

Stone v 685 Fifth Ave. Owner, LLC
2019 NY Slip Op 30752(U)
March 22, 2019
Supreme Court, New York County
Docket Number: 158812/2016
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 2EFM

Justice

JACQUELINE STONE, Plaintiff, INDEX NO. 158812/2016 MOTION SEQ. NO. 001

- v -

685 FIFTH AVENUE OWNER, LLC, THE SWEET CONSTRUCTION GROUP, LTD., and SUMEREAU CONSTRUCTION CORP.,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion and cross motion are decided as follows.

In this personal injury action by plaintiff Jacqueline Stone ("Stone"), Stone moves, pursuant to CPLR 3212, for summary judgment on liability as against defendants 685 Fifth Avenue Owner, LLC ("685 Fifth Avenue"), The Sweet Construction Group, Ltd. ("Sweet Construction Group"), and Sumereau Construction Corp. ("Sumereau Construction"). Plaintiff also moves for summary judgment dismissing defendants' affirmative defenses, and for this Court to set this action down for a trial on the issue of damages. All defendants oppose the motion, and 685 Fifth Avenue and Sweet Construction Group cross-move, pursuant to CPLR 3211 and 3212, for summary judgment dismissing plaintiff's complaint insofar as asserted against them. Plaintiff opposes the cross motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion and cross motion are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Stone was allegedly injured on February 18, 2016 when she was struck by a wheelbarrow while she was walking on the sidewalk adjacent to 685 Fifth Avenue in Manhattan. (Doc. 18 at 1–2.) The premises are owned by 685 Fifth Avenue. (Doc. 25 at 2.) At the time of Stone’s accident, 685 Fifth Avenue had hired Sweet Construction Group as a general contractor to perform renovation work at the building. (*Id.*) Sumereau Construction was hired as a subcontractor by Sweet Construction Group to perform concrete construction work. (*Id.*)

Stone commenced this personal injury action against defendants on October 18, 2016 by filing a summons and complaint. (Doc. 19 at 1–15.) In the complaint, she alleged negligence as her sole cause of action. (*Id.* at 13.) Sweet Construction Group and Sumereau Construction filed their answer on December 29, 2016. (*Id.* at 17–23.) In addition to asserting crossclaims against 685 Fifth Avenue for indemnification and contribution (*id.* at 20–21), Sweet Construction Group and Sumereau Construction asserted ten affirmative defenses against plaintiff, including, *inter alia*, that she was comparatively negligent in causing the accident (*id.* at 18), that she had assumed the hazards and risks of walking into a construction zone (*id.*), and that she failed to mitigate her damages (*id.* at 19). 685 Fifth Avenue filed its answer on February 3, 2017. (*Id.* at 24–28.) In its answer, 685 Fifth Avenue asserted the same affirmative defenses as Sweet Construction Group and Sumereau Construction. (*Id.* at 25–27.)

Plaintiff Stone now moves, pursuant to CPLR 3212, for summary judgment on the issue of defendants’ liability. (Doc. 18 at 1.) Stone claims that 685 Fifth Avenue breached its duty—as the owner of the premises—to keep the premises in a reasonably safe condition. (*Id.* at 6–7.) She further asserts that Sweet Construction Group is liable for her injuries because it created the

dangerous condition on the sidewalk which caused her accident. (*Id.* at 6.) Regarding defendant Sumereau Construction, plaintiff argues that, “[a]s is clear from the undisputed evidence in this matter, the only explanation for the happening of this accident is that defendant was negligent when he¹ pushed the buggy and struck the plaintiff.” (*Id.* at 5.) Essentially, Stone argues that Sumereau Construction was negligent in that it failed to use cones to warn pedestrians of concrete construction work and that it did not have an employee directing pedestrian traffic. (*Id.*) In particular, Stone also relies on her deposition testimony, wherein she stated that Christopher Sumereau (“Mr. Sumereau”), the president of Sumereau Construction, saw her after the accident and said:

“I am the general contractor on the job. Here is my business card. I am happy to pay for your dry cleaning since you are covered in cement. I am sorry this happened to you. We were having an argument upstairs, and I called all my men in. And that is why nobody was standing for safety.”

(*Id.* at 3.) At his own deposition, Mr. Sumereau confirmed that he spoke with plaintiff after the accident and that he gave her his business card. (Doc. 27 at 93–94.) Additionally, Stone maintains that defendants’ affirmative defenses should be stricken and that this action should be set down for a trial on the issue of damages. (Doc. 18 at 7.)

In opposition, defendants argue that the motion should be denied because Stone has not proven her entitlement to judgment as a matter of law as against each of them. For example, 685 Fifth Avenue argues that it did not direct, supervise, or control the construction work at the premises and that, as an owner, it cannot be liable for the negligent acts of independent contractors and subcontractors, such as Sweet Construction Group and Sumereau Construction. (Doc. 25 at 3.) Sweet Construction Group similarly argues that it owed no duty to Stone because it did not

¹ An employee of Sumereau Construction named Ricardo was the person operating the wheelbarrow that struck Stone. (Doc. 25 at 5.) The last name of this employee is unknown. (*Id.*)

create any dangerous condition and because it was not supervising or controlling the concrete work on the sidewalk. (*Id.* at 8–9.) Sumereau Construction claims that the motion should be denied because plaintiff did not establish that she was free of comparative fault. (*Id.* at 9–10.) Given the foregoing, all three defendants assert that their affirmative defenses should not be stricken and that the action should not be set down for a trial on the issue of damages, since plaintiff has failed to establish that any of them were liable. (*Id.* at 10–12.)

685 Fifth Avenue and Sweet Construction Group have also filed a cross motion for summary judgment dismissing the complaint pursuant to CPLR 3211 and 3212. (Doc. 33.) In support of the cross motion, they reiterate the arguments they made in opposition to Stone’s motion: that they did not owe a duty of care to plaintiff; that they did not create a dangerous condition on the sidewalk; that they neither supervised, directed, nor controlled the construction work; and that they did not have notice of the condition that led to Stone’s injuries. (Doc. 33 at 4–7.)

In opposition to the cross motion, Stone maintains that, although owners are not generally liable for the conduct of independent contractors, 685 Fifth Avenue should be deemed liable in this action because the work it hired Sweet Construction Group to perform was inherently dangerous, and because it had a nondelegable duty to keep its premises safe so that the public could use its sidewalk. (Doc. 38 at 7–11.) Stone further asserts that Sweet Construction Group had a nondelegable duty to not create a “public nuisance” on the sidewalk, and that it is therefore liable for the negligence of Sumereau Construction, its subcontractor. (*Id.* at 11–12.)

LEGAL CONCLUSIONS:

Under CPLR 3212, a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Plaintiff's Motion for Summary Judgment.

A threshold question in tort cases is whether the defendant owed a duty of care toward the injured party. (*See Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002].) Thus, this Court must address whether 685 Fifth Avenue, Sweet Construction Group, and Sumereau Construction—as the owner, contractor, and subcontractor of the premises, respectively—owed a duty of care toward Stone at the time of her accident.

With respect to 685 Fifth Avenue, a “property owner who engages an independent contractor ordinarily is not liable for the latter’s negligent acts, unless certain exceptions . . . are present.” (*Acevedo v Audubon Mgt., Inc.*, 280 AD2d 91, 97 [1st Dept 2001].) “Such exceptions include negligence in hiring the independent contractor, where an independent contractor is hired to perform inherently dangerous work, or where the owner is subject to a nondelegable duty.” (*Id.*)

With respect to the third exception, and contrary to 685 Fifth Avenue's assertions, property owners are under a "statutory nondelegable duty to maintain [a] sidewalk (Administrative Code of City of N.Y. § 7-210)." (*Cook v Consol. Edison Co. of N.Y., Inc.*, 51 AD3d 447, 448 [1st Dept 2008]; see also *Backiel v Citibank*, 299 AD2d 504, 505 [2d Dept 2002] ("[T]he owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress. This duty may not be delegated by the owner to . . . an independent contractor.")) Therefore, this Court finds that 685 Fifth Avenue may not escape liability to Stone by reason of its having delegated the construction work to Sweet Construction Group. (See *Backiel*, 299 AD2d at 508 (holding that a property owner was liable for the plaintiff's injuries even though the accident was caused by an employee of the independent contractor that was hired to maintain the premises).) Since 685 Fifth Avenue failed to keep its sidewalk safe for pedestrians, and since 685 Fifth Avenue did not raise an issue of fact in opposition to plaintiff's summary judgment motion,² it is liable to Stone for her injuries.

