

**Kalendarev v Planet Wings Inc.**

2019 NY Slip Op 34998(U)

December 23, 2019

Supreme Court, Queens County

Docket Number: Index No. 706349/2019

Judge: Leslie J. Purificacion

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39  
Justice

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MAYA KALENDAREV

Index  
Number 706349/2019

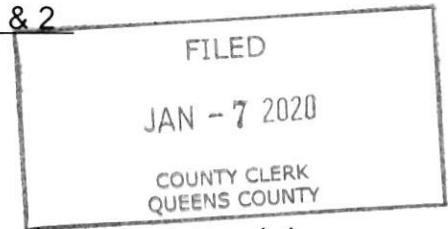
Plaintiff,

-against-

Motion Seq. 1 & 2

PLANET WINGS INC., et al.,

Defendants.  
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The following papers numbered 1 to 8 read on this motion sequence 1 by defendant, Planet Wings Inc., Planet Wings Enterprises, Inc., Planet Wings Management, Inc., (Planet Wings) for an order, pursuant to CPLR § 3211, dismissing the plaintiff's complaint and on this motion sequence 2 for an order dismissing the cross-complaint of co-defendant, RP 121, LLC (RP121).

PAPERS  
NUMBERED

(Motion Seq. 1)  
N.M., Aff., Exhibits and Service ..... 1-4

(Motion Seq. 2)  
N.M., Aff., Exhibits and Service..... 5-8

Upon the foregoing papers, it is ordered that these motions are consolidated and decided as follows:

This is a personal injury action wherein plaintiff alleges that on March 3, 2017, she tripped and fell due to an unsafe condition on the property located at 95-05 63<sup>rd</sup> Drive Queens, New York. In paragraph 108 of the Amended Verified Complaint, plaintiff describes the cause of the accident in very broad terms. She alleges the accident was

caused by “the carelessness, recklessness negligence and gross negligence of the defendants, their agents... in the ownership, operation, management, maintenance, usage and control of the aforementioned premises, sidewalk, grounds and hose/cleaning hose thereat...” Plaintiff further alleges that it was defendants’ duty to keep the sidewalk free from hazards and defects and that defendants made special use of the sidewalk. The complaint does not differentiate between the defendants. Now, Planet Wings moves to have the complaint and cross-complaint dismissed pursuant to CPLR 3211(a)(1), based upon documentary evidence.

CPLR 3211(a)(1) provides that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence...” “To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.”(AGCS Mar. Ins. Co. V Scottsdale Ins. Co., 102 AD3d 899, quoting Nevin v Laclede Professional Prods., 273 AD2d 453).

The court notes that movant was the only party to timely appear at the motion calendar call for these motions on September 5, 2019. As such, the motions were marked fully submitted with no opposition. Thereafter, plaintiff and RP121 e-filed opposition paper. Part rules require appearance and submission of working copies of papers to be considered. Accordingly, the improperly submitted papers have not been considered in the disposition of these motions.

Plaintiff filed a summons and complaint on April 10, 2019. On June 6, 2019, RP121 filed an answer that included a cross-complaint alleging causes of action for breach of

contract, common law indemnity, common law negligence, contractual indemnity and insurance coverage. Movant argues that it has provided documentary evidence showing that it did not own, occupy, control or make special use of the premises, had no duty to maintain the premises and owed no duty to either plaintiff or RP121.

The documentary evidence shows that the premises are owned by RP121, that prior to the accident herein RP 121 leased the premises to Food Express Rego Park, that the lease stated that the premises was to be used to operate a Planet Wings franchise restaurant, that the franchise was taken over by A&E by agreement dated January 18, 2014, that the lease assigned all of the interest in the lease from Food Express to A&E, and A&E thereafter assumed all of Food Express' liabilities and obligations under the lease.

The documentary evidence provided by movant includes the franchise agreement, the lease and the assignment of the lease. The evidence indicates that movant did not own or occupy the premises. Furthermore, the lease agreement designates responsibility for repairs and maintenance to the tenant, A&E. While the court agrees that movant's status as a franchisor does not in and of itself open it to liability for failure to maintain the premises, the court finds that there are questions unresolved by the documentary evidence that require the denial of this motion.

Movant acknowledges that plaintiff's injury allegedly occurred when the plaintiff tripped and fell over a hose on the sidewalk outside of the premises. Movant also acknowledges it had the right to inspect the premises within the context of evaluating the performance of the restaurant's goods and services and that it, as franchisor, can be vicariously liable for the franchisee's alleged negligence if it maintained control over "the

manner of performing the very work in the course of which the accident occurred.” Repeti v Mc Donald’s Corp., 49 A.D.3d 1089 (3d Dept2008).

Various provisions in the lease including sections 6.4.3 and 7.5.4, in particular, fail to resolve all questions regarding movant’s management and control of the premises. Furthermore, the franchise agreement mentions certain “Manuals” to be complied with but movant has not provided the court with those manuals. As such, it has not provided the court with certain documentary evidence necessary to resolve all questions and conclusively dispose of the claims.

In view of the foregoing, the motions are denied.

This is the decision and order of the court.

Date:

DEC 23 2019

Hon. Leslie J. Purificacion, JSC

FILED  
JAN - 7 2020  
COUNTY CLERK  
QUEENS COUNTY