

Shemkover v New York City Hous. Auth.

2017 NY Slip Op 31865(U)

August 23, 2017

Supreme Court, New York County

Docket Number: 157266/2012

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X

DMITRI SHEMKOVER,

Plaintiff,

INDEX NO. 157266/2012

MOTION SEQ. NO. 005

- v -

NEW YORK CITY HOUSING AUTHORITY

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164

were read on this application to/for Summary Judgment (After Joinder)

Plaintiff Dmitri Shemkover alleges that, on October 19, 2011, he was working as a driver for FedEx and, while making deliveries to 825 Columbus Avenue – a building owned and operated by defendant New York City Housing Authority – he tripped while descending a negligently maintained flight of stairs and sustained personal injuries. (Doc. Nos. 129, 132, 136-137.) Specifically, plaintiff asserts that he delivered a package to the tenth floor of the building, then fell in between the tenth and ninth floor, while on the way to deliver another package to the second floor of the building. Defendant now moves to amend its answer, to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), for this Court to treat the motion as one for summary judgment dismissing the complaint pursuant to CPLR 3211 (c), and for costs and

sanctions.¹ After oral argument, and following a review of the motion papers submitted, as well as the relevant statutes and case law, the motion is denied in its entirety.

The main evidence that defendant has put before this Court is a three-row spreadsheet printout, accompanied by a Certification of Business Records submitted by Brandie M. Owens, of FedEx Ground Package System, Inc.'s Legal Department. In the certification, Owens states, among other things, that the record was prepared and kept as part of FedEx's regular course of business. (Doc. No. 151.) According to the affidavit Owens submits to explain the record, the printout represents "computer-generated scanner data from [plaintiff] for his deliveries made to 825 Columbus Avenue . . . on October 19, 2011." (Doc. No. 152.) She further explains that the scanner data indicates that "two packages were delivered by [plaintiff] on October 19, 2011: one package was delivered to apartment 9B at 2:47 p.m. and the other package was delivered to apartment 2 at 2:50 p.m." (Doc. No. 152.)

Defendant's theory based on the document starts with the premise that plaintiff has alleged and testified that he delivered a package to the tenth floor, then fell on the way down the stairs between the tenth and ninth floors. If, defendant argues, the package was actually addressed to and delivered to an address on the ninth floor, plaintiff would have had no occasion to be on the tenth floor. Thus, defendant asserts that the document conclusively proves that plaintiff was not on the tenth floor, and the accident could not have happened as plaintiff claims. Defendant also stresses that the record shows that the packages were delivered exactly three minutes apart, thus precluding the possibility that a serious accident occurred between the two deliveries.

¹ This action was discontinued as to defendant City of New York. The caption should reflect this development, and plaintiff will be instructed to alert the Clerk's office to make this change.

Based on the printout, defendant seeks leave to amend its answer in order to add the purported affirmative defense of “founded upon documentary evidence.” (Doc. No. 128.) Documentary evidence, however, is not itself an affirmative defense; rather, it is a vehicle through which a motion may be made to dismiss a complaint via CPLR 3211 (a) (1). *See Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197, 197 (1st Dept 1993). Furthermore, the branch of the motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1) is untimely. *See* CPLR 3211 (e); *Portilla v Law Offs. of Arcia & Flanagan*, 125 AD3d 956, 956-957 (2d Dept 2015). Even if this Court were to consider the motion as having been timely made (*see* CPLR 2004), based upon defendant’s assertion that it did not have access to the information until discovery had taken place, it would find that there is no merit to either branch of the motion pursuant to CPLR 3211 (a).

“[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). “However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence.” *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (internal quotation marks, brackets and citations omitted). “Where extrinsic evidence is used, the standard of review on a CPLR 3211 (a) (7) motion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” *M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 (1st Dept 2008), *mod* 12 NY3d 798 (2009) (internal quotation marks and citation omitted); *see Basis*

Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 134-135 (1st Dept 2014); *Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1094-1095 (2d Dept 2016); *Allen v Gordon*, 86 AD2d 514, 514-515 (1st Dept 1982), *affd* 56 NY2d 780 (1982).

For a complaint to be dismissed based upon extrinsic evidence submitted in the context of a CPLR 3211 (a) (7) motion, the evidence submitted must “flatly contradict” the allegations in the complaint (*NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640, 640 [1st Dept 2016]; *see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]; *MCAP Robeson Apts. L.P. v MuniMae TE Bond Subsidiary, LLC*, 136 AD3d 602, 602 [1st Dept 2016]; *see also Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]) such that “the essential facts have been negated beyond a substantial question” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 95 NY2d 659 [2000]; *see M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d at 260).

Alternatively, for a claim to be dismissed under CPLR 3211 (a) (1), documentary evidence must “conclusively establish that [the plaintiff] has no cause of action.” *Rovello v Orofino Realty Co., Inc.*, 40 NY2d at 636; *see NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d at 640; *see also United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 (1st Dept 2014); *Matter of Walker*, 117 AD3d 838, 839 (2d Dept 2014); *State of N.Y. Workers’ Compensation Bd. v Madden*, 119 AD3d 1022, 1028-1029 (3d Dept 2014).

Considering that plaintiff’s name does not appear on the face of the document that defendant seeks to have this court consider as documentary evidence, and that the lines can only be fully understood with the aid of an affidavit, this Court is not convinced that the submission constitutes the sort of “unambiguous, authentic, and undeniable” evidence appropriate for determination of the action under CPLR 3211 (a) (1). *Fox Paine & Co., LLC v Houston Cas.*

Co., ___ AD3d ___, 2017 NY Slip Op 06162, *3 (2d Dept 2017). Further, defendant's theory requires this Court to make many assumptions beyond the face of the record, including that the packages were scanned exactly when they were delivered, all of the information in the record is totally accurate, and no alternative directions were given by the intended recipient as to where the package should be delivered. While the evidence suggests that plaintiff did not make a delivery to the tenth floor, it falls far short of conclusively establishing that plaintiff never went to the tenth floor. *See* CPLR 3211 (a) (1). It also falls far short of demonstrating beyond a substantial question that plaintiff did not fall in the manner alleged. *See* CPLR 3211 (a) (7).

Even if this Court were to entertain defendant's invitation to treat the motion as one for summary judgment, and consider the remainder of the evidence it submits, defendant has failed to meet its prima facie burden. A defendant's burden on summary judgment is not met where it merely points to "perceived gaps in plaintiff's proof;" to prevail on the motion, the defendant must "submit[] evidence showing why [the] plaintiff's claims fail." *Ricci v A.O. Smith Water Prods. co.*, 143 AD3d 516 (1st Dept 2016); *see McCullough v One Bryant Park*, 132 AD3d 491, 492 (1st Dept 2015); *Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 (1st Dept 2012). At best, the scanner record and the other issues raised by defendant, including that defendant does not recall how he exited the building, present significant questions regarding plaintiff's credibility. They do not, however, strike at the heart of plaintiff's claim.

Plaintiff testified at his General Municipal Law § 50-h hearing that he had to deliver two packages at 825 Columbus Avenue on the date of the accident. (Doc. No. 130 at 24.) He stated that the accident happened in the stairwell of the building. (*Id.* at 26.) Plaintiff explained that he entered the building "carrying two packages;" the first package was to be delivered to the "tenth floor," and the second one was to be delivered to "some low floor, maybe to the second floor."

(*Id.* at 27, 30.) He stated that he entered the building and went up to the tenth floor using the elevator and delivered the first package to the tenth floor. (*Id.* at 31.) After he delivered the first package to the tenth floor, he carried the remaining package, which he described as a “small box” weighing “two to three pounds” to the second destination. (*Id.* at 32.) Plaintiff testified that he “intended to use the elevator [and] waited . . . five minutes” for it to arrive. (*Id.*) He stated that, after waiting, he decided to use the stairwell. (*Id.* at 34.)

