Lebron v 3835 9th Ave. Realty Corp.
2018 NY Slip Op 32447(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 156703/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 156703/2015

EDERMINO LEBRON,

Plaintiff,

MOTION SEQ. NO. 002

- v -

3835 9TH AVE. REALTY CORP.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 47, 48, 49, 50, 51, 52, 53, 54, 58

were read on this motion to/for JUDGMENT - SUMMARY.

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

In this personal injury action commenced by plaintiff Edermino Lebron against defendant 3835 9th Avenue Realty Corp., defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after consideration of the parties' motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff alleges that he was injured on May 30, 2015 at approximately 7:20 p.m. At that time, he rolled down a metal security gate in front of his place of employment, Lebron Restaurant Supply ("Lebron"), located at 3835 9th Avenue in New York County ("the building") and then,

when he turned around, he tripped over a forklift parked on the sidewalk adjacent to his workplace. The building was owned by defendant and leased to three tenants. Doc. 35, at p. 19. One tenant was Lebron and another, located next door, was Dairy Direct, a grocery vendor. Doc. 35, at p. 20-22, 25.

Plaintiff commenced the captioned action on July 2, 2015. Doc. 1. Defendant joined issue on or about August 18, 2015. Doc. 6. In his bill of particulars, plaintiff alleged, inter alia, that defendant had actual and constructive notice of the presence of the forklift. Doc. 39.

At his deposition, plaintiff stated that, on the evening in question, he closed the security gate to his place of employment and, when he turned to walk away, he tripped over the forklift. Doc. 34, at p. 24-26. He identified the forklift in a photograph marked at his deposition. Doc. 34, at p. 20.

Plaintiff maintained that, prior to his accident, he complained to a man named Jose, who worked for Dairy Direct, about the presence of the forklift on the sidewalk, urging Jose that it should not be there for "safety reasons." Doc. 34, at p. 27-28.

Toy Eng, president of TLE Associates, Inc. ("TLE") appeared for a deposition on behalf of defendant. Eng said that defendant owned the building and that TLE has been managing agent for the building pursuant to an oral agreement since 1995. Doc. 35, at p. 8-12. Eng visited the building approximately once per month. Doc. 35, at p. 15. Eng did not know who owned the forklift and denied that defendant would have supplied the forklift to a tenant. Doc. 35, at p. 31. She denied that any of the tenant's leases would have contained a provision regarding storage of equipment such as a forklift. Doc. 35, at p. 32. She believed that the tenant's leases only required

that they keep the sidewalk free of debris such as garbage. Doc. 35, at p. 32-33. She did not recall ever making any complaints to defendant or to Dairy Direct about the presence of the forklift on the sidewalk. Doc. 35, at p. 33-34. Eng did not know whether Lebron or Dairy Direct used a forklift as part of its business operations. Doc. 35, at p. 36, 57

On September 8, 2017, defendant filed the instant motion seeking summary judgment dismissing the complaint pursuant to CPLR 3212. Doc. 30. In support of the motion, defendant submits, inter alia, the pleadings, bill of particulars, the deposition transcripts, and an affidavit by Paul Gagliardi, defendant's President, who states that defendant is an out-of-possession landowner which did "not own, operate, lease, manage, [or] control" any forklifts at the building and did not have notice of the presence of any forklift at the building prior to plaintiff's alleged accident. Doc. 40.

In support of the motion, defendant argues that it cannot be liable for plaintiff's injuries since it is a landlord out-of-possession which merely had the right to reenter the building for the purpose of inspecting the same, and that it cannot be liable absent a contractual or statutory duty.

In opposition to the motion, plaintiff asserts, inter alia, that defendant has failed to establish that it is a landlord out-of-possession since it fails to submit a copy of its lease. Plaintiff further maintains that it has alleged specific statutory provisions violated by defendant, including New York City Administrative Code § 7-210, which sets forth the responsibilities of property owners in the City of New York for maintaining adjacent sidewalks.

In reply, defendant reiterates its argument that it cannot be held liable as a landlord out-of-possession. It further asserts that its motion must be granted since plaintiff did not allege statutory

violations until it supplemented its bill of particulars in October of 2017, after the instant motion was filed.

LEGAL CONCLUSIONS:

As noted above, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

> [S]ummary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When the movant fails to make this prima facie showing, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.*). When deciding a motion for summary judgment, the court's function is issue finding rather than issue determination (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Moreover, the evidence will be construed in the light most favorable to the nonmoving party (*id.*). Summary judgment must be denied "where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [internal quotation marks omitted]) or where "the issue is arguable" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968] [internal quotation marks omitted]).

Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC, 157 AD3d 479, 481-482 (1st Dept 2018).

Defendant has failed to establish its prima facie entitlement to summary judgment. Despite its contention that it is an out-of-possession landlord, defendant fails to submit any lease which would establish the circumstances, if any, under which it was permitted to reenter the premises.

This omission is highlighted by the fact that Eng testified regarding the defendants' duties under the leases issued to the tenants of the buildings. Therefore, defendant's motion must be denied.

The parties' remaining contentions are without merit or need not be addressed given the finding above.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant 3835 9th Avenue Realty Corp. is denied; and it is further

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

10/1/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE