

Galvin v George Units LLC

2020 NY Slip Op 30613(U)

February 28, 2020

Supreme Court, New York County

Docket Number: 156383/2018

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

REGINA GALVIN, INDEX NO. 156383/2018

Plaintiff, MOTION DATE 02/26/2020, 02/26/2020

- v -

MOTION SEQ. NO. 002 004

THE GEORGE UNITS LLC, THE CITY OF NEW YORK, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, RACHEL BRIDGE CORPORATION,

DECISION + ORDER ON MOTION

Defendant.

THE GEORGE UNITS LLC

Third-Party Index No. 596118/2019

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK & NEW JERSEY

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 74, 75

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for DISMISS

This action arises out of injuries allegedly sustained by plaintiff on December 27, 2017. Plaintiff alleges she slipped and fell on ice located on the sidewalk abutting 111 Wadsworth Avenue, in the County, City and State of New York.

Plaintiff moves to renew and vacate the judgment as against the third-party defendant, formerly a direct defendant, the Port Authority of New York and New Jersey (the Port Authority)

pursuant to CPLR § 2221(a), (e), or in the alternative to preclude the George Units LLC (the George) from attempting to shift liability to the Port Authority at the time of trial. Third-party defendant, Port Authority, moves to dismiss the third-party complaint pursuant to CPLR § 3211 (a)(5) and (7) or in the alternative pursuant to CPLR § 3212, on various grounds. For the reasons set forth below, both motions are denied.¹

Background

Plaintiff commenced the instant action naming the City of New York, The George and the Port Authority as defendants. On October 4, 2018, Port Authority's motion to dismiss the complaint was granted without opposition. The George answered the complaint on October 9, 2018, in compliance with an extension of time to answer granted by plaintiff. Thus, the George was not a party to the instant action until after the Port Authority had been dismissed from the action.

Plaintiff's Motion to Preclude

Plaintiff argues that the judgment of dismissal as to the Port Authority in the main action should be vacated pursuant to CPLR §2221(a), (e). Plaintiff avers that newly discovered facts renders her motion proper. Specifically, plaintiff cites to a Freedom of Information Law (FOIL) response that was received after the Port Authority's motion was already granted, as well as deposition testimony of a witness from defendant, the George. Plaintiff does not specify how the delayed FOIL response hindered her ability to oppose Port Authority's underlying motion. With respect to the deposition testimony, plaintiff cites to the transcript of Mr. Benito Pellerano. Mr. Pellerano testified, in sum and substance, that the Port Authority installed expansion joints on the sidewalk in question and is responsible for the maintenance of the expansion joints. Because Mr.

¹ The Court is not addressing any arguments raised in the City's partial opposition papers.

Pellerano's examination before trial did not occur until September 2019, plaintiff contends that the Port Authority should be reinstated as a direct defendant. The Court disagrees.

Plaintiff's notice of claim states in relevant part "ice was caused to form on the public sidewalk due to the diversion of water through a trough on the public sidewalk running from and towards the street, and/or when said water flow was interrupted due a defect within the trough causing water to form on the public sidewalk and street, and the ice to form on the public sidewalk and street." The affidavit, of Mr. Richard T. Gill, provided by the Port Authority in support of its motion to dismiss the complaint simply affirms "that the Port Authority did not own, operate, and/or control the location where the alleged incident took place." Notably, nothing in the affidavit submitted in support of the Port Authority's underlying motion to dismiss addresses any trough or hardware relating to the cause of an accumulation of ice.

Because plaintiff's own notice of claim alleges a defect with a trough and the Port Authority did not address the trough in its affidavit, the Court finds that plaintiff had a full and fair opportunity to oppose the motion arguing that the Port Authority did not make out prima facie entitlement to dismissal and failed to do so. There are no new facts not previously known to plaintiff that warrant renewal.

Furthermore, even assuming *arguendo* that the Court deems plaintiff's motion as one made pursuant to CPLR § 5015(3), the Court finds that the statute does not apply. The plain language of the statute would only allow such vacatur if the court finds that the Port Authority had misrepresented its position or otherwise proceeded in bad faith. During oral argument, plaintiff's counsel conceded that there is no indication of such bad faith on the part of the Port Authority. Thus, as the plaintiff had a full opportunity to oppose the Port Authority's motion and failed to do so, the plaintiff is without remedy as to direct claims as to the Port Authority.

The George, however, is not precluded from trial arguments in shifting blame to the Port Authority, as the George did not appear in this case until after the Port Authority's motion to dismiss was fully submitted. Accordingly, the George did not have a full and fair opportunity to oppose the Port Authority's motion.

Port Authority's Motion to Dismiss/Summary Judgment

As to the Port Authority's motion to dismiss the third-party complaint and for summary judgment, that motion is denied. The Port Authority has failed to make out *prima facie* entitlement to judgment as a matter of law. The affidavit of Mr. Frank Minervini, provided by the Port Authority in support of its motion to dismiss the third-party complaint states that the "Port Authority is not responsible for the removal of snow or ice from the sidewalk" abutting 111 Wadsworth.

While it may be true that the Port Authority did not own or control the location of the accident, there is a question of fact as to whether the Port Authority was a substantial factor in causing the accident. As noted above, plaintiff's theory of the case is that of a defective trough causing seeping water, which froze and led to the plaintiff's accident. Additionally, the George's complaint specifically alleges the expansion joints, owned and maintained by the Port Authority, contributed to the accident. Port Authority's affidavit is silent as to the ownership and maintenance of the expansion joints. At this juncture the Port Authority has not established its *prima facie* entitlement to dismissal or summary judgment, as it remains in question whether the Port Authority owed a duty to the plaintiff.

Moreover, Port Authority's motion argues that the original decision dismissing the Port Authority from the main action acts as an estoppel on the third-party complaint. As indicated above, the George did not have a full opportunity to oppose that motion, thus defeating the

estoppel arguments. Finally, the motion as it relates to contractual indemnity is granted without opposition. Based on the foregoing, it is

ADJUDGED that plaintiff's motion to renew and preclude the George Units, LLC, as well as the motion to dismiss the third-party complaint by the Port Authority of New York and New Jersey and for summary judgment, are both denied, except that the third party complaint cause of action as to contractual indemnification is granted.

2/28/2020
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

LF

 LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.