Orlando v New York Homes by J & J Corp.
2019 NY Slip Op 32753(U)
September 10, 2019
Supreme Court, Suffolk County
Docket Number: 13-22344
Judge: Denise F. Molia

SHORT FORM ORDER

COPY

INDEX No. 13-22344
CAL. No. 18-01667OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-19-18 (003)
MOTION DATE 2-1-19 (004)
MOTION DATE 3-1-19 (005)
ADJ. DATE 3-29-19
Mot. Seq. # 003 - MG
004 - MG
005 - MD

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GARY ORLANDO,

Plaintiff,

- against -

NEW YORK HOMES BY J AND J CORP., JOSEPH DELUCA, CAROL MICHAELS REALTY, INC., and IMAGINATION AT WORK LLC d/b/a VAMP GRAPHICS,

Defendants.

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Upon the following papers numbered 1 - 33 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 9; Notices of Cross Motion and supporting papers 14 - 17; 22 - 33; Answering Affidavits and supporting papers 10 - 11; 18 - 19; Replying Affidavits and supporting papers 12 - 13; 20 - 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

RST

ORDERED that the motion (seq. 003) by defendant Carol Michaels Realty, Inc., the motion (seq. 004) by defendant Imagination at Work, LLC d/b/a Vamp Graphics, and the motion (seq. 005) by defendant Joseph DeLuca are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Carol Michaels Realty, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion by defendant Imagination at Work, LLC, for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by defendant Joseph DeLuca for summary judgment dismissing the complaint and cross claims against him is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff Gary Orlando to recover damages for injuries he allegedly sustained on June 1, 2011, when he tripped and fell after stepping into a hole located in the front lawn of a premises known as 30 Patchogue Street in Patchogue, New York. It is alleged that a dangerous condition was created on the lawn when a "For Sale" sign was removed from the lawn and the void left by the missing signpost was not filled.

Carol Michaels Realty, Inc. (CM), now moves for summary judgment in its favor, arguing that it owed no duty to plaintiff, as it did not own, occupy, or control the subject premises, nor did it create the alleged dangerous condition. In support of its motion, CM submits, among other things, transcripts of the parties' deposition testimony and a copy of a lease agreement.

Imagination at Work, LLC, d/b/a Vamp Graphics (Vamp), also moves for summary judgment in its favor, arguing that there is no evidence of who created the alleged dangerous condition, or when such condition was created, that it has no legal relationship to plaintiff, and that the lease agreement provides that plaintiff had the duty to fill any holes at the subject premises.

Further, Joseph DeLuca moves for summary judgment in his favor, arguing that he did not own the subject premises and, therefore, cannot be liable for plaintiff's alleged injuries. In support of his motion, he submits, among other things, his own affidavit, an uncertified copy of a deed, a copy of a lease agreement, and a copy of a tax return. However, the Court finds that Mr. DeLuca's motion for summary judgment, having been served more than 120 days after the filing of the note of issue, is untimely as to the application for dismissal of plaintiff's complaint (*see* CPLR 3212 [a]). While Mr. DeLuca's motion is incorrectly designated a cross motion as to plaintiff, it is timely as to his application for dismissal of the cross claims against him (*see* ***Sanchez v Metro Bldrs. Corp.***, 136 AD3d 783, 25 NYS3d 274 [2d Dept 2016]; CPLR 2215). However, Mr. DeLuca failed to submit a complete copy of the pleadings as required by CPLR 3212 (b) and, thus, the entirety of his motion is denied.

Plaintiff testified that in the early afternoon of the date in question, he was mowing the lawn of the single-family home he leased at the subject premises. He indicated that the lease was signed on December 30, 2010, and obligated him to maintain the lawn. Plaintiff stated that while mowing the front lawn, his left foot stepped into a hole located approximately 20 feet from, and directly in front of, the

home's entrance door, causing him to fall forward. Asked to describe the hole's dimensions, plaintiff testified that it was "probably almost a foot deep" and "probably eight or nine inches wide." Plaintiff indicated that he had not seen the hole before the incident, but when questioned as to what may have caused the hole, he stated that he "believe[s]" a "For Rent" sign had been installed there in the past. He testified that he recalled seeing the "For Rent" sign in December of 2010, when a realtor brought him to the premises, but that the sign was removed "around February" of 2011. Upon questioning, plaintiff denied being present when the sign was removed, and had no knowledge of who installed the sign or who removed it.

Charmaine Mikolajczyk testified that she is the sole owner and broker of CM, which has been in the business of listing real estate since 2004. Asked to explain the process of listing a property through her agency, Ms. Mikolajczyk stated that a listing contract would be drafted and signed by the property owner, a sign would be ordered, and marketing of the property would commence. Regarding the subject premises, she indicated that it was listed for sale through her agency by Joseph DeLuca, and that a "For Sale" sign was placed on the property on May 25, 2010. Ms. Mikolajczyk testified that CM hired Vamp Graphics to install the signs at its listed properties. She stated that the signs were 18 by 26 inches in size and were hung from a bar atop a pole.

Ms. Mikolajczyk testified that the subject property was eventually rented, rather than sold, to plaintiff in late 2010. She stated that following the rental transaction, CM "would have" called or faxed Vamp to request removal of the "For Sale" sign, but would not receive confirmation of completion. She further stated that Vamp routinely retained CM's signs after their removal because they would be re-used for future listings. Ms. Mikolajczyk conceded that, as a result, she has no specific knowledge of how, when, or by whom the subject sign was actually removed. In addition, Ms. Mikolajczyk testified that neither she nor any of CM's affiliates returned to the subject property after the lease agreement was signed.

Joseph DeLuca testified that on the date in question the subject premises was owned by NY Homes by J&J, Corp. (NYH), and that he is NYH's sole shareholder. He stated that plaintiff entered into a one-year lease with NYH to rent the property, and that the "For Sale" sign was present at the time plaintiff took possession thereof. Mr. DeLuca indicated that he did not remove the "For Sale" sign, and does not know who did, but he noticed that it was missing at some unknown time after plaintiff moved in. Mr. DeLuca further stated that the lease dictated that plaintiff "was responsible [for] maintain[ing] the property," including the exterior. Mr. DeLuca testified that the lease gave him the right to conduct monthly inspections of both the interior and exterior of the premises, which he accomplished while collecting his rent payments from plaintiff. He stated that he never saw any holes in the front lawn of the premises, but that if a hole was present, it was plaintiff's responsibility to remedy it.

Adam Mooney testified that he has been the owner and sole employee of Vamp since 2007, a company generally in the business of making commercial signs. However, with regard to real estate "For Sale" signs, he stated that Vamp did not manufacture them but, instead, would supply the mounting posts for such signs, and install them at properties upon request of realtors. Asked to describe the mounting posts, Mr. Mooney testified that they were eight feet long, 3 ½ inches by 3 ½ inches, with a 42-inch

horizontal cross bar from which the sign was hung. He stated that to install the post at a property, he would dig a four-inch square hole, 30 inches deep, then place the post in the hole, filling in any space with dirt. As to the sign at the subject premises, Mr. Mooney indicated that he installed it on May 25, 2010, at the request of CM, and never returned to the premises. He testified that he did not receive a "sign removal form" from CM, did not remove the sign in question, did not direct anyone to remove it, and did not re-gain possession of it. Mr. Mooney stated that it was common for him to not remove signs from premises, because "[p]eople steal them, [and] [h]omeowners take them out, cut them out, [or] throw them out." He further stated that he did not keep records of which properties he "lost" posts from, and did not follow-up with properties after installing a sign. Asked the manner that he would fill holes left by removed signs, he testified that he carried a five-gallon bucket of dirt in his truck, which he would use as filler.

A party moving for summary judgment "must make 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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Orlando v New York Homes By J & J Corp.***, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). A contractual obligation alone "will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks and citations omitted]).

Here, CM and Vamp established a prima facie case of entitlement to summary judgment in their favor as to plaintiff's complaint and the cross claims against them (*see* ***Billordo v E.P. Realty Assoc.***, 300

AD2d 523, 752 NYS2d 556 [2d Dept 2002]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Specifically, CM and Vamp demonstrated that they did not own the subject premises and did not create the alleged dangerous condition. CM testified that it did not return to the subject premises after plaintiff signed the lease agreement, and defendant Vamp testified that it did not receive a request to remove the subject sign and did not remove it. The burden then shifted to any opposing parties to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to the motions of CM and Vamp, plaintiff submits affirmations by his counsel. With regard to CM, plaintiff argues that it negligently hired, supervised, and/or instructed Vamp, and that it "derived special use from the [subject] property." As a general rule, "one who hires an independent contractor may not be held liable for the independent contractor's negligent acts" (***Sanchez v 1710 Broadway, Inc.***, 79 AD3d 845, 846, 915 NYS2d 272 [2d Dept 2010]). Here, it is undisputed that Vamp was an independent contractor hired by CM to install and, often, remove its "For Sale" signs. There has been no evidence presented that CM controlled or supervised Vamp's work, or that any of the exceptions to the "independent contractor rule" apply in this case (*see* ***Rosenberg v Equit. Life Assur. Socy.***, 79 NY2d 663, 584 NYS2d 765 [1992]; ***Shusterich v Kleinman***, 171 AD3d 1236, 98 NYS3d 638 [2d Dept 2019]). Plaintiff's other contentions are without merit. Accordingly, the motion by defendant Carol Michaels Realty, Inc., for summary judgment dismissing the complaint and cross claims against it is granted.

As to Vamp, plaintiff argues that CM ordered the sign removed, that it was removed by someone, and, thus, triable issues remain as to whether Vamp removed the sign. The obvious implication of plaintiff's argument is that the dangerous condition in this case was the hole and, since he alleges that Vamp created the hole, Vamp "launched" an instrument of harm pursuant to ***Espinal***, *supra*. This argument is unavailing and speculative. While Vamp's act of leaving a hole in the lawn of the subject premises would fall within an ***Espinal*** exception, there is no competent evidence to prove that Vamp removed the subject sign. When asked if she "specifically remember[ed] calling Adam Mooney or anyone at Vamp Graphics to remove the [subject sign]," Ms. Mikolajczyk testified that she "cannot specifically remember that." Further, neither Ms. Mikolajczyk nor CM was able to produce, or recall the production of, any physical evidence of an order given to Vamp to remove the subject sign. Plaintiff fails to adduce evidence that such an order was given, despite Ms. Mikolajczyk's testimony as to what "would have" happened, or what CM's usual practice was. Plaintiff's reliance on Ms. Mikolajczyk's phrase "Yes, Carol Michaels Realty did [request that the sign be removed]" is unwarranted, as it came immediately after Ms. Mikolajczyk was prompted to clarify that she was testifying on behalf of CM and not in her personal capacity, and followed the equivocal responses she offered only moments prior.

Affording plaintiff the benefit of every possible favorable inference and assuming, *arguendo*, that Vamp did receive an order from CM instructing it to remove the subject sign, there has been no evidence submitted by plaintiff to demonstrate that Vamp actually removed the sign or, if it did, that it did not properly fill the resultant void. Mr. Mooney specifically testified that he did not return to the subject premises following his installation of the sign, and testified, without equivocation, that he did not remove the sign. Further militating against plaintiff's own arguments is his testimony regarding the origin of hole in question. He does not state that the subject hole was a hole left after a "For Sale" sign was removed.

Rather, he merely testified that he "believe[s]" there was a "For Sale" in the location of his fall. Given plaintiff's failure to adduce any evidence of who removed the sign, he is unable to raise a triable issue. Accordingly, the motion by defendant Imagination at Work, LLC d/b/a Vamp Graphics for summary judgment dismissing the complaint and cross claims against it is granted.

Dated: 9-16-19

[redacted]

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**