

Robinson v Executive Assoc. N. I, L.L.C.

2019 NY Slip Op 34297(U)

March 19, 2019

Supreme Court, Rockland County

Docket Number: Index No. 031183/2017

Judge: Robert M. Berliner

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

-----X
PENA-EMILIA ROBINSON and MALCOLM
ROBINSON,

DECISION AND ORDER

Plaintiffs,

-against-

EXECUTIVE ASSOCIATES NORTH I, L.L.C.,
EXECUTIVE ASSOCIATES NORTH II, L.L.C.,
EXECUTIVE ASSOCIATES NORTH III,
L.L.C., EXECUTIVE ASSOCIATES NORTH
IV, L.L.C, EXECUTIVE ASSOCIATES IX,
L.L.C., EMPIRE EXECUTIVE INN, L.L.C.,
EMPIRE EXECUTIVE INN MANAGEMENT
COMPANY, L.L.C., and ASCAPE
LANDSCAPE & CONSTRUCTION CORP.,

Index No.: 031183/2017

Defendants.

Motion Sequence #3

-----X

The following papers, numbered 1 to 4, were read in connection with Defendants' Empire
Executive Inn, LLC and Empire Executive Management Company LLC [hereinafter collectively
"Defendants"] motion to dismiss pursuant to CPLR §3211(a)(1).

Notice of Motion/Affirmation in Support/Exhibits(A-J).....1-2
Affirmation in Opposition/Exhibit 1.....3
Reply Affirmation/Exhibit A.....4

Upon the foregoing papers, it is ORDERED that this application is disposed of as follows:

Plaintiffs commenced this action seeking damages for personal injuries Plaintiff Pena-
Emilia Robinson sustained in a slip and fall accident on January 12, 2015. Ms. Robinson alleges
that she slipped and fell on an icy exterior portion of a common sidewalk/walkway located at "2
Executive Boulevard, Suffern, NY 10901" [hereinafter the "Premises"]. Plaintiffs allege causes of
action for common law negligence.

In support of their application, Defendants assert that they did not own, manage, supervise,
operate, control or make special use of the walkway where Ms. Robinson's alleged accident
occurred. Defendants further argue that they did not have any involvement with the snow or ice
removal of the subject walkway. Defendants proffer the affidavit of Victor Ebert, the Director of
Finance for Defendants. Mr. Ebert affirms that Defendants never owned, managed, supervised,

operated, controlled or made any special use of the walkway or had involvement with the snow removal agreement. He further attests that Defendants own the premise located at “3 Executive Blvd., Suffern, NY” which is located across the street from the location where Ms. Robinson allegedly slipped and fell. Defendants annex a copy of the deed for the Premises which states that the owner of the property is co-Defendant Executive Associates North II and the deed for “3 Executive Boulevard, Suffern, NY” which states that the owners of the property are Defendants. Defendants argue they cannot be liable for any part of Plaintiffs’ alleged accident or injuries, and therefore Plaintiffs cannot establish a *prima facie* cause of action against them.

In opposition, Plaintiffs argue that the area in which Ms. Robinson slipped and fell was in a large corporate park with more than one building and more than one owner. Plaintiffs assert that control of the exterior portions of the corporate park are not discernable as a matter of law prior to depositions. Plaintiffs contend that Defendants’ motion must be denied because they have failed to meet the high standard of documentary proof pursuant CPLR §3211(a)(1). Plaintiffs state that Defendants merely proffer the self-serving affidavit of Mr. Ebert without any maps, surveys or photographs and annex uncertified deeds to demonstrate as a matter of law that they do not own, manage, supervise, operate, or control the area where Ms. Robinson slipped and fell. Furthermore, Plaintiffs contend that Defendants improperly seek, without explicitly stating so in their motion papers, summary judgment pursuant to CPLR §3211(c) by attempting to use an affidavit to prove their entitlement to summary judgment. Plaintiffs assert that, even in the absence of express contractual responsibilities, maintenance responsibility for a given location may be assumed through course of conduct or other means. Plaintiffs argue that this action is in its infancy and discovery has only just begun with no disclosures from answering co-Defendants. Plaintiffs state that dismissal of Defendants at this juncture of the action would severely and unfairly prejudice Plaintiffs.

In reply, Defendants note that co-Defendants did not interpose opposition to their motion. Defendants assert that they proffered a certified and notarized copy of the deed for the Premises which unequivocally establishes that it is owned by co-Defendant Executive Associates North II, LLC, who do not oppose Defendants’ motion. Additionally, they proffered a certified and notarized copy of the deed for “3 Executive Boulevard,” which is located across the street from the Premises and owned by Defendants. Defendants contend that the fact that this action is in the early stage litigation is of no legal consequence as Defendants do not own or have any involvement with the Premises where Ms. Robinson allegedly slipped and fell. Therefore, it would be fruitless

to depose them. Defendants assert that Plaintiffs' arguments regarding Defendants' involvement and potential liability in this action are pure speculation and conjecture.

"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. [I]f the court does not find [their] submissions 'documentary', it will have to deny the motion." *Fontanetta v Doe*, 73 AD3d 78, 83-84 [2d Dept 2010][internal citations omitted].

"In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable. [J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. At the same time, [n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)." *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012].

"In opposition to a motion pursuant to CPLR 3211(a), a plaintiff may submit affidavits to preserve inartfully pleaded, but potentially meritorious claims." *Matter of Koegel*, 160 AD3d 11, 21 [2d Dept 2018], *lv to appeal dismissed*, 32 NY3d 948 [2018].

The Court has reviewed the parties' submissions and finds that Defendants have provided sufficient documentary evidence to resolve all factual issues as to their potential liability in this action as a matter of law. The Court finds that both the certified and notarized copies of the deeds for the Premises and "3 Executive Park" along with a copy of the "Agreement for Snow Removal" contract collectively and conclusively establish that Defendants did not own, manage, supervise, operate, control or make special use of the walkway where Ms. Robinson allegedly slipped and fell. Furthermore, it is noteworthy that co-Defendant Executive Associates North II, LLC, who owns the Premises where Ms. Robinson allegedly slipped and fell, did not interpose opposition to Defendants' motion. Even when viewed in the most favorable light to Plaintiffs, it is clear from the documentary evidence submitted that Defendants did not owe a duty to Plaintiffs and therefore cannot be found liable for Ms. Robinson's alleged injuries. Therefore, Defendants' motion to dismiss is granted.

Accordingly, it is

ORDERED, that Defendants' motion to dismiss pursuant to CPLR §3211(a)(1) is granted and Plaintiffs' complaint is dismissed as against Defendants Empire Executive Inn, LLC and Empire Executive Management Company LLC.

The remaining parties are advised that a status conference has been scheduled in this matter for **April 11, 2019 at 9:30a.m.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
March 19, 2019

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:
Sobo & Sobo, LLP
Margaret G. Klein & Associates