Burton v Khedouri Exair Corp
2017 NY Slip Op 31899(U)
August 28, 2017
Supreme Court, New York County
Docket Number: 156604/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

SHEENA BURTON

INDEX NO. 156604/15

MOT. DATE

- v -

MOT. SEQ. NO. 002, 003 and 004

KHEDOURI EXAIR CORP et al.

The following papers were read on these motions for summary judgment, etc. and cross-motions to strike

Motion Sequence Number 002

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 119-130
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 137, 183-198
Replying Affidavits	NYSCEF DOC No(s). 225

Motion Sequence Number 003

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 85-100
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 140, 163-182
Replying Affidavits	NYSCEF DOC No(s). 199-209, 215

Motion Sequence Number 004

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 101-118
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 135, 143-162
Replying Affidavits	NYSCEF DOC No(s). 210-212, 218-220

This personal injury action arises from a slip and fall due to black ice on the sidewalk adjacent to the premises located at 1452 2nd Avenue, New York, New York on February 9, 2014. The subject premises is a multi-use building consisting of two commercial tenants and a residential doorway sharing the ground level. On the date of plaintiff's accident, defendant Khedouri Ezair Corp. (the "Owner") owned the premises, Defendants H.K. Paris, Inc. and H.K. Paris Inc. d/b/a Voila 76 ("Viola") occupied the portion of the premises known as the North Store and 7Just One Corp., t/a Iggy's ("Iggy") occupied the portion of the premises known as the South Store.

In motion sequence number 002, defendant Iggy moves for summary judgment dismissing plaintiff's complaint and all cross-claims against it. Plaintiff opposes the motion and cross-moves for an order striking Iggy's answer due to its failure to provide discovery responses and compelling Iggy to appear for a deposition. Iggy opposes the cross-motion. The Owner joins and in part and opposes in part Iggy's motion.

In motion sequence number 003, the Owner moves for summary judgment dismissing plaintiff's claims and on its cross-claim against Iggy's for contractual and common law indemnity against Iggy.

Dated: 8/28/17

HON. LYNN R. KOTLER, J.S.C.

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**

Iggy and plaintiff oppose the Owner's motion. Alternatively, the Owner seeks an order striking plaintiff's complaint for failing to provide discovery and comply with court orders. Plaintiff also cross-moves against the Owner to strike the Owner's answer for failing to provide discovery responses and to compel the owner to produce a witness for deposition.

Finally, in motion sequence number 004, Viola moves for summary judgment dismissing plaintiff's complaint against it as well as for sanctions, and alternatively, for an order striking plaintiff's complaint for failure to comply with discovery. Plaintiff also cross-moves against Viola for the same relief it seeks against Iggy and the Owner, specifically, an order striking its answer or alternatively compelling it to provide discovery responses and appear for a deposition.

These motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined as to the parties seeking summary judgment and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts concerning plaintiff's claims are largely undisputed and are as follows. The last snowfall prior to plaintiff's accident was on February 5, 2015, based upon weather reports from the National Climatic Data Center which have been provided to the court by plaintiff.

Plaintiff testified at her deposition that she went to the premises on February 8, 2014 to participate in a karaoke event at approximately 8pm. When plaintiff arrived at the premises, she did not observe any ice on the sidewalk. Plaintiff consumed several alcoholic drinks on the premises. Plaintiff smoked a cigarette outside the premises at approximately 10pm, at which point plaintiff did not observe any ice on the subject sidewalk. At around 3am the early next morning, plaintiff exited the premises and stood on the sidewalk in front of Iggy's doorway to smoke a cigarette while waiting for her friend, Hiba Anderson, to drive a car to the premises and pick plaintiff up. Plaintiff estimated that she was standing outside Iggy's smoking a cigarette for "[m]aybe like two minutes." During that time, plaintiff did not see any ice on the ground. Plaintiff was asked about the lighting conditions outside Iggy:

Q. What was the lighting like at that point in time, was it something where there's street lights out in front, or were there lights on in front of the businesses, or anything else?

A. From what I can remember it was like lighting outside, there were street lights on.

Q. Could you see – say without any problem at the point that you got out of Hiba's car up to the point that you walked to the door of Iggy's, could you see without obstruction the entire time?

A. Yeah.

Q. Now, at the 3:00 in the morning time that you were coming back out, what were the lighting conditions like at that point in time?

A. They were the same to me because there was lights from the businesses and the streetlights.

Q. So, it was similar, you can see?

A. Yeah, I could see.

Q. So, if you stood at the doorway of Iggy's you could see all the way out to the car?

A. Yeah.

When plaintiff's friend arrived, plaintiff "toss[ed her] cigarette and started walking." Plaintiff suddenly slipped and landed on her stomach. Plaintiff slipped on something "slippery" which she believes was "black ice." When asked how she knew it was black ice, she stated "[b]ecause I felt it." Plaintiff further explained:

A. What else – because I had to think what else is – first of all, what else could I possibly fall on, you don't just fall and break your leg for no reason and I just felt it. I just know what it feels like, it's slippery.

...

Q. So, it's your testimony that you felt that you slipped on something slippery but you physically did not see any ice, what you slipped on?

