Fox v Bremen House, Inc.
2021 NY Slip Op 31436(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 153972/2020
Judge: J. Machelle Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **IAS MOTION 62**

Justice

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DRUCILLA FOX,

Plaintiff,

- v -

BREMEN HOUSE, INC.,UNO RESTAURANTS, LLC,UNO RESTAURANT HOLDINGS CORPORATION, BUON CIBO ACQUISITION LP, BUON CIBO INC.,GREEN ACRES CLEANERS, J.A.P EURO REMODELING, C & C HAIR SALON, 85TH CANDY, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION

Defendant.

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INDEX NO. 153972/2020

MOTION DATE 01/28/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38

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

Pending before the court is a motion by defendant C & C HAIR SALON (the "movant") seeking an order pursuant to CPLR §321 granting the movant summary judgment and dismissing the complaint and all cross claims asserted against the movant, with prejudice, on the basis that the movant did not own, lease or occupy the premises in front of which the alleged accident occurred. The City of New York, New York City Department of Transportation, New York City Department of Parks and Recreation (collectively, the "City defendants") take no position with respect to the motion. Defendant "85th Candy" takes no position on the motion. Defendant Bremen House did not appear or otherwise serve or file any opposition to the motion. Based on the forgoing documents, this motion is GRANTED.

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Here, the movant argues that the plaintiff fell in front of the property located at 217 East 85th Street. However, the movant is a tenant at the adjacent premises located at 219 East 85th Street. The movant argues that it did not operate, manage, maintain, supervise, repair, construct, alter or exercise control over the premises located at 217 East 85th Street, and it did not, therefore, have any obligation under the common law or by contract with respect to the sidewalk adjacent to the 217 East 85th Street premises.

Plaintiff opposes and attaches to the opposition papers a tax map that purportedly states that 217 East 85th Street and 219 East 85th Street are on the same parcel of property with respect to taxation. Plaintiff also cites a portion of the movant's lease, which reads:

> . . . Tenant shall, throughout the term of the least, take good care of the demised premises (including, without limitation, the storefront) and the fixtures and appurtenances therein, **and the sidewalk adjacent thereto**, and at its sole cost and expense, make all non-

> structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted. . . .
>
> Tenant shall at Tenant's expense, keep the demised premises clean and in order, to the satisfaction of the Owner, and if the demised premises are situated on the street floor, **Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto**, keep said sidewalks and curbs free from snow, ice, dirt and rubbish and maintain said sidewalks in a reasonably safe condition in compliance with requirements of law. [emphasis added by plaintiff]

Plaintiff argues that under said lease, the movant is responsible for the "sidewalk adjacent thereto" and that includes the property located at 217 East 85th Street. Finally, plaintiff argues that summary judgment is premature, as plaintiff has not been afforded the opportunity to obtain "adequate discovery" from defendants in this action.

Here, it is important to distinguish between the two adjacent parcels of property: 217 East 85th Street and 219 East 85th Street. Based on plaintiff's Complaint (NYCEF Document #1), plaintiff's injuries were allegedly caused by a defect "on the sidewalk at or near the front of 217 East 85th Street in New York, New York." Photographs (NYCEF Document #34) submitted by plaintiff and attached to plaintiff's opposition also show the area where plaintiff fell. The area was marked with a red circle located in front of 217 East 85th Street and not 219 East 85th Street, which is the premises leased by the movant and described in the movant's lease agreement. (NYCEF Document #28). Importantly, the lease, when read as a whole, shows that any references therein to the sidewalk or curbs "adjacent thereto" means the sidewalk or curbs adjacent to the premises located 219 East 85th Street only. Additionally, in support of its claim, the movant submits the sworn affidavit by CENGIZ CAKIRCA, the owner of C & C HAIR SALON (the movant), that reiterates that the movant did not have any control or responsibility with respect to the sidewalk located in front 217 East 85th Street.

Further, to the extent that the tax map shows that 217 and 219 East 85th Street may be linked with respect to property taxes it does not show that the responsibilities of movant extend to the sidewalk located in front of 217 East 85th Street. Finally, to the extent that plaintiff argues this motion is premature, plaintiff failed to identify any such key fact or to offer an evidentiary basis to suggest that discovery may lead to relevant evidence, or that any fact essential to opposing the motion was exclusively within the knowledge and control of the movant. See DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C., 125 A.D.3d 480 (Sup. Ct. App. Div. 1st Dept. 2015) ("Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.) *and* A & W Egg Co. v. Tufo's Wholesale Dairy, Inc., 169 A.D.3d 616 (Sup. Ct. App. Div. 1st Dept. 2019) ("Since defendant could have opposed the motion based on its own documents, and pointed to no facts essential to its opposition that are in plaintiff's control, the motion was not prematurely decided before discovery").

In conclusion, given the totality of the circumstances:

IT IS HEREBY ORDERED that summary judgment is granted to the movant (C & C Hair Salon) and the complaint and all cross claims asserted against C & C Hair Salon are dismissed with prejudice.

4/28/2021
DATE

J. MACHELLE SWEETING, 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