

Lindsay v Tishman Speyer Props., L.P.

2018 NY Slip Op 31427(U)

July 2, 2018

Supreme Court, New York County

Docket Number: 152226/2016

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2 Justice INDEX NO. 152226/2016 BERNARDITA LINDSAY, Plaintiff, MOTION SEQ. NO. 002

- v -

TISHMAN SPEYER PROPERTIES, L.P., TISHMAN SPEYER PROPERTIES, INC., NBCUNIVERSAL REAL ESTATE LLC, RCPI LANDMARK PROPERTIES, L.L.C., RCP ASSOCIATES, RCPI CLEANING SERVICES, L.L.C., XYZ SECURITY

DECISION AND ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 63, 65

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this slip and fall tort action, defendant NBCUniversal Real Estate LLC ("NBCU") moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiff Bernardita Lindsay's complaint as well as Tishman Speyer Properties, L.P. ("Tishman L.P."), Tishman Speyer Properties, Inc. ("Tishman Inc."), RCPI Landmark Properties, L.L.C. ("RCPI Landmark"), and RCP Associates' ("RCP") cross-claim seeking indemnification. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

On May 8, 2013, plaintiff purportedly sustained injuries when she fell down a set of stairs at 30 Rockefeller Plaza in Manhattan, New York. (Doc. 42.) She asserts that her fall was caused by the presence of water on the stairway, which was intended for general use by the public, and

that the water was permitted to remain on the steps for an unreasonable amount of time. (*Id.*)

Alleging negligence, plaintiff thereafter instituted this personal injury action against the following entities: Tishman L.P.; Tishman Inc.; NBCU; RCPI Landmark; RCP; XYZ Security (a fictitious name for a company performing security services at 30 Rockefeller Plaza); and ABC Maintenance (a fictitious name for a company performing maintenance services at the site). (*Id.*)

In an amended complaint, plaintiff dropped her claims against ABC Maintenance and added RCPI Cleaning Services, L.L.C. (“RCPI Cleaning”) as a defendant. (Doc. 43.)

Plaintiff’s claims against all defendants stem from her assertion that they either owned, operated, maintained, managed, had the exclusive care and custody of, or otherwise controlled the premises at issue at 30 Rockefeller Plaza on the date of the accident. (Docs. 42, 43.) She argues that defendants were obligated to maintain the subject premises in a reasonably safe condition for use by the public and that defendants failed to do so when water remained on the stairs for an unreasonable period of time. (Doc. 43.) In its verified answer to the complaint, NBCU denied nearly every allegation, admitting only that it is a Delaware limited liability company. (Docs. 45, 48.) Further, NBCU filed a cross-claim for indemnification against Tishman L.P., Tishman Inc., RCPI Landmark, RCP (hereinafter “co-defendants”), RCPI Cleaning, and XYZ Security. (Doc. 45.) Co-defendants, in turn, submitted a cross-claim against NBCU and XYZ Security, asserting that plaintiff’s injuries were the result of their negligence. (Doc. 46.)

During discovery, plaintiff requested a plethora of documents from NBCU, including its insurance agreements and policies, corporate records, copies of statements of opposing parties, any photographs and videos pertaining to the accident, and information for any witnesses and expert witnesses that NBCU retained for this matter. (Doc. 53.) NBCU represents that it

complied with plaintiff's discovery demands to the extent possible. (Docs. 57, 58, 59.) NBCU turned over to plaintiff its Commercial General Liability insurance policy as well as a policy which it has with ACE Property & Casualty Insurance Company. (Doc. 58.) However, NBCU also represented that it is not in possession of any photographs or videos relating to the accident, that it is not aware of any eyewitnesses, that it has not retained any expert witnesses, that it does not have possession of any statements made by the opposing parties, and that it does not have any other document or piece of information that is relevant to this action. (Doc. 57.) With respect to its corporate records, NBCU objected to producing those records on the ground that plaintiff's demand was vague and overly burdensome. (Doc. 59.)

NBCU, pursuant to CPLR 3212, has moved to dismiss plaintiff's complaint as well as the cross-claim of the co-defendants, who have not opposed the motion. (Docs. 40, 41.)

POSITIONS OF THE PARTIES:

In support of its motion for summary judgment, NBCU argues that it does not own, operate, maintain, manage, have the exclusive care or custody of, or otherwise control the premises at 30 Rockefeller Plaza. NBCU has submitted an affidavit of Andrew Fossett ("Fossett"), who is the Senior Vice President of Corporate Transactions for NBCUniversal Media, LLC ("NBCU Media") and is also a member of the Board of Managers for NBCU. In the affidavit, Fossett claims that NBCU was formed for the sole purpose of holding brokerage licenses on behalf of the NBCU Media family of companies, and therefore that NBCU neither has any employees nor owns, operates, or maintains any real property. NBCU also asserts that further discovery would be fruitless, as it has already complied with plaintiff's discovery demands and has represented that it possesses no additional relevant information to turn over.

Based on the discovery already conducted, NBCU claims that plaintiff cannot maintain a viable cause of action against it.

In opposition, plaintiff argues that NBCU's summary judgment motion is premature because discovery is still ongoing and depositions have not yet been conducted. According to plaintiff, further discovery is warranted because NBCU may have information establishing it as the owner or manager of 30 Rockefeller Plaza. Moreover, plaintiff has submitted a document printed from the website of the New York City Department of Buildings which purports to show "NBC/Universal" as the owner of the premises.

The Court now considers NBCU's motion for summary judgment.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie demonstration of entitlement thereto as a matter of law on the undisputed facts. (*See City of New York v. R.A.M. Used Auto Parts, Inc.*, 43 Misc 3d 1205[A], 2014 NY Slip Op 50503[U], *3 [Sup Ct, NY County 2014].) In so doing, the moving party must tender sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party satisfies this initial showing, then the burden shifts to the opposing party to raise a genuine, triable issue of fact with admissible evidence. (*See Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 [1st Dept. 2006].) If the opposing party fails to make that showing, then summary judgment must be granted. (*See Oates v. Marino*, 106 A.D.2d 289, 291 [1st Dept. 1984]) (granting summary judgment where the opposing party could not establish a triable issue of fact). However, if the moving party fails to make a prima facie demonstration of entitlement to judgment as a matter of law, then the court must deny the motion regardless of the

sufficiency of the opposing papers. (*See Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 [2008] (internal quotations omitted).)

With respect to the opposing party's burden, CPLR 3212(f) allows a court to deny summary judgment when facts are unavailable to the movant's adversary. "Further discovery may be permitted where it appears that essential facts supporting the position of an opposing party exist but cannot be stated." (*Smith v. Andre*, 43 A.D.3d 770, 771 [1st Dept. 2007].) In other words, if the opposing party can convince the court that further discovery may lead to issues of fact, then the motion will be denied. (*See Solano v. Skanska USA Civ. Northeast Inc.*, 148 A.D.3d 619 [1st Dept. 2017] (denying a defendant's summary judgment motion where plaintiff demonstrated that further discovery could establish defendant's liability). However, courts have held that an opposing party's mere surmise, conjecture, or suspicion is insufficient to create a genuine issue of fact. (*See Oates*, 106 A.D.2d at 291.)

Here, NBCU has failed to establish its prima facie showing of entitlement to judgment as a matter of law. Although Fossett's affidavit represents that NBCU is not the owner or manager of 30 Rockefeller Plaza, NBCU failed to submit any corporate documents to support its motion. Therefore, the affidavit, alone is insufficient evidence on which to grant summary judgment, as there are additional facts regarding ownership of 30 Rockefeller Plaza that may be disclosed once corporate records are exchanged or once depositions are taken. Relatedly, the Court notes that NBCU's summary judgment motion is premature because party depositions have yet to be conducted. (*See Solano*, 148 A.D.3d at 619 (denying summary judgment where discovery was ongoing and depositions were still outstanding); *see also Figueroa v. City of New York*, 126 A.D.3d 438, 439 [1st Dept. 2015] ("It was premature to consider defendants' cross motion for summary judgment before plaintiff deposed (defendants).").)

Even if NBCU had established its prima facie case, summary judgment is still not warranted because plaintiff's opposing papers raise a genuine, triable issue of fact. Plaintiff has submitted a document printed from the New York City Department of Buildings' website which clearly marks "NBC/Universal" as an owner of 30 Rockefeller Plaza. Contrary to NBCU's position, this print out constitutes proper evidence that the Court may consider because "[t]here is every reason to believe that the information that appears on governmental websites is a reasonably reliable reflection of what the hard copies on file with the government show." (*Tener Consulting Servs., LLC v. FSA Main St., LLC*, 23 Misc 3d 1120[A], 2009 NY Slip Op 50857[U], *5 [Sup Ct, Westchester County 2009].) Thus, plaintiff is not relying on mere conjecture or surmise to create an issue of fact. Although the print out does not specify which entity in the NBCU Media family of companies owns 30 Rockefeller Plaza, that uncertainty only accentuates the need for further discovery. Without this specification, the possibility is left open that the movant, NBCU, can be found liable for plaintiff's injuries if it is disclosed to be the owner of the premises.

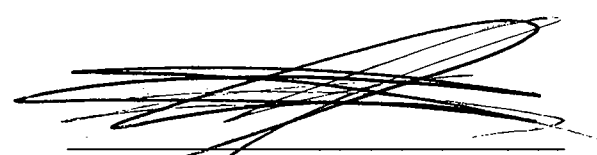
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that NBCU's motion to dismiss plaintiff's claims is denied; and it is further

ORDERED that NBCU's motion to dismiss the co-defendants' cross-claim is denied;
and it is further

ORDERED that this constitutes the decision and order of the Court.

7/2/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>