Gambino v 77 Ave D Supermarket Corp.
2020 NY Slip Op 33716(U)
November 9, 2020
Supreme Court, New York County
Docket Number: 150631/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 150631/2016

JOSE GAMBINO,

Plaintiff,

MOTION SEQ. NO. 004

- v -

77 AVE D SUPERMARKET CORP., C&C APARTMENT MANAGEMENT LLC., AVENUE D OWNERS LLC., RITE AID OF NEW YORK, INC., and MADISON SB, LLC.,

DECISION + ORDER ON MOTION

Defendants.

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RITE AID OF NEW YORK, INC.,

Third-Party
Index No. 565726/2019

Third-Party Plaintiff,

-against-

VOLKS SERVICE CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 145, 146, 147

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant 77 Ave D Supermarket Corp. (77) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all claims and cross claims against it. Plaintiff and third-party defendant Volks Service Corp. (Volks) oppose the motion. After consideration of the arguments in support and in opposition to the motion, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this court entered June 9, 2020 (the 6/9/2020 order) (Doc. 80), which granted defendant Madison SB LLC's (MSB) motion for summary judgment dismissing all claims and cross claims asserted against it (*id.*). However, a brief summary of the facts, as well as any additional relevant facts, is set forth below.

Plaintiff alleges that he sustained injuries on February 5, 2015, when he slipped and fell on ice "on the northeast side of East 6th Street, approximately 17 flagstones west of Avenue D and 2 flagstones south of the fence located in front of 79 Avenue D and 77 Avenue D" (NYSCEF Doc. No. 1, ¶ 7). According to 77, plaintiff alleges in his verified bill of particulars that he fell "on the sidewalk located in front of the fenced/gated area between 745 East 6th Street and 77 Avenue D" (NYSCEF Doc. No. 117, ¶ 12 [citing NYSCEF Doc. No. 125, ¶ 3]). MSB owns the property located at 77 Avenue D. 77 was a lessee of the building and operated a bodega there (NYSCEF Doc. No. 117, ¶ 13).

In support of its motion to dismiss (motion sequence 001), MSB submitted the affidavit of Roopa Bhusri, one of its members, who averred that the area had "never been owned, controlled, maintained, leased, occupied, or used in any way by [MSB]" (NYSCEF Doc. No. 64, ¶ 3), and that MSB was not responsible for ice and snow removal in the area in question. This Court concluded that MSB's documents, including Bhusri's affidavit, court papers, as well as a photograph of the accident site, established MSB's prima facie entitlement to summary judgment dismissing all claims against it and that none of the parties opposing the motion raised a triable issue of fact.

In addition, this Court found that "plaintiff's unsubstantiated claim that the area where plaintiff fell was owned by more than one property owner, as well as his conclusory allegation that MSB's negligent maintenance of the area in front of its building caused or contributed to the condition in front of the parking lot, do not alter this Court's opinion" (*id.*, at 7-8 [citing *Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020]).[1] This Court expressly rejected plaintiff's "conclusory allegation that MSB's negligent maintenance of the area in front of its building contributed to the condition in front of the parking lot" (NYSCEF Doc. No. 80, at 7-8). Further, this Court implicitly rejected plaintiff's argument that, as an abutting landowner, MSB would be held liable if it had created the problem through its negligent maintenance of snow and ice conditions on its property or if it had made a special use of the property, finding plaintiff's argument unsubstantiated and speculative. Additionally, this Court determined that the deposition testimony of nonparty Carla Mangual, who worked at a deli on MSB's property, was not sufficient to raise a triable issue that MSB may have been responsible for a fall 10 feet from its property. Plaintiff's motion to renew and reargue this Court's order was unsuccessful (NYSCEF Doc. Nos. 83, 149).

77, the lessee of the bodega in MSB's building, now moves for summary judgment, relying on this Court's finding in the 6/9/2020 order that:

> MSB established its prima facie entitlement to summary judgment by submitting Bhusri's affidavit, plaintiff's deposition testimony, the notice to admit and MSB's response thereto, and the photograph of the accident site, on which plaintiff marked the precise location of his fall. The spot marked by plaintiff as the precise location of the accident was in front of the lot and not in front of MSB's building

[1] This Court additionally noted that plaintiff's failure to aggressively pursue the discovery that was outstanding lent further support to its decision. However, this was not the basis of its decision.

(NYSCEF Doc. No. 80, at 6). This is the law of the case, 77 asserts, and therefore is binding here as well (NYSCEF Doc. No. 117, ¶¶ 23-25). According to this Court, plaintiff did not fall in front of the building and the building owner itself is not liable. Thus, claims 77, it, too, is not responsible.

Alternatively, 77 argues that there is an evidentiary basis for granting summary judgment. It reiterates that plaintiff's alleged accident did not occur on the sidewalk adjoining its leased property. Moreover, it asserts that plaintiff has not provided evidence establishing that it breached a duty to maintain the sidewalk. In support of its motion, 77 submits, among other things, a copy of the transcript of plaintiff's May 23, 2019 deposition, at which he testified that he fell in front of the neighboring lot and identified the spot in a photograph (NYSCEF Doc. No. 127). Additionally, 77 submits the affidavit of Hector Martinez, who was the store's manager on the accident date. Martinez states that "[t]he fenced in/gated area located between 745 East 6th Street and 77 Ave D was, to my knowledge, owned by the Rite Aid pharmacy located around the corner on Avenue D and was used by Rite Aid to get deliveries" (NYSCEF Doc. No. 129, ¶ 4). Thus, 77 argues that it had no obligation to maintain the area in question.

According to 77, even if this Court concludes there were an issue of fact regarding its obligation to maintain the area – a position 77 strongly denies – then 77 had no responsibility to maintain the sidewalk on the East 6th Street side of the building. Under Administrative Code § 7-210, an owner is responsible for maintaining the area in front of its building in a safe condition. Martinez states in his affidavit that the bodega's employees "only perform[ed] snow and ice removal activities from the sidewalk on Avenue D, where the front door and display windows of the bodega were located" and that the superintendent was responsible for the sidewalk on the East 6th Street side of the building (NYSCEF Doc. No. 129 at ¶ 5).

Plaintiff and Volks oppose the motion.[2] Plaintiff asserts that only plaintiff's deposition has been held and therefore the motion is premature, an argument he raised in the motion made by MSB. Specifically with respect to 77's motion, he notes that he has not deposed Martinez, upon whose affidavit 77 partially relies. According to plaintiff, the testimony of Martinez belies the statement in 77's discovery response that it knew of no witnesses to plaintiff's fall (NYSCEF Doc. No. 141, ¶ 2) and the affidavit of Bhusri, an MSB member, that MSB did not perform snow and removal work in the area of plaintiff's fall (NYSCEF Doc. No. 64, ¶ 5). Plaintiff further notes that Martinez was not a witness to the incident.

Plaintiff also reiterates that Mangual testified at her deposition that the area in front of the bodega looked like it had not been shoveled and that the area was generally not maintained well (NYSCEF Doc. No. 134, ¶ ¶ 25-27, citing Mangual dep at 19-20, 62-63, 66, 91-92, 103-104 [NYSCEF Doc. No. 142]). Plaintiff maintains that, coupled with 77's representation that it was responsible for the condition in front of the bodega, this shows that the bodega did not fulfill its responsibility. Mangual also states that plaintiff told her he fell near the deli and, according to workers at the deli, "some guy fell on the side of the deli" (NYSCEF Doc. No. 142, at 98 lines 5-6). Plaintiff states this raises a question as to the area where plaintiff fell.

Further, plaintiff alleges that Martinez's affidavit does not establish that 77 had no responsibility for maintaining the entire sidewalk in front of the building. Plaintiff notes that there is no supporting documentation, such as the governing lease, that substantiates the affidavit on this issue. As he did in opposition to MSB, plaintiff argues that 77 has not satisfied its burden of showing that it neither created the condition nor made a special use of the area in question (also

[2] Volks' opposition consists of a short affirmation which adopts plaintiff's arguments (NYSCEF Doc. No. 144, ¶ 3).

citing *Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 212 [1st Dept 1999] [triable issue exists if a party's "affirmative acts of negligence . . . created or increased a hazard and were the proximate cause of plaintiff's injuries"]).[3]

In reply, 77 states that plaintiff has merely set forth "sheer speculation, conjecture and surmise and [sought] to distort the facts through numerous red herrings in a vain attempt to raise a question of fact where none exists" (NYSCEF Doc. No. 145, ¶ 5). It notes that plaintiff's argument ignores the crucial fact that plaintiff did not fall in front of the bodega. 77 maintains that the testimony of Mangual is irrelevant since she did not witness the accident. Further, her testimony about the statements of several bodega workers is hearsay and unpersuasive. 77 rejects plaintiff's position that the condition of the entire area, including neighboring buildings, is at issue.

Due to plaintiff's repeated argument that plaintiff fell in an area for which MSB and 77 bear responsibility, 77 submits additional evidence in the form of an affidavit by Saied Jalilvand, a licensed professional surveyor (NYSCEF Doc. No. 146). Based on Jalilvand's examination of the deed and of his survey of the property, Jalilvand concludes that "the area where the plaintiff alleges to have fallen is not adjacent to the property at 77 Avenue D owned by [MSB], and where defendant 77 Ave D was the tenant" (*id.*, ¶ 10). Specifically, Jalilvand states that plaintiff fell eight feet from the property line (*id.*, ¶ 9).

[3] He additionally states that, if this assertion is true, then summary judgment dismissing MSB should have been denied. The court rejects this argument, as the court's dismissal of MSB relied on the fact that MSB did not own or control the area where the accident occurred. Therefore, its maintenance of the area it did control is not relevant.

LEGAL CONCLUSIONS

"The law of the case is applicable to legal determinations that were necessarily resolved on the merits in a prior decision" (*J.P. Morgan Sec., Inc. v Vigilant Ins. Co.*, 166 AD3d 1, 9 [1st Dept 2018] [internal quotation marks and citation omitted]). Further, once the issue has been resolved, the determination is binding on judges and courts of coordinate jurisdiction (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717, 717 [2d Dept 2012]). It also is applicable when the same issue was decided in the same case (*RPG Consulting, Inc. v Zormati*, 82 AD3d 739, 740 [2d Dept 2011]). In the case at hand, as 77 correctly notes, this Court has already ruled that plaintiff did not fall in front of area that was under control of MSB (NYSCEF Doc. No. 80). Further, after the parties fully submitted this motion, this Court denied plaintiff's motion to reargue (NYSCEF Doc. No. 149). In so holding, this Court expressly restated that MSB was not responsible for the area where the accident occurred (*id.* at 6). Since the portion of the sidewalk arguably under 77's control is within the same area, dismissal of the claims and cross claims against 77 is appropriate.

Even if this were not the case, movant would be entitled to summary judgment on the merits. "To succeed on [a] motion for summary judgment, defendant[] had to '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'" (*Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 186 [2020], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [other citation omitted]). If the defendant has satisfied this burden, the burden then shifts to plaintiff to produce evidentiary proof which raises a triable factual issue (*Maritza P. v Devereux Found.*, 149 AD3d 554, 554 [1st Dept 2017] [citing *Alvarez*, 68 NY2d at 324). Conclusory assertions or allegations, or "a shadowy semblance of an issue," are insufficient to defeat the motion once the movant establishes its right to relief (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439,

448 [2016] [quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). Here, 77 has submitted ample evidence to satisfy its prima facie burden. The photograph, plaintiff's deposition testimony, the Martinez affidavit, and the surveyor's affidavit all establish that plaintiff did not fall in an area under 77's control. Plaintiff's opposition does not raise a triable fact insofar as he does not demonstrate that the accident took place in front of the bodega. As 77 notes, any conversation Mangual had with bodega employees is hearsay. Moreover, because none of them witnessed the accident, their versions of the incident are of no moment herein. As this Court stated in considering MSB's motion and plaintiff's motion to reargue, plaintiff's special use argument does not create an issue of fact because he presents no evidence of, or argument about, any special use. Nor has plaintiff set forth any inconsistencies which create factual issues. For example, Martinez's statement does not belie other statements by 77 and MSB that there were no witnesses, as Martinez expressly states that he was not a witness to the incident. Also, plaintiff's position that it should be allowed to depose Martinez is not persuasive as plaintiff does not indicate that a deposition would yield any useful or relevant evidence.

This Court does not reach the issue of whether 77 was responsible for maintaining the entire area in front of MSB's building or merely the area in front of its store. In any event, however, this issue is immaterial because plaintiff did not fall in front of the building.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to dismiss all claims and cross-claims against 77 Ave D Supermarket Corp. is granted, and the claims and cross-claims are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, based on this court's decisions in motion sequence numbers 001, 002, and 004, the caption of this action is amended, and the new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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JOSE GAMBINO,

Plaintiff,

Index No. 150631/2016

-against-

C&C APARTMENT MANAGEMENT LLC., AVENUE D OWNERS LLC., and RITE AID OF NEW YORK, INC.,

Defendants.

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RITE AID OF NEW YORK, INC.,

Third-Party Plaintiff,

-against -

VOLKS SERVICE CORP.,

Third-Party Defendant.

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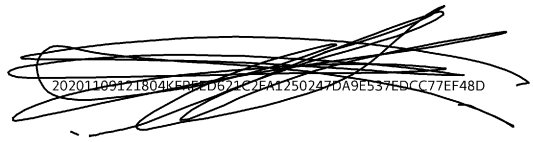
and it is further

ORDERED that the Trial Support Clerk and County Clerk shall note the new caption in their records, and the parties shall use the new caption in future court papers; and it is further

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



11/9/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE