S.D.P. v M&S Bargain Hunters
2021 NY Slip Op 31791(U)
May 24, 2021
Supreme Court, Kings County
Docket Number: 508179/2015
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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S.D.P. , an infant by her Mother and Natural Guardian, NICOLE PINCKNEY and NICOLE PINCKNEY, Individually,

Plaintiffs,

-against-

M&S BARGAIN HUNTERS, M&S BARGAIN HUNTER 1 CORP., BAWABEH BROTHERS NO. 2 LLC and SIGN WORLD INC.,

Defendants.
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Index No.: 508179/2015
Motion Date: 4-26-21
Mot. Seq. No.: 7

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 179-202, 204-211, 213-214, the motion is decided as follows:

In this action to recover damages for personal injuries, defendants/second third-party plaintiffs, M&S BARGAIN HUNTERS and M&S BARGAIN HUNTER 1 CORP. ("the moving defendants"), move for an Order pursuant to CPLR §3212 granting summary judgment dismissing the complaint insofar as asserted against them and all cross-claims.

This action was commenced on behalf of the infant plaintiff S'D'P who was allegedly injured on November 24, 2013, when she was struck by bricks and a metal sign that fell from the facade of the building located at 1190 Fulton Street, Brooklyn, New York while she was traversing the public sidewalk. The building was owned by defendant/third-party plaintiff, Bawabeh Brothers No. 2 LLC (hereinafter "Bawabeh"), who had leased the building to the moving defendants for use as a retail discount store. The metal sign that struck the infant plaintiff belonged to the moving defendants and had the words "Bargain Hunters" written on it. The sign was affixed to a three-foot wall that ran along the roof of the building and was installed by defendant Sign World, Inc. at the moving defendants' request sometime in 2001. According to Jeffrey Silver, the manager of the moving defendants' store at the time of the accident, the sign might have been replaced after its initial installation and before the store's closure in August of 2018. Mr. Silver also recalled that Sign World came down to repair the sign on one occasion long before the accident.

The moving defendants' argument in chief is that they did not have a duty to maintain and repair the sign since the lease obligated Bawabeh to maintain the exterior of the building. This is not accurate. Paragraph 4 of the lease provides as follows:

> Owner (Bawabeh), shall maintain and repair the public portions of the building, both exterior and interior, **except if the Owner allows tenant to erect on the outside of the building a sign or signs… for the exclusive use of a Tenant shall maintain such exterior installations in good appearance… shall make all repairs thereto necessary to keep same in good order and condition, at Tenant's own costs and expense**, and shall cause same to be covered by the insurance provided for hereafter in Article 8 [of this lease] (emphasis added).

It was not demonstrated that Bawabeh did not allow the moving defendants to erect the sign on the outside of the building.

Paragraph 78 of the Lease Ride provides:

> Notwithstanding anything in this Lease to the contrary, Landlord shall be responsible to and make any and all repairs to the roof, liters, gutters, facade (excluding the store front) and any repairs of a structural nature, provided that same has not been caused by Tenant's negligent acts.

While Bawabeh was obligated to maintain and repair the exterior and façade of the building pursuant to the lease, it cannot be determined as a matter of law from the record presented whether the metal sign and facade fell as a result of a defective condition in the façade or the metal sign or a combination of both.

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "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" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion "the burden shift[s] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make such a showing, the motion must be denied regardless of the sufficiency of

the opposing papers" (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York*, 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661).

Assuming that a defective condition in the metal sign contributed to the happening of the accident, which as stated above cannot be ruled out, the moving defendants haven not demonstrate that it did owe a duty to the infant plaintiff to maintain the sign in a reasonably safe condition. Clearly, the defendants had a duty to "maintain the sign created for [their] benefit in a safe condition" (*see Gillette v. Luone Co.*, 114 N.Y.S.2d 713, 717, citing 5 Warren's N.Y. Negligence, § 352, *see also*, *San Filippo v. Am. Bill Posting Co.*, 188 N.Y. 514, 81 N.E. 463; *McNulty v. Ludwig & Co.*, 153 A.D. 206, 210, 138 N.Y.S. 84, 88). Further, the moving defendants were also required to repair and maintain the sign pursuant to the lease agreement which required them to "make all repairs [to the sign] necessary to keep same in good order and condition, at Tenant's own costs and expense."

Since the moving defendants failed to demonstrate as a matter of law that they did not owe a duty to the infant plaintiff to maintain the sign in reasonably safe condition, their motion for summary judgment must be denied because they failed to demonstrate "prima facie, that it ever inspected the...sign…or that reasonable periodic inspections of … sign would not have prevented the accident (*see McGrew v. V.V. Bldg. Corp.*, 306 A.D.2d 131, 132, 761 N.Y.S.2d 43, 44, citing 85 N.Y. Jur 2d, Premises Liability, §§ 51–59). "This initial burden was not satisfied by defendant's showing that it never…received any complaints about [the sign] (*id*.).

While the moving dependents submitted admissible proof that they did not create the condition that caused the sign and the facade of the building to collapse and that the lacked actual constructive knowledge of any defective condition of the sign or façade, in light of the above, such does not entitle them to summary judgement. The moving defendants failure to make a prima facia showing or their entitlement to judgment as a matter of law, the motion must be denied regardless of sufficiency papers submitted in opposition.

The court has considered the moving defendant's remaining arguments in support of their motion and find them to be without merit.

Accordingly, it is hereby

ORDRED that the motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 24, 2021

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020