A. No, I did not see it. No.

Non-party Anderson appeared for a deposition. Anderson saw plaintiff fall while she was driving her vehicle towards Iggy's. Anderson pulled her car up to the curb, observing a mound of snow on the curb. Anderson helped plaintiff up and put her in the vehicle. Anderson and plaintiff then drove to plaintiff's home in New Jersey. Anderson was asked why plaintiff fell, to which she responded:

A. Because when she walked out of Iggy's she fell on ice.

Q. How do you know she slipped on ice?

A. Because I was looking right at it as I was standing over her trying to help her up.

Q. Do you know what color the ice was?

A. What color?

Q. Was it clear, was it black, was it dirty, you know, can you describe it to me?

A. It was black ice and also it was two o'clock in the morning so, it was dark outside, but it was black ice.

Q. You know, black, ice, how were you able to see it, how did you know it was ice on the ground?

A. That's how close to the ground I had to get to help her up.

...

Q. Was this the first time you observed that ice on the ground that evening?

A. Yes.

Q. Did you observe any black ice when you walked into Iggy's approximately eight pm when you arrived?

A. There was lots and lots of snow. ... The street was a mess to be quiet (sic) honest. The snow was piled into mounds all over the place.

Iggy's argues in support of its motion that it is entitled to summary judgment because there is no evidence on this record that Iggy's created or caused the dangerous condition. The Owner argues, relatedly, that plaintiff's claims must be dismissed because plaintiff cannot identify the proximate cause of

her fall. Viola contends that it did not owe plaintiff a legal duty since plaintiff did not fall in front of its store front, nor did it cause or create the icy condition or have notice of same.

Plaintiff argues that her deposition transcript which Iggy's relies on in support of its motion is not in admissible form since it was not sent to plaintiff and signed under oath or sixty days passed since service of same before the motion was made. Further, Anderson's deposition was taken on October 14, 2016 and Iggy filed this motion on November 3, 2016. Therefore, plaintiff argues that Anderson's deposition is also not in admissible form. The court rejects these procedural arguments outright since plaintiff does not dispute the accuracy of the deposition transcripts or otherwise demonstrate any prejudice resulting from the court's consideration of these accurate transcripts.

Otherwise, plaintiff maintains that none of the movants have met their burden on these motion because they have not submitted any evidence of snow/ice removal at the premises and/or they have not eliminated all triable issues of fact.

DISCUSSION

The court will first consider the motions for summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, Viola's motion dismissing plaintiff's claims against it must be granted. Pursant to its lease, Viola is responsible for maintaining the sidewalk in the front of the North Store, to wit:

> Tenant shall keep and maintain the sidewalk in front of the demised premises reasonably clean at all times and shall remove snow as soon as practical after a storm.

Plaintiff does not dispute that she fell in front of Iggy's. Plaintiff, however, maintains that Viola's snow and ice removal may have caused and/or contributed to the allegedly icy condition which caused her fall. Whether a defendant owes a duty of care to a plaintiff is a question of law to be determined by the court (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Generally, contractual obligations do not give rise to a duty of care in favor of third-parties and plaintiff has not demonstrated an applicable exception to that rule. (*Id.*) Plaintiff has failed to demonstrate an exception to the general rule, nor has plaintiff established that Viola caused and/or contributed to the alleged icy condition. Accordingly, Viola's motion for summary judgment dismissing the complaint and any cross-claims against it is granted. That portion of Viola's motion which is for sanctions is denied. The court cannot say that plaintiff's claims against it are patently frivolous within the meaning of the court rules (22 NYCRR 130-1.1[a]).

Iggy and the Owner's motions for summary judgment dismissing plaintiff's claims must also be granted. Plaintiff cannot demonstrate a *prima facie* case of negligence against either party. In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

Plaintiff testified that she did not observe any ice on the sidewalk multiple times throughout the evening prior to her fall. Indeed, prior to her fall, she stood outside the premises for approximately two minutes, could see clearly from the doorway to the curb, and still didn't observe any ice on the sidewalk. Therefore, even if plaintiff can establish through admissible evidence sufficient facts to support a determination that there was ice on the sidewalk which was the proximate cause of her fall, plaintiff cannot demonstrate that either party had actual or constructive notice of the allegedly icy condition. And while plaintiff does not specifically invoke CPLR § 3212[f], plaintiff has not demonstrated that any of the discovery she seeks by way of the cross-motions would lead to evidence on the issue of notice. Accordingly, Iggy and the Owner's motions are granted to the extent that the plaintiff's complaint and any cross-claims against them are hereby severed and dismissed. The balance of the motions, as well as the cross-motions, are denied as moot.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 002, 003 and 004 are granted to the extent that plaintiff's claims against defendants Khedouri Ezair Corp., H.K. Paris, Inc. and H.K. Paris Inc. d/b/a Voila 76 and 7Just One Corp., t/a Iggy's are severed and dismissed, as well as all cross-claims by and against these parties; and it is further

ORDERED that the balance of the motions is denied as moot; and it is further

ORDERED that plaintiff's cross-motions are denied as moot.

ORDERED that plaintiff is directed to renew its motion for a default judgment against defendant Antonio Pecora within 90 days from the date of entry of this decision/order or those claims will be dismissed for failure to prosecute (CPLR § 3216).

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9/27/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.