

Estrella v 211 Dyckman St., LLC
2018 NY Slip Op 31709(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 155108/2014
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

REINALDO ESTRELLA and ANAMARIA CASTILLO,
Plaintiffs,

INDEX NO. 155108/2014

- v -

MOTION DATE _____

211 DYCKMAN STREET, LLC, 4761 BROADWAY ASSOCIATES
LLC, and TOMMY TORRES,

MOTION SEQ. NO. 003

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for RESTORE/SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted and the complaint is dismissed.

In this personal injury action, defendant 211 Dyckman Street, LLC moves: 1) to restore this case to the active calendar; 2) upon restoration to the calendar, for summary judgment dismissing the complaint pursuant to CPLR 3212, or, in the alternative; 3) dismissing the complaint pursuant to CPLR 3216 for failure to prosecute; and 4) for such other relief as this Court deems just and proper. The motion is unopposed. After a review of defendant's motion, and after consideration of the relevant case law and statutes, **the motion is granted and the complaint is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Reinaldo Estrella, an employee of International Food House Restaurant (IFHR), was allegedly injured on February 14, 2013 when he tripped and fell on a drainage grate at his place of employment at 217 Dyckman Street, New York, New York. The premises were owned by defendant 211 Dyckman Street, LLC (211 Dyckman) and were leased to nonparty IFHR.

This action was commenced against defendants 211 Dyckman, 4761 Broadway Associates, LLC, and Tommy Torres by the filing of a summons and verified complaint on February 23, 2014. Doc. 1.¹ In the complaint, plaintiff alleged that he was injured due to the negligence of defendants, who either created or had actual or constructive notice of the allegedly dangerous condition. Doc. 1. Plaintiff's wife, Anamaria Castillo, asserted a claim for loss of consortium. Doc. 1.

A preliminary conference was held in this matter on February 5, 2015, at which plaintiff was directed to file a note of issue by December 3, 2015. Doc. 74.

At his deposition, conducted in October and November of 2015, plaintiff testified that he was injured while working for IFHR on February 14, 2013. Doc. 71, at p. 31-33. The incident occurred when he tripped on a drainage grate in the basement of the restaurant. Doc. 71, at p. 41, 52-53, 73-74. His foot got caught in the grate causing him to fall. Doc. 71, at p. 41, 76-78, 81. Plaintiff circled the metal grate in a photograph to indicate the precise location of his fall. Doc. 71, at p. 52-53. He did not notice any food or waste on the floor before he fell. Doc. 71, at p. 74. He had never previously complained about the metal grate and was not aware of anyone who had. Doc. 71, at p. 93.

David Malanga, director of property management for Solil Management LLC, which managed the premises, testified at a deposition on behalf of 211 Dyckman in December of 2015.

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

Doc. 73, at p. 6-7. Malanga stated that IFHR occupied 217 Dyckman Street pursuant to a lease with 211 Dyckman. Doc. 73, at p. 14. He stated that, although the address of the tenant, IFHR, was 217 Dyckman Street, the building was known as 211 Dyckman Street. Doc. 73, at p. 7. The lease between 217 Dyckman Street and IFHR was identified by Malanga and was marked as an exhibit at Malanga's deposition, and he stated that the lease was in effect as of the date of the accident. Doc. 73, at p. 14-15; Doc. 81.

Pursuant to paragraph 49 of the addendum to the lease, 211 Dyckman was responsible only for structural repairs. Doc. 81. Malanga stated that according to the lease, any repairs to be made to the grate would have been performed by IFHR and not by 211 Dyckman. Doc. 73, at p. 18.

Since the note of issue was not filed by December 3, 2015, as required by the preliminary conference order, this Court (Kenney, J.) marked this action off its active calendar by order dated January 21, 2016. Doc. 29.

By stipulation dated December 18, 2015, plaintiffs discontinued their claims as against 4761 Broadway Associates, LLC and Tommy Torres. Doc. 42.²

On April 20, 2016, 211 Dyckman demanded all outstanding discovery and purported to serve a 90-day notice pursuant to CPLR 3216. Doc. 76.

On or about August 16, 2016, 211 Dyckman moved (mot. seq. 002): 1) to restore this action to the calendar; 2) pursuant to CPLR 3216, to dismiss the complaint due to plaintiff's failure to prosecute the action or; 3) in the alternative, for failure to provide all outstanding discovery. Doc. 30. Plaintiff opposed the motion and cross-moved for an order restoring the action to the calendar, extending plaintiff's time to file a note of issue, to vacate 211 Dyckman's 90-day notice, and for such other relief as this Court deemed just and proper. Doc. 44. By order dated February 14,

² The caption was never amended to reflect the discontinuance against these entities.

2017, this Court (Kenney, J.), inter alia: denied 211 Dyckman's motion to dismiss "within this court's discretion, at this juncture"; directed plaintiff to respond to 211 Dyckman's discovery demands dated November 23, 2015 and to appear for a physical examination no later than March 15, 2017; and ordered that either party could move to restore the action to the trial calendar once discovery had been completed. Doc. 63. The decision did not address plaintiff's cross motion, thereby implicitly denying the same.

On October 18, 2017, 211 Dyckman Street, LLC filed the instant motion seeking: 1) to restore this case to the active calendar; 2) upon restoration to the calendar, for summary judgment dismissing the complaint pursuant to CPLR 3212, or, in the alternative; 3) dismissing the complaint pursuant to CPLR 3216 for failure to prosecute; and 4) for such other relief as this Court deems just and proper. The motion is unopposed. In support of the motion, 211 Dyckman submits, inter alia, the affidavit of Steven Greve, an engineer, who opined that the grate was not a structural element of the building. Doc. 68.

On or about January 8, 2018, Asher & Associates, P.C., the firm representing plaintiff in this matter, moved to be relieved as counsel. Doc. 89. By order dated January 30, 2018, Asher & Associates, P.C. was relieved as counsel. Doc. 93. Although plaintiffs were granted 30 days to retain new counsel (Doc. 93), they have not done so.

LEGAL CONCLUSIONS:

Restoration to the Calendar

Although Justice Kenney's order dated February 14, 2017 stated that either party could move to restore the action to the trial calendar once discovery had been completed (Doc. 63), the good faith affirmation submitted by 211 Dyckman's attorney in support of the instant application

reflects that no further discovery has been forthcoming from plaintiffs. Thus, this Court finds that 211 Dyckman's motion to restore the case to the calendar should be granted. Since plaintiffs do not oppose this motion, there has been no showing that they would be prejudiced by the restoration of the case to the calendar.

Summary Judgment

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 (2010) quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Here, defendant 211 Dyckman has established its prima facie entitlement to summary judgment dismissing the complaint by submitting plaintiff's sworn deposition testimony that he fell on a grate in the basement at 217 Dyckman Street, that he was not aware of any problems with the grate before he fell, and that he did not know about any complaints being made about the grate prior to the incident. Malanga also testified that the lease required the tenant, IFHR, and not 211 Dyckman, to make non-structural repairs to the leased premises. Further, Greve stated the grate was not a structural element. Since 211 Dyckman established that it was a landlord-out-of-possession which did not have the duty to perform non-structural repairs, it is entitled to summary judgment dismissing the complaint. *See Dinkins v Kansas Fried Chicken, Inc.*, ___ AD3d ___, 2018 NY Slip Op 00618 (1st Dept 2018); *Figueroa v Skillman Realty Co.*, 154 AD3d 470 (1st Dept 2017); *Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413 (1st Dept 2012). By failing to oppose

the motion, plaintiffs failed to rebut this prima facie showing. Thus, the complaint is dismissed as against 211 Dyckman.

Failure to Prosecute

Given the foregoing, there is no need to address 211 Dyckman's argument that the case should be dismissed pursuant to CPLR 3216.

In light of the foregoing, it is hereby:

ORDERED that the branch of the motion by 211 Dyckman Street, LLP seeking to restore this case to the court's active calendar is granted; and it is further

ORDERED that the branch of the motion by 211 Dyckman Street, LLP seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is granted, and the complaint is dismissed in its entirety; and it is further

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

3/26/2018
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