Plaintiff clarified that he fell on the “fifth step from the bottom” of the first set of stairs, each of which had about fourteen steps, between the tenth and ninth floors. (*Id.* at 35.) He asserted that “[w]hen [he] was falling down [he] hit himself several times and when [he] finally stopped, [his] head and [his] back [were] positioned on the steps.” He further stated that the “rest of [his] body, meaning legs, . . . were over there on the platform.” (*Id.* at 51.) He explained that he fell backwards and his midback was the first part of his body to make contact with the stairs. (*Id.* at 52-53.) He also explained that he “hit [him]self several times and when [his] body finally stopped [he] hit [his] head and [his] back on the steps while [his] legs were on the landing.” (*Id.* at 53.) When asked what caused him to fall, plaintiff responded that he “observed what [he] didn’t see when [he] was going down this flight of stairs[:] one of the steps, the edge was . . . broken. One portion of the edge was missing, it was like a dent.” (*Id.* at 53-54.)

Plaintiff was asked whether the fall caused him to lose consciousness, to which he replied that he did not remember, but he “was lying on the steps for about three minutes and when [he] opened [his] eyes [he] could not breathe.” (*Id.* at 57.) He stated that he remained on the floor for “one and a half minutes more[,] and then [he] started getting up very, very slowly.” (*Id.*)

Plaintiff testified that he then “crawled to the place where the rails were and where [he] could

hold onto rails.” (*Id.*) He stated that he “needed to get up in order to start breathing [be]cause [he] felt . . . a very strong pressure on [his] chest.” (*Id.* at 58.)

Plaintiff stated that, after the incident, he “got out of the building on [his] own but with very bad pains, trying to move very slowly.” (*Id.* at 50.) Plaintiff could not recall whether he continued his descent down the stairwell. (*Id.* at 58.) He stated that he “tried to get the elevator but it didn’t come and maybe [he] tried to use [the] stairwell again[,] but [he] was not sure.” (*Id.*) He testified that he did not “remember the way [he] got downstairs[,] but he exited the building.” (*Id.*) He stated that he neither called 911 nor spoke to anyone in the building. Plaintiff further testified that, once he got back to the FedEx truck, he stayed inside the vehicle while his two helpers continued with deliveries for half an hour. (*Id.* at 59-60.) He stated that he was “afraid to move around and [he] turned on heating because all of a sudden [he] felt cold.” (*Id.* at 60.)

When asked whether he was driving the vehicle at that point in time, plaintiff testified that he was “the only driver in the team[; the helpers] cannot drive.” (*Id.*) Plaintiff stated that the team continued to make deliveries and, afterwards, he drove and returned the truck to the main location in Queens near LaGuardia Airport. (*Id.* at 61.)

At plaintiff’s deposition, he again testified about the incident. (Doc. No. 143.) He stated that he entered the building through the front door, carrying two packages with him: one larger and one smaller. (*Id.* at 62.) Plaintiff testified that one box was “for the tenth floor” and the other box was “for the second floor.” (*Id.* at 63.) He could not recall the names on the boxes. (*Id.*) Plaintiff stated that he took the elevator to the tenth floor to deliver the parcel, but could not recall which apartment he went to. (*Id.*) He testified that he remembered delivering it, but could not “remember whether it was handed directly into the hands of the person whose name was

written there or [to] a neighbor next to him. Everyone knows each other there, so you can leave it with the neighbor and they will transfer it to them. There was definitely a delivery.” (*Id.* at 65.)

Plaintiff recalled scanning the package for the tenth floor inside the elevator. (*Id.*) He stated that, after he delivered the package to the tenth floor, he called the elevator and waited for five minutes before taking the stairs. (*Id.* at 66.) Plaintiff’s testimony regarding the fall itself was similar to that given at his 50-h hearing. He also testified that he was not sure whether he lost consciousness, but remembered that he “opened [his] eyes sometime later because [he] wasn’t able to breathe.” (*Id.* at 83.) Plaintiff stated that, after he got up, he “tried to touch [his] back, [his] arms, hands. [He] tried to estimate what happened. Absolutely everything hurt. [He] started to slowly breathe. [He] was scared a lot. [He] was . . . in shock.” (*Id.* at 91.) Plaintiff further stated that he could hear his “bones cracking and breaking” and that he thought “this is it, this is it.” (*Id.*)

When asked how he got out of the building after standing up, plaintiff responded, “I don’t remember. I don’t remember now.” (*Id.* at 91.) He explained that “[t]here was such a shock that [he] did everything automatically. [He could not] remember where [he] went, what [he] did. For some time [he] was just dazed.” (*Id.* at 92.)

Taken together, plaintiff’s deposition testimony and the records from plaintiff’s scanner are replete with triable issues of fact. The record indicating that the first package was destined for the ninth floor, rather than the tenth floor, will likely be a basis of impeachment of plaintiff’s trial testimony. However, considering plaintiff’s otherwise consistent testimony, defendant has failed to completely dispel triable issues of fact such that its prima facie burden was met.

Although this Court finds that it is unnecessary to turn to plaintiff's submissions, it must note that plaintiff submits an affidavit in which he explains the discrepancy between the testimony he has given and the scanner record. He states:

"Checking the lobby delivery instructions which was my custom and practice, the recipient of the package in apartment 9B had left a note directing that it be left with a resident on the 10th floor, which it was. On that date, the package to be delivered to the 9th floor was in fact scanned while your affiant was riding the elevator to the 10th floor pursuant to the recipient's instructions. After that package was dropped off at the designated apartment on the 10th floor, and while still on the 10th floor, I scanned the package to be delivered to the 2nd floor, waited for the elevator which did not arrive, and then entered the staircase in the 10th floor hallway. My accident occurred as I was walking down the staircase from the 10th floor to the 9th floor. I intended to walk all the way down to the 2nd floor."

(Doc. No. 158.) It is difficult to understand how plaintiff could fail to mention, while under oath on two prior occasions, that the only reason why he was on the tenth floor, rather than the ninth floor, was because the intended recipient had left a note telling him to leave the package with a neighbor. His impending credibility problems with a jury are incapable of overstatement. Yet, this Court is not empowered to make credibility determinations on a summary judgment motion. *See Grullon v Queens Ballpark Co., L.L.C.*, 139 AD3d 427, 428 (1st Dept 2016). Plaintiff submitted to two lengthy examinations under oath at which he testified as to how the accident occurred. Although this Court envisions a trial attorney making much use of plaintiff's omissions at those examinations, defendant's proffered evidence still amounts to nothing more than "gaps in plaintiff's proof." *Ricci v A.O. Smith Water Prods. co.*, 143 AD3d at 516.

Because the substantive branches of defendant's motion have been denied, the branch of the motion for costs and sanctions is similarly denied. This Court also declines plaintiff's invitation to impose sanctions on defense counsel, but notes that attacks on the ethical integrity

of other attorneys in court papers should be reserved for circumstances far more egregious and clear-cut than this.

Accordingly, it is hereby:

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that, since the City of New York is no longer a party to this action pursuant to NYSCEF Doc. No. 16, the City is dropped from the caption and all subsequent filings shall reflect that the only named defendant herein is New York City Housing Authority; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order with notice of entry on defendant within 20 days after it is entered; and it is further

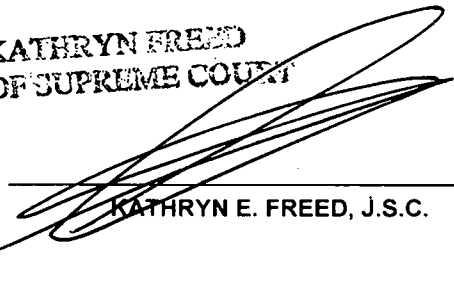
ORDERED that counsel for plaintiff is directed to e-file a completed Notice to County Clerk (Form EF-22, available on the NYSCEF site), with copies of this order and NYSCEF Doc. No. 16 attached thereto, within 20 days after this order is entered, and the clerk is directed to amend the caption to reflect that the City of New York is no longer a defendant; and it is further

ORDERED that counsel for plaintiff is directed to e-mail the General Clerk's Office at genclerk-ords-mot@nycourts.gov with a copy of this order as well as NYSCEF Doc. No. 16

attached, within 20 days after this order is entered, and the clerk is directed to amend the caption to reflect that the City of New York is no longer a defendant.

This constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT



8/23/2017

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE