

**Lopez v CRP Uptown Portfolio II LLC**

2019 NY Slip Op 30163(U)

January 22, 2019

Supreme Court, New York County

Docket Number: 150213/2016

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

JOSE LOPEZ,

Plaintiff,

- v -

INDEX NO. 150213/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

CRP UPTOWN PORTFOLIO II LLC and 2108 DELI  
GROCERY INC.,

Defendants.

-----X

CRP UPTOWN PORTFOLIO II LLC,

Third-Party Plaintiff,

- v -

YUEN FA REALTY, INC. and 2108 DELI GROCERY  
INC.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 80, 81, 82, 84, 86, 87, 88, 89, 117

were read on this motion to dismiss.

Third-party defendant Yuen Fa Realty, Inc. (Yuen) moves pursuant to CPLR 3211(a)(1), (5), and (7) for an order summarily dismissing the complaint. Third-party plaintiff CRP Uptown Portfolio II LLC (CRP) opposes and cross moves for summary judgment.

I. RELEVANT BACKGROUND

On January 11, 2016, plaintiff initiated this action alleging that on February 20, 2014, he fell and sustained injury due to a defect in the sidewalk abutting 2108 Amsterdam Avenue in

Manhattan. At the time, defendants CRP and 2108 Deli Grocery Inc. owned the premises at 2108 Amsterdam. (NYSCEF 70).

On April 20, 2018, third-party plaintiff impleaded Yuen, the owner of premises at 2106 Amsterdam, alleging that in the event CRP is held liable to plaintiff, Yuen should be held liable to CRP for either the full amount awarded or a portion thereof. (NYSCEF 74).

## II. CONTENTIONS

### A. Yuen (NYSCEF 65-74)

Yuen relies on a decision and order, dated March 19, 2018, rendered in *Jose Lopez v Yuen Fa Realty and Peter Pun*, Index No. 450044/2017, whereby it was granted summary dismissal of plaintiff's claim against it based on its demonstration that plaintiff's tripping accident occurred on the property located at 2108 Amsterdam, not on property owned by Yuen, arguing that the decision is the law of the case or that plaintiff is collaterally estopped from arguing otherwise. Yuen submits all of the underlying motion papers from that action including (1) a photograph of the location where plaintiff allegedly fell, on which plaintiff circled and identified the sidewalk defect at issue; (2) the expert affidavit of an engineer who opines that the sidewalk defect is in front of 2108 Amsterdam; and (3) the affidavit of a licensed land surveyor, in which he states that a survey demonstrates that the sidewalk defect was located entirely in front of the property at 2108 Amsterdam. (NYSCEF 71). Yuen thus argues that pursuant to CPLR 3211(c), it offers evidence sufficient to allow the motion to be considered as one seeking summary judgment pursuant to CPLR 3212.

To the extent that Yuen's evidence does not constitute documentary evidence or is insufficient to warrant granting it summary judgment, Yuen maintains that CRP fails to state a

cause of action, as CRP's claim for common law indemnification/contribution lacks a factual basis for finding Yuen liable.

#### B. CRP (NYSCEF 80-81)

Although CRP does not object to treating the motion as one for summary judgment, it argues that when the order dismissing claims against Yuen in the other case was decided, not all of the facts were available, and that in any event, the earlier order has no preclusive effect because CRP was not a party to that action and did not have a full and fair opportunity to be heard on their claims. CRP also contends that Yuen's evidence is insufficient, as the property survey was not conducted by the affiant and it is unsworn, unstamped, and reflects no official seal. In addition, the survey is dated May 8, 2015, while the supporting affidavit was provided more than two years later, and the engineer's affidavit contains no information supporting his conclusions, such as inspection notes, schematics, measurements, calculations, or photographs.

CRP submits its own expert affidavit, that of an engineer who opines that Yuen's survey is erroneous and that the sidewalk defect is in front of 2106 Amsterdam. (NYSCEF 81). As the parties' expert opinions conflict, they present a triable issue of fact, rendering summary judgment inappropriate.

#### C. Yuen's Reply ((NYSCEF 86-89)

Yuen reiterates its arguments regarding law of the case and collateral estoppel.

Yuen explains that given the death of the surveyor of the property, it was unable to offer his affidavit, and that as its affiant is a licensed surveyor, employed by the firm that employed the deceased surveyor at the time the survey was completed, and is familiar with all the relevant records, his affidavit is sufficient support for the survey. While an unstamped copy of the survey was inadvertently annexed to the original motion, Yuen submits an updated affidavit attesting to

the sworn, stamped, and officially sealed survey, and explains that the time elapsing from the date of the survey to the date of the affidavit is attributable to the time elapsing before filing the motion for summary judgment.

Yuen observes that CRP does not submit a survey in opposition, but only the affidavit of an engineer unqualified to opine on its accuracy. Moreover, it argues, CRP's expert has no personal knowledge of the circumstances in issue, as he did not perform his own survey. Yuen reasserts its arguments concerning the sufficiency of the evidence and notes that CRP fails to oppose its argument that its claims are improperly pleaded.

### III. ANALYSIS

#### A. Failure to state a cause of action

A pleading may be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Affidavits may be submitted "to preserve inartfully pleaded, but potentially meritorious claims." (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] [standard is whether pleader has cause of action rather than whether one was properly stated]).

CRP's complaint, in conjunction with its affidavit in opposition to the motion sufficiently apprises Yuen of the conduct on which the indemnification and contribution claim is based. (*Blonder & Co. v Citibank, N.A.*, 28 AD3d 180, 189 [1<sup>st</sup> Dept 2006] [expert affidavit may be used to defeat motion to dismiss where complaint facially insufficient]).

#### B. Preclusion

Pursuant to CPLR 3211(a)(5), a party may move for an order dismissing a cause of action

against it on the ground that it is barred by a prior decision on the merits.

A judicial determination constitutes the law of the case when rendered during a single litigation before final judgment. Such a determination precludes later determinations of the same issue, if the parties had a full and fair opportunity to litigate the earlier determination. (*People v Evans*, 94 NY2d 499, 502 [2000]). As the decision and order relied on by Yuen was rendered in a different litigation, it does not constitute the law of the case in this action.

Issues litigated and resolved which were essential to the prior determination may not be relitigated. (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018], quoting *New Hampshire v Maine*, 532 US 742, 748 [2001]). However, the party asserted to be collaterally estopped from advancing an issue must have been afforded a full and fair opportunity to contest the prior determination. (*Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984]). As CRP was not a party to the original action, it had no opportunity to contest whether the sidewalk defect was in front of 2106 or 2108 Amsterdam, and as such, CRP is not precluded from asserting its claim.

### C. Location of accident

When parties receive no notice from the court that a motion to dismiss is converted into one seeking summary judgment, the motion may nonetheless be converted if all parties (1) specifically request it, (2) indicate that the case involves purely legal questions, or (3) deliberately chart a course for summary judgment. (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). Here, the parties consider the motion as one for summary judgment.

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22

NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

The expert opinion of Yuen’s engineer sufficiently establishes, *prima facie*, that the defect at issue is not located on Yuen’s premises, as the expert bases his opinion on his personal inspection of the premises, along with a review of 2106 Amsterdam’s deed, the property survey, and the photograph of the defect identified by plaintiff. (*Cf. Tedone v Success Homes, Inc.*, 31 AD3d 745, 746 [2d Dept 2006], *lv denied* 7 NY3d 716 [expert affidavit insufficient where expert failed to visit site and provided no factual basis for opinion]). However, as the surveyor did not attest to the survey, and the affiant does not establish the competency of the surveyor who performed the survey, the survey is not considered. (*See Raab v Lefkowitz*, 76 AD3d 619 [2d Dept 2010]; *Bergstrom v McChesney*, 92 AD3d 1125, 1126 [3d Dept 2012] [failure to provide affidavit of surveyor or admissible proof establishing foundation precludes considering survey]).

The affidavit of CRP’s expert, which is based on his personal inspection of the accident site and review of Yuen’s evidence, demonstrates that a material issue of fact exists as to the accident’s location. Yuen’s argument that CRP’s engineer’s expert opinion is unreliable must be resolved at trial. (*Severino v Weller*, 148 AD3d 272, 275 [1<sup>st</sup> Dept 2017] [conflicting expert

opinions raising issues of fact and credibility not to be decided on summary judgment], citing *Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1<sup>st</sup> Dept 2004]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Yuen's motion to dismiss the third-party complaint is denied; it is further

ORDERED, that Yuen is directed to serve and file an answer to the third-party complaint within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a compliance conference on April 17, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

1/22/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

  
  
  


CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

  
  
  


NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

20190122151815B7AFFED7CBF84585204C4EB1713BA145E06A68

  
 BARBARA JAFFE, J.S.C.