N.Y.S. 2d 595 (1980). The motion must be decided viewing the facts in the light most favorable to the moving party. *See, Mullin v. 100 Church LLC*, 12 A.D. 3d 263, 784 N.Y.S. 2d 545 (1st Dep't 2004). A movant cannot succeed on a summary judgment merely motion by pointing to gaps in the opponent's proof; movant must affirmatively demonstrate the absence of triable issues of fact. *See, e.g. Salgado v. Port Auth. of N.Y. & N.J.*, 105 A.D. 3d 417, 962 N.Y.S. 129 (1st Dep't 2013). That there is any factual dispute at all does not necessarily prevent a grant of summary judgment; the factual dispute must relate to the material issue. *See, Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 819 N.E. 2d 998, 786 N.Y.S. 2d 382 (2004); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y. 2d 223, 385 N.E. 2d 1068, 413 N.Y.S. 2d 141 (1978). If the opponent of the motion fails to contradict a fact, it is deemed admitted. *See, Tortorello v. Carlin*, 260 A.D. 2d 201, 668 N.Y.S. 2d 64 (1st Dep't 1999). The court's role is limited to the identification, not the resolution, of triable issues of material fact. *See, Lindgren v. New York City Hous. Auth.*, 269 A.D. 2d 299, 704 N.Y.S. 2d 30 (1st Dep't 2000). Factual issues requiring credibility assessments also preclude summary judgment. *See, Gaspari v. Sadeh*, 61 A.D. 3d 405, 876 N.Y.S. 2d 46 (1st Dep't); *Chunn v. New York City Hous. Auth.*, 55 A.D. 3d 437,

866 N.Y.S. 2d 145 (1st Dep't 2008).

The defendants have sustained their burden in showing their entitlement to summary judgment since there are no triable issues of fact as against the defendants South Bronx Overall Economic Development Corp. and SOBRO Development Corp.

The plaintiff has not sustained her burden in showing that any issues of fact exists for this court to deny the motion for summary judgment before the Court. The plaintiff's opposition, even if reviewed in the light most favorable to the plaintiff, does not rise to the level to defeat the defendants' motion for summary judgment. In fact, the court finds the arguments in opposition, unavailing.

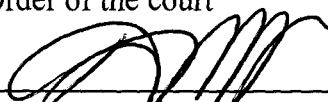
Based on the record before the court, it is undisputed that SOBRO and South Bronx Overall Economic Development Corp., was an out-of-possession landlord who delegated all snow removal responsibilities to its tenant under the lease agreement. The moving defendant did not create nor have notice of any alleged snow or ice condition. It was not at the premises in question nor did they receive prior complaints. Any submissions in the affirmation or opposition which were not in admissible form, were not considered by the Court.

Accordingly, pursuant to the applicable law; a review of the Court file and due deliberation; it is hereby

ORDERED, that the complaint and any and all cross-claims against South Bronx Overall Economic Development Corp., and SOBRO Development Corp. are dismissed with prejudice.

This constitutes the decision and Order of the court

October 7, 2016
Bronx, New York



HON. DORIS M. GONZALEZ, AJSC