Sweet Construction Group, on the other hand, correctly argues that it owed no duty toward Stone. A general contractor may be held liable for a plaintiff's injuries if it performed the alleged defective work or if its contractual obligations to supervise the work created a duty of care to the plaintiff. (See *Kenny v Turner Constr. Co.*, 155 AD3d 479, 480 [1st Dept 2017].) At his deposition, Mr. Sumereau testified that Sweet Construction Group was not directly involved in the cement work: "Sweet Construction does not directly supervise my employees." (Doc. 27 at 38.) Thus, because Sweet Construction Group was not engaged in the work which injured plaintiff—i.e., its employees were not pushing the wheelbarrow that struck plaintiff—and because it did not supervise Sumereau Construction's employees, this Court finds that it did not owe a duty of care

² 685 Fifth Avenue's sole argument in opposition to Stone's summary judgment motion is that it did not owe her a duty. (Doc. 25 at 6–8.)

toward Stone at the time of the accident. Stone's summary judgment motion must therefore be denied as against Sweet Construction Group.

Defendants' counsel maintains that Stone's summary judgment motion must be denied as against Sumereau Construction because plaintiff has not proven that she was free from comparative fault. However, this argument is in direct contravention with *Rodriguez v City of New York*, 31 NY3d 312, 318 (2018), in which the Court of Appeals held that a plaintiff moving for summary judgment on the issue of defendant's liability is not required to demonstrate the absence of his or her own comparative fault. Indeed, placing the burden on Stone to prove that she was not comparatively negligent is inconsistent with CPLR 1412, which provides that "the culpable conduct attributable to the claimant . . . including contributory negligence or assumption or risk, shall not bar recovery . . ." (*See id.* at 317-18.) Given the above, as well as the fact that there is no dispute that an employee of Sumereau Construction was operating the wheelbarrow that struck plaintiff (Doc. 25 at 5), Stone's motion must be granted as against Sumereau Construction.

Although Stone seeks summary judgment striking defendants' affirmative defenses, plaintiff made no argument in her initial motion papers regarding why they should be stricken. (Doc. 18.) Even in her reply papers, Stone merely states, in conclusory fashion, that she "is certainly entitled to defendants' affirmative defenses with respect to liability being stricken." (Doc. 38 at 12.) In other words, Stone's argument seems to be that, if liability is found against defendants herein, then she is entitled to their affirmative defenses with respect to liability being stricken. (*See id.*) This Court disagrees: While comparative negligence is not a bar to a plaintiff's recovery under CPLR 1411 (*see Rodriguez*, 31 NY3d at 320), it may be used by defendants to diminish the amount of recoverable damages (*see id.*). In any case, because conclusory statements are insufficient to establish entitlement to judgment as a matter of law (*see 400 E. 77th Owners, Inc. v New York*

Eng'g Assn., P.C., 122 AD3d 474 [1st Dept 2014]), the branch of plaintiff's motion seeking to strike defendants' affirmative defenses is denied.

b. 685 Fifth Avenue and Sweet Construction Group's Cross Motion for Summary Judgment Dismissing the Complaint.

The cross motion is denied to the extent it seeks to dismiss the complaint as to defendant 685 Fifth Avenue. However, the cross motion is granted to the extent it seeks to dismiss the complaint as against defendant Sweet Construction Group, given this Court's determination that Sweet Construction Group owed no duty toward Stone.

In accordance with the foregoing, it is hereby:

ORDERED that the summary judgment motion by plaintiff Jacqueline Stone pursuant to CPLR 3212 is granted to the extent that liability is found in her favor against defendants 685 Fifth Avenue Owner, LLC and Sumereau Construction Corp., and is otherwise denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike the affirmative defenses of defendants 685 Fifth Avenue Owner, LLC and Sumereau Construction Corp. is denied; and it is further

ORDERED that the cross motion by defendants 685 Fifth Avenue Owner, LLC and The Sweet Construction Group, Ltd., pursuant to CPLR 3211 and 3212, seeking to dismiss the complaint is granted as to The Sweet Construction Group, Ltd., only, and is otherwise denied, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the action against is severed against The Sweet Construction Group, Ltd. and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant The Sweet Construction Group, Ltd. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 20 days of entry of this order, counsel for the plaintiff shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh)].

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

3/22/2019

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE