Lee v 145 E. 15th St. Tenants Corp.
2018 NY Slip Op 30923(U)
May 11, 2018
Supreme Court, New York County
Docket Number: 160882/2015
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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BARBARA LEE,

Plaintiff,

- v -

145 EAST 15TH STREET TENANTS CORP., ORSID REALTY CORP., PHOENIX INTERIORS, LLC, CARRIE A. GIULIANO, DDS, PC,

Defendants.

INDEX NO. 160882/2015

MOTION DATE

MOTION SEQ. NO. 1, 2

DECISION AND ORDER

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By notice of motion, defendant Carrie A. Guilliano, DDS, P.C. moves pursuant to CPLR 3212 for an order granting summary dismissal of the complaint, or, alternatively, scheduling a competency hearing to determine whether plaintiff is competent to testify at a further deposition and at trial (sequence one). By notice of cross motion, defendant Phoenix Interiors, LLC moves for the same relief, as do defendants 145 East 15th St. Tenants Corp. and Orsid Realty Corp. by notice of motion under sequence two. Plaintiff opposes all of the motions.

During plaintiff's deposition, while she could not remember precisely what caused her to trip and fall when she walked out of the elevator in her apartment building, she testified that it was either a wood or metal object. Her partner, who was with her at the time of her fall but did not see it as she had walked ahead after they had exited the elevator, testified at her deposition that there were wooden boards on the floor where plaintiff fell, and that when she saw plaintiff on the ground after the fall, she was lying on top of one of the boards.

IS THIS WHAT PARTNER SAID AT DEP? SAY SO. At her deposition, plaintiff's partner testified that approximately an hour before plaintiff fell and at the same location, she observed the boards which she described as unstable and unmoored, and noticed that they were not flush with the floor but raised slightly.

Photographs taken immediately after the accident show a wooden board or boards in front of the elevator, one portion of which is raised. (NYSCEF 58). There is also evidence that construction or demolition work was being performed in an apartment on the ground floor near the elevator.

Plaintiff's affidavit in opposition to the motions is not inconsistent with her testimony **and other evidence which tend to prove that** she tripped on a board in front of the elevator. There is thus evidence from which a trier of fact could reasonably infer that plaintiff tripped on a board on the floor, thereby rendering other possible causes remote. (*See Ruffin v Chase Manhattan Bank, N.A.*, 66 AD3d 549 [1st Dept 2009] [court properly rejected argument that defendants entitled to summary judgment based on plaintiff's deposition testimony that she did not know cause of fall, as she first testified that she did not know cause, tried to clarify her response, and her other testimony was consistent with her affidavit in opposition to motion in terms of what caused fall]; *see also Costello v Pizzeria Uno of Albany, Inc.*, 139 AD3d 1336 [3d Dept 2016] [even if plaintiff uncertain at deposition about cause of fall, her affidavit clarified ambiguity, which, together with testimony of two nonparty witnesses that floor was defective, provided proof that other possible causes of fall sufficiently remote]; *Dixon v Superior Discounts and Custom Muffler*, 118 AD3d 1487 [4th Dept 2014] [defendant not entitled to summary judgment where, although plaintiff during deposition could not identify precise cause of fall, she testified she fell in immediate vicinity of elevation differential in pavement]; *Aller v City of New*

York, 72 AD3d 563 [1st Dept 2010] [plaintiff's deposition testimony not unduly speculative as she testified she fell due to unlevel ground and photographs showed uneven sidewalk at accident location]; *Affenito v PJC 90th St. LLC*, 5 AD3d 243 [1st Dept 2004] [evidence sufficient to raise inference of negligence based on testimony that plaintiff saw defendant's employee performing task at location of fall and, after fall, saw employee with hose washing substance away]).

Tresgallo v Danica, is not on point as there, the plaintiff did not see the boards on the floor before she fell and did not notice whether they were raised from the floor. Thus, the Court found that the plaintiff did not identify any aspect of the boards or their placement which was defective or caused her to fall. (286 AD2d 326 [2d Dept 2001]). Here, there is evidence that the boards were raised, unstable, and right in front of the elevator door.

Whether plaintiff cannot remember the cause of her fall has not yet been established, as she stated at her deposition that she was having a difficult time that day and asked for a continuance, which the parties agreed to do in a May 2017 so-ordered compliance conference stipulation. Rather than conducting the deposition, defendants interposed these motions, and by refusing to conduct plaintiff's continued deposition as scheduled, they ignored the court order. If defendants again refuse to continue plaintiff's deposition, they will be deemed to have waived of their right to do so.

That plaintiff may have difficulties with her memory, had a stroke in the past, and may be suffering from some form of dementia does not establish that she is incompetent to testify or assert her claims. DDS'S submission of some of plaintiff's medical records for the first time in reply is not only improper (*see e.g., All State Flooring Distributors, L.P. v MD Floors, LLC*, 131 AD3d 834 [plaintiff improperly submitted document for first time in reply]), but the records do not establish incompetence. Additionally, the cases cited by defendants are inapposite, including

Regina v Day, 186 AD2d 119 (2d Dept 1992), in which the plaintiff's own psychologist submitted a report wherein she found that plaintiff was not competent to testify.

Other cases cited by defendants are also off point. For example, in *Brian VV v Chenango Forks Cent. School Dist.*, the issue was whether a child was competent to testify 299 AD2d 803 [3d Dept 2002]), as it was in *Jensen v Shady Pines*, 32 AD2d 648 (2d Dept 1969), and *Tuohy v Gaudio*, where the plaintiff was a not only an infant but also suffered from brain damage (87 AD2d 610 [2d Dept 1982]). *Dabbagh v Newmark Knight Frank Glob. Mgt. Svces., LLC*, also addresses whether "an infant" is competent to testify. (99 AD3d 448 [1st Dept 2012]). And in *Steenbuck v Sklarow*, 63 AD3d 823 (2d Dept 2009), the Court does not mention a competency hearing at all, but finds that the plaintiff's failure to appear for a General Municipal Law § 50-h hearing was excusable due to his acknowledged incapacity.

Also inapposite is *Rau v Tannenbaum*, where the Court dismissed a defense that the plaintiff lacked the capacity to sue, and noted that while the defendant could seek a judicial determination of the plaintiff's competency and the appointment of a committee or guardian for him, until such a determination was made, the plaintiff was entitled to continue prosecuting his action. (85 AD2d 522 [1st Dept 1981]).

Accordingly, it is hereby

ORDERED, that defendants' motions and cross motions for summary judgment or for a competency hearing, under sequence numbers one and two, are denied in their entirety; it is further

ORDERED, that plaintiff appear for her continued deposition within 45 days of the date of this order; and it is further

ORDERED, that the parties appear for a compliance conference on June 13, 2018 at 2:15 pm, as previously scheduled.

5/11/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	DO NOT POST		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE