

Quiles v Bay 28th Realty, LLC

2020 NY Slip Op 35403(U)

September 2, 2020

Supreme Court, Kings County

Docket Number: Index No. 521698/2017

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 2nd day of September 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X
BARBARA QUILES,

Index No.: 521698/2017

Plaintiff,

DECISION & ORDER

-against-

BAY 28th REALTY, LLC, DAFNONAS ESTATES LTD., and NIKOLAOS LEONARDOS,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

NYSCEF Doc. No.:

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____

112- 127

Opposing Affidavits (Affirmations) _____

134-142, 144-146

Reply Affidavits (Affirmations) _____

148-151, 152-154

Introduction

Defendants, Bay 28th Realty, LLC, Dafnonas Estates Ltd., and Nikolaos Leonardos, move by notice of motion, sequence number eight, (1) pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint as against defendants; (2) pursuant to CPLR § 3211(a) dismissing plaintiff's complaint for lack of standing; (3) pursuant to CPLR § 3211(a) dismissing plaintiff's complaint against defendants pursuant

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[* 1]

to the doctrine of judicial estoppel; and (4) for such other and further relief as this Court deems just and proper. Plaintiff, Barbara Quiles, opposes this application.

Background

Plaintiff allegedly sustained personal injuries in January 2017, when she tripped and fell on an interior staircase at the premises located at 45 Bay 28th Street, in Brooklyn New York. Plaintiff testified at an examination before trial (EBT) on July 25, 2019 (*see* NYSCEF Doc. # 123, Plaintiff EBT transcript). Plaintiff cannot recall whether the accident occurred on January 1 or January 2, of 2017. Plaintiff descended the second-floor stairwell and held onto the handrail when her left foot slipped on the marble step. She was wearing shoes with a one-inch heel. After the incident, plaintiff observed a 9-inch-long crack and a “little indent” on the first step. She testified that the step was clean, with no dirt, debris or water on it.¹ Plaintiff testified that she had used this stairwell approximately twice a day for the 14 years that she has lived in the building.

The building is owned by Bay 28th Realty, LLC and managed by Nickolaos Leonardos. Leonardos testified at an EBT on July 30, 2019 (*see* NYSCEF Doc. # 124, Leonardos EBT transcript). Leonardos visits the building two-three times a month and has never observed any issues with the stairwell. He has also never received complaints about the building. The building has a superintendent who, along with his wife, sweeps the apartment’s stairwells two-three times a week and mops them every other day (*see id.* at 25-30). The super and his wife who also cleaned were not responsible for looking for

¹ Photographs of the stairs can be found at NYSCEF Doc. # 127).

tripping hazards (*see id.* at 26-27). Leonardos viewed photographs of the stairs and did not observe any defects, but rather a vein in the marble. (*see id.* at 49-51). Ernico Ferdico, owner of Bay 28th Realty, LLC, provided an affidavit, sworn to on October 23, 2019 (*see* NYSCEF Doc. # 126, Ferdco Affidavit). Ferdico stated that Bay 28th Realty, LLC, did not receive complaints regarding the stairs at the premises, did not have notice of the alleged condition, and did not create the alleged stairway defect (*see id.* at ¶ 3-4).

Bernard P. Lorenz, a professional engineer licensed in the State of New York, and employed by Affiliated Engineering Laboratories, Inc., inspected the stairwell (*see* NYSCEF Doc. # 125, Lorenz Affidavit). Lorenz opines that the stairway, handrail and step in question were well maintained and free of unsafe conditions (*see id.* at ¶ 7).

Lorenz further opines that as the building was constructed in 1926, it is subject to the Tenement House Law of 1922 (*see id.* at ¶ 6).

It has been alleged that the subject stairway violated the following sections of the New York State Multiple Dwelling Law: § 37 (Artificial hall lighting), § 52 (Stairs) and § 78 (Repairs). Article 3, § 25 of the New York State Multiple Dwelling Law states that it applies to multiple dwellings erected after April 18, 1929. As such, none of the sections of the New York State Multiple Dwelling law cited by Plaintiff are applicable to the subject stairway, as said building was constructed in 1926. Regardless, the subject stairway was in compliance with § 37 (Artificial hall lighting), § 52 (Stairs) and § 78 (Repairs) of the New York State Multiple Dwelling Law. Therefore, the Defendants did not violate New York State Multiple Dwelling Law.

(*id.* at ¶ 8).

James Pugh, Ph.D, P.E. provided an affidavit in opposition to the motion (*see* NYSCEF Doc. # 137). Pugh inspected the stairwell on October 30, 2017 and disagrees with Lorenz' characterization that the step is free of any unsafe conditions.

During my inspection, I observed the subject tread to be cracked, and portions of the tread were missing in the vicinity of the crack near the nosing of the subject tread. The defect that caught Ms. Quiles' heel was measured to be 3/8 inches wide by 2 inches in dimension from the nosing rearwards to the riser by 1/4 inch deep. The nosing of the tread was measured to be dished downwards approximately 1/2 inch due to the cracked tread, in the area of the crack. A tread that is dished downwards is one that concaved in the direction of descent. This, as well as the cracked tread, are dangerous conditions. The walking surface of a tread should be flat and free from cracks in order to be safe. The dishing actually increased the dimensions of the defect beyond what is above-reported as the measured dimensions by decreasing the riser height in the area of the dishing, all of which constitute lack of maintenance. The heels of the shoes worn by plaintiff were examined at the time of my inspection and were found to be of a dimension to have been caught in the tread defect.

...

7. It is my opinion to a reasonable degree of safety engineering certainty that the presence of a crack in the stairs and the downward dishing of the tread were proximate causes of Ms. Quiles' accident. The crack should have been filled and/or the tread replaced.

8. It is my opinion, within a reasonable degree of safety engineering certainty, that the aforesaid defective conditions were long-standing. A crack in a step and downward dishing of a step are conditions which develop over time. These conditions should have been discovered and remedied by the owner and management had they performed a reasonable inspection of the staircase in question.

(*id.* at ¶ 5, 7-8).

Pugh further opined that the conditions violated sections 102 and 35 of the Tenement House Law of 1924 (*see id.* at ¶ 6).

Procedural History

Plaintiff commenced the instant action by e-filing a summons and verified complaint on November 8, 2017. Plaintiff filed for Chapter 7 Bankruptcy in the Eastern District of New York on or about January 17, 2018 (*see* NYSCEF Doc. # 115). Plaintiff did not list the instant action as a potential asset in the bankruptcy filing. Plaintiff filed an amended complaint on November 19, 2018 (*see* NYSCEF Doc. # 46). Defendants filed an amended answer on December 11, 2018, which includes, *inter alia*, affirmative defenses that this action is barred by collateral estoppel and that the plaintiff lacks standing to pursue the claims herein (*see* NYSCEF Doc. # 119, Amended Answer). The note of issue and certificate of readiness for trial were filed in the instant action on August 30, 2019.

Defendants filed the instant motion on October 28, 2019, nearly two months after certifying that this action is ready for trial. The parties stipulated to a briefing schedule dated January 28, 2020, wherein opposition was to be served on or before March 6, 2020 (*see* NYSCEF Doc. # 149). A handwritten amendment was made and initialed on the stipulation which stated that “[Plaintiff]’s bankruptcy attorney is amending petition and needs additional time” (NYSCEF Doc. # 150). On January 28, 2020, three months after this motion was filed, plaintiff moved to reopen the bankruptcy proceeding to include the instant action (*see* NYSCEF Doc. # 135). A hearing was held in the bankruptcy proceeding on March 3, 2020. Plaintiff e-filed opposition to the instant motion on March

6, 2020. An order was issued by the Eastern District Bankruptcy Court on March 17, 2020, permitting plaintiff to amend her petition to include the instant action and stating that “the office of the United States Trustee shall may appoint a Chapter 7 Trustee” (NYSCEF Doc. # 145). Thereafter, on May 6, 2020, plaintiff e-filed supplemental opposition to the motion to include the order issued by the Bankruptcy Court reopening the proceeding. Defendants e-filed reply on June 5, 2020, objecting to plaintiff’s supplemental opposition. Thereafter, on July 13, 2020 plaintiff e-filed an “Affirmation in Response to Reply” (*see* NYSCEF Doc. # 152-154).

Discussion

As an initial matter, this Court will address a few procedural issues. Although the parties stipulated that opposition should be filed by March 6, 2020, this Court will consider plaintiff’s supplemental opposition filed without leave of Court on May 6, 2020. Plaintiff’s supplemental opposition did not set forth new arguments, but rather provided an order from the Bankruptcy court which was not yet in her possession when opposition was due on March 6, 2020. Further, defendants filed reply on June 5, 2020, nearly a month later, and had ample opportunity to address all of plaintiff’s arguments in their reply. For the foregoing reasons, defendants are not prejudiced by this supplemental opposition and this Court will consider it. Additionally, in their reply, defendants raised new arguments with respect to a handwritten change made to the stipulated briefing schedule. Accordingly, this Court will also consider plaintiff’s July 13, 2020 “Affirmation in Response to Reply”, which responds to those arguments (*see generally*, *U.S. Bank Tr., N.A. v. Rudick*, 156 A.D.3d 841, 67 N.Y.S.3d 646 [2 Dept., 2017]; *Gluck*

v. New York City Tr. Auth., 118 A.D.3d 667, 987 N.Y.S.2d 89 [2 Dept., 2014]).

With respect to this handwritten amendment to the stipulated briefing schedule, defendant alleges that this was made unilaterally by plaintiff's counsel. Plaintiff's counsel alleges that the amendment was made at the request of the court. This is a red herring, as this handwritten change in no way amended the briefing schedule. Rather, the handwritten change "[Plaintiff]'s bankruptcy attorney is amending petition and needs additional time", merely provided a reason for the request for an adjournment.

Motion to Dismiss

Lack of Capacity to Sue

Defendants move to dismiss the complaint pursuant to CPLR § 3211(a)(3), alleging that plaintiff does not have legal capacity to sue because this action was not originally listed in her Chapter 7 Bankruptcy petition. "Capacity to sue concerns a litigant's power to appear and bring its grievance before the court" (*Nicke v. Schwartzapfel Partners, P.C.*, 148 A.D.3d 1168, 51 N.Y.S.3d 121 [2 Dept., 2017], citing *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644 [1994]).

The commencement of a bankruptcy proceeding creates an "estate" that is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case ... Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate ... Although federal law determines when a debtor's interest in property is property of the bankruptcy estate, property interests are created and defined by state law ... Causes of action that accrue under state law prior to the filing of a bankruptcy petition, as well as those that accrue as a result of the filing, are property of the

estate ... [A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf.

(*Burbacki v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 172 A.D.3d 1300, 99 N.Y.S.3d 671 [2 Dept., 2019] [internal citations and quotation marks omitted]).

Here, plaintiff commenced the instant action on November 8, 2017, prior to filing her bankruptcy petition. Defendants contend that plaintiff lost her capacity to sue when she failed to disclose this cause of action on January 17, 2018 bankruptcy filing. Since the plaintiff had an interest in this negligence action as of the commencement of the bankruptcy petition the cause of action is property of the bankruptcy estate and the plaintiff lacks the legal capacity to sue on that cause of action.

In opposition, plaintiff relies on the Appellate Division, Second Department decision in *Fausset v. Turner Construction Co.*, for the proposition that the issue of standing is re-established where bankruptcy is reopened (177 A.D.3d 702, 112 N.Y.S.3d 7 [2 Dept., 2019]). In *Faussett*, the motions before that court were to amend the answer to assert the affirmative defense of lack of capacity to sue, and thereupon dismiss the complaint for lack of capacity to sue, and plaintiff's cross-motion to amend and reserve the complaint, substituting plaintiff for the bankruptcy trustee. The Bankruptcy Court by order, permitted that substitution of a trustee as successor in interest to the plaintiff in the personal injury action. The Appellate Division, Second Department, "as a matter of comity, and in deference to the Bankruptcy Court" granted plaintiff's cross-motion to substitute the plaintiff for the Bankruptcy trustee and denied defendant's motion.

In the case at bar case, plaintiff first moved to amend her bankruptcy petition to include the instant action on January 28, 2020, nearly two years after the initial filing on January 17, 2018 (*see* NYSCEF Doc. # 135). A hearing was held on March 3, 2020. An order was issued by the Eastern District Bankruptcy Court on March 17, 2020, permitting plaintiff to amend her petition to include the instant action and stating that “the office of the United States Trustee shall may appoint a Chapter 7 Trustee” (NYSCEF Doc. # 145). Although plaintiff opposes defendant’s motion on this ground, there is no cross-motion before this Court to substitute a bankruptcy trustee for the plaintiff. Certainly, as a matter of comity, and in deference to the determination of the Bankruptcy Court, to permit plaintiff to amend her bankruptcy petition to include the instant action this Court would be inclined to substitute the bankruptcy trustee as the plaintiff. However, there is not an indication to this Court that a trustee was appointed. Therefore, there is no trustee to substitute (*cf. id.* [“On or about November 14, 2016, the bankruptcy trustee moved in the Bankruptcy Court to reopen the plaintiff’s case because assets existed to be administered by the trustee. On January 5, 2017, the Bankruptcy Court issued an order authorizing the bankruptcy trustee to retain Argyropoulos & Associates, LLC, the plaintiff’s counsel, to act as the trustee’s personal injury counsel to handle and conclude the pending personal injury action. The Bankruptcy Court further ordered counsel, within 30 days of the entry of the order, to move in the court in which the personal injury action was pending to substitute the trustee as successor in interest to the plaintiff so that the caption would identify the plaintiff as Richard J. McCord, as Trustee of the Estate of Walter Fausset.”]).

Conclusion

Accordingly, the branch of defendants' motion to dismiss for lack of capacity to sue is granted. The remainder of defendant's motion is denied as academic.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

To:

Judith Sempler, Esq.
Burns & Harris
Attorney for Plaintiff

Keith J. Norton, Esq.
Law Office of Kevin J. Philbin
Attorney for Defendants

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