

Feldman v Five Points II LLC
2018 NY Slip Op 32401(U)
August 8, 2018
Supreme Court, Queens County
Docket Number: 716434/2017
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, CHEREÉ A. BUGGS
Justice

IAS PART 30

ARLENE FELDMAN,

Index No.: 716434/2017

Plaintiff,

Motion Date: June 13, 2018

-against-

FIVE POINTS II LLC, AND KAUFMAN
MANAGEMENT COMPANY, LLC., MISORENA,
LTD., 260 SAMPLE SALE, NEST FRAGRANCES
HOLDINGS, LLC, AND NEST FRAGRANCES,
LLC.,

Motion Cal. No.: 17

Motion Seq. No.: 1

Defendants.

The following e-file papers numbered 17-24;28-30 submitted and considered on this motion by defendants Nest Fragrances, LLC and Nest Holdings, LLC., (hereinafter "Nest") pursuant to CPLR sections 3211(a)(1) and (7) dismissing the complaint and all cross-claims against it as they are without merit and Nest is not proper party to this litigation.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	EF 17-24
Answering Affidavits-Exhibits.....	EF 28-29
Replying Affidavits.....	EF 30

Plaintiff, Arlene Feldman(hereinafter "Feldman") initiated this litigation with the filing of a verified complaint on November 28, 2017, to recover damages for injuries she allegedly sustained on November 4, 2017 as a result of trip and fall accident due to the negligently placed stanchion on the sidewalk adjoining 260 5th Avenue, New York, New York. Plaintiff alleged that the accident was due to the negligence of the said defendants. On December 27, 2017, co-defendants Misorena Ltd., and 260 Sample Sale filed a verified answer with cross-claims. On February 8, 2018, co-defendants Five Points II LLC and Kaufman Management Company, LLC filed a verified answer with cross-claims. On February 13, 2018, a Request for Judicial Intervention and for a Preliminary Conference were filed.

On February 20, 2018, parties entered into a Stipulation Extending Nest's Time to Answer or Appear until March 12, 2018. On the said agreed dated, Nest filed this motion.

Now, Nest moves to dismiss the verified complaint pursuant to CPLR sections 3211(a)(1) and (7) and all claims against it. In support of the motion, Nest submitted Feldman's summons and verified complaint; defendants' verified answers; Request for Judicial Intervention, Stipulation Extending Time to Answer or Appear, an affidavit of its Chief Financial Officer, Marshall Bernstein (hereinafter "Bernstein") dated February 27, 2018; licensing agreement effective as of September 12, 2017, and Certificate of Liability Insurance.

Bernstein alleges in his affidavit that on or about September 12, 2017, Nest Fragrances, LLC and Chelsea Morning, Inc., d/b/a/ 260 Sample Sale entered into a Licensing Agreement. He alleges that at the time of the subject accident, the agreement was in effect. He further alleges that the agreement was prepared in the regular and ordinary course of business. He states that 260 Sample Sale operates a showroom and sales office at the ground level of the subject premises and has the customary and usual equipment for merchandising and selling product at the subject premises and accepting deliveries and packing for return equipment. Under the said agreement, Nest was permitted to sell its fragrances at the subject premises; however, the use of the premises was limited to providing fragrances for sale through 260 Sample Sale.

Bernstein further explains that the agreement provided that Nest would ship all the merchandise to the premises and 260 Sample Sale would "supply all the aspects of the sale to be conducted... including floor staff, security personnel, [and] display..." It was further agreed that 260 Sample Sale would provide liability insurance for the premises to cover any claims and liability for personal injuries "arising out or relating to" the services 260 Sample Sale provided. However, Nest was to provide insurance to cover its merchandise from damages, theft, or fire in the amount of \$1,000,000.00 per occurrence and \$3,000,000.00 in the aggregate. Bernstein alleges that Nest did not own, manage, or control the subject premises and further alleges that Nest did not maintain the subject premises to be responsible for the maintenance or cleaning the sidewalk adjoining the premises where the accident occurred. Lastly, Bernstein alleges that Nest did not supervise any of the employees at the subject premises or ever operated a stanchion at the subject premises.

In opposition, plaintiff alleges that the motion is premature because crucial discovery has yet to occur and depositions have not been held. Plaintiff also alleges that there exists genuine issues

of material facts.

In opposition, co-defendants Misorena, Ltd. and 260 Sample Sale allege that this motion should be denied for the following reasons: (1) evidence submitted is not documentary and insufficient to warrant a dismissal pursuant to CPLR 3211 (a)(1); (2) motion is premature as depositions have not been held; and (3) genuine issues of material fact exist as to the scope of services provided and Nest's involvement. As for the documentary evidence provided, co-defendants allege that documentary evidence cannot be affidavits, testimony or communications thereby noting that the licensing agreement and the affidavit is insufficient. Further, co-defendants allege that there are issues of fact with the licensing agreement; as a result, discovery should take place.

In reply, Nest finds both plaintiff and co-defendants' arguments unavailing because the motion is not premature, and moreover, its documentary evidence submitted in support of the motion was sufficient to grant its requested relief. Nest also contends that plaintiff's opposition was untimely and should not be considered as well as its motion to dismiss not being a motion for summary judgment.

Under CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence. Under CPLR 3211 (a)(7), a party may move to dismiss if the pleading fails to state a cause of action.

Here, "when it is clear from a license agreement that a defendant had no custodial, cleaning, maintenance, control, supervision or responsibilities for a premises, that defendant cannot be found to have a duty of care with respect to any unsafe condition on the premises" (*Stanton v Oceanside Union Free School Dist.*, 140 AD3d 731 [2d Dept 2016], citing *Gibba v Port Auth.*, of *School Dist.*, 17 AD3d 252 [1st Dept 2005]). As stated above, Bernstein established in his affidavit the terms of the Licensing Agreement. In the agreement, it set forth that Nest did not own, lease, maintain, control, supervise, or manage the subject premises. Therefore, Nest was not responsible for the accident on the subject premises.

As for documentary evidence, the Second Department has held that "a motion to dismiss pursuant to CPLR 3211 (a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*See Cives Corp., v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010].) "In order for evidence submitted under a CPLR 3211

(a)(1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable'" (*Cives Corp., v George A. Fuller Co., Inc.*, 97 AD3d at 714, citing *Grandada Condominium III Assn v Palomino*, 78 AD3d 996, 996-997 [2d Dept 2010]).

Here, this Court has determined that the licensing agreement is documentary evidence as it is clear of ambiguity, it is a real and accurate description of Nest and 260 Sample Sale's duties responsibilities, and it is undeniable. (See *Id.*, see also *Cochard-Robinson v Concepcion*, 60 AD3d 800, 802 [2d Dept 2009].) "Judicial records as well as other documents reflecting out-of-court transactions such as . . . contracts and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (See *Fontanetta v John Doe 1*, 73 AD3d at 84-85.) The sole purpose of the licensing agreement was to set forth how Nest and 260 Sample Sale would sell fragrances such as displaying, packing and shipping such merchandise and for no other purposes (see Nest's motion-Exhibit F-Licensing Agreement.) Additionally, Nest's equipment was limited to posters, bills, or cards inside the showroom and the sales office and not for outside use. Therefore, the documentary evidence submitted in support of the motion supports that Nest was not negligent in contributing to the subject accident and plaintiff's injuries.

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; see also *Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]). Here, the facts presented in this case fail to prove that Nest was responsible for the stanchion on the sidewalk that caused the subject accident. Further, a case should be dismissed pursuant to CPLR 3211 (a)(7) if the facts alleged do not fit within any cognizable legal theory, lacking any merit (see generally *Hecht v Andover Assocs. Mgmt. Corp., etal.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineola Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]). Here, as noted above, the facts do not fit plaintiff's claim for negligence against Nest. Therefore, the case should be dismissed against them.

Additionally, this Court considers this motion a motion to dismiss under CPLR 3211 (a)(1) and (2) and not CPLR 3212 as was in Nest's requested relief. Despite co-defendants' and plaintiff's arguments, there are no issues of fact because Nest was not responsible for the maintenance and control of the subject premises.

Therefore, based upon the aforementioned, Nest's motion pursuant to CPLR sections 3211(a)(1) and (7) dismissing the complaint and all claims against it is granted.

This constitutes the decision and Order of the Court.

Dated: August 8, 2018



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Hon. Chereé A. Buggs, J.S.C.

FILED
AUG 24 2018
COUNTY CLERK
QUEENS COUNTY