Charles v Sherman Parking
2021 NY Slip Op 31817(U)
May 27, 2021
Supreme Court, New York County
Docket Number: 159853/2020
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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DESTINY CHARLES,

Plaintiff,

- v -

SHERMAN PARKING, LA CASA DEL MOFONGO & PIANO BAR

Defendant.

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INDEX NO. 159853/2020

MOTION DATE N/A, N/A, N/A, 04/30/2021

MOTION SEQ. NO. 001 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 20, 27, 28, 29, 36

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 21, 22, 23, 24, 25, 26

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 30, 31, 32, 33, 34, 35

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Plaintiff Destiny Charles ("Plaintiff") brings this negligence action against Defendants Sherman Parking ("Sherman") and La Casa Del Mofongo & Piano Bar ("La Casa") for injuries sustained during an alleged slip and fall on a sidewalk.

In motion sequence 001, Sherman moves to dismiss the complaint for failure to state a claim, on the grounds that Sherman is the manager of the underground parking garage and thus owed no duty to maintain the sidewalk. In motion sequence 002, Plaintiff seeks a default judgment

against La Casa. In motion sequence numbers 003 and 004,[1] Plaintiff seeks an order consolidating this action with a related action, *Destiny Charles v Caroline Apartments Preservation LP*, bearing index number 159825/2019 (Action No. 1).[2] Plaintiff opposes the relief sought in motion sequence number 001; motion sequence numbers 002, 003, and 004 have been submitted to the court unopposed. The motions are consolidated for disposition.

Background

Plaintiff alleges that on July 18, 2019, she was caused to fall on a sidewalk, in an area between the two premises occupied by Defendants. (NYSCEF Doc. No. 1, ¶¶ 27-32; 40-43.) Plaintiff claims that Sherman carelessly, recklessly, and negligently maintained the sidewalk by leaving it in a defective, unsafe, and dangerous condition, therefore violating a duty to the Plaintiff. (NYSCEF Doc. No. 1, ¶¶ 27-32; 40-43.)

Sherman operates an underground parking garage located at 210 Sherman Avenue, New York, New York and La Casa is a restaurant located at 546 West 207th Street. Sherman maintains that it does not owe a duty of care to plaintiff as it operates the underground parking garage in accordance with management agreements with the owner of the property, Caroline Holdings, LLC and Caroline Apartments Co. (NYSCEF Doc. Nos. 10, 11.) Sherman seeks dismissal of the complaint as it contends that it has no "legal possession" of the sidewalks or any area outside the underground garage. (NYSCEF Doc. No. 8, ¶ 10.) Plaintiff opposes the motion to dismiss and

[1] Motion sequence numbers 003 and 004 seek identical relief, however, it appears that Plaintiff filed motion sequence 004 to correct the index number for Action No. 1. (*Compare* NYSCEF Doc Nos. 22 at ¶¶ 3-4 *with* 30 at ¶¶ 3-4.)

[2] In Action No. 1, which was commenced on October 8, 2019, Plaintiff brings an identical claim arising out of the same alleged accident as this case; both Sherman and La Casa are named as Defendants, in addition to Caroline Apartments Preservation, LP and Caroline Holdings, LLC. In the complaint in this action, Plaintiff includes allegations against both Caroline parties which are not named as defendants. (NYSCEF Doc No. 1, Complaint, at ¶¶ 1-8.)

claims that there are issues of fact concerning Sherman's special use of the portion of the sidewalk where Plaintiff is alleged to have fell and that discovery is needed to resolve these issues.

Motion sequence number 001

A motion to dismiss may be granted pursuant to CPLR 3211(a)(7) if "the pleading fails to state a cause of action" (CPLR 3211[a][7]). "[T]he pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory" (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I. Inc. v Goldman. Sachs & Co.*, 5 NY3d 11, 19 [2005].)

Generally, "liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control or special use of the property" (*Welwood v Association for Children with Down Syndrome,* 248 AD2d 707, 708, 670 N.Y.S.2d 556 [2d Dept 1998] [internal quotation marks and citation omitted]). Pursuant to New York City Administrative Code § 7-210, owners of real property have a nondelegable duty to maintain the sidewalk in a reasonably safe condition (see *Baghban v City of NY,* 140 AD3d 586, 586, 33 N.Y.S.3d 695 [1st Dept 2016]; *Wolfe v Gallery Partners,* LLC, 2012 NY Slip Op 32301[U], 2012 NY Misc LEXIS 4299, *12 [Sup Ct, NY County 2012]; see also, *Pichardo v City of New York*, 2020 WL 2302997, at *3 [Sup Ct, NY County 2020].)

Liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the abutting owner or lessee if they either: (i) affirmatively created the dangerous condition; (ii) voluntarily but negligently made repairs; (iii) caused the condition to occur through

a special use; (iv) or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street (see *Gibbs v Husain*, 184 AD3d 809, 127 N.Y.S.3d 42 [2d Dept 2020]; see also *Richter v Reade*, 303 AD2d 232, 757 N.Y.S.2d 16 [1st Dept 2003]; *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311, 851 N.Y.S.2d 512 [1st Dept 2008]). A tenant is not responsible for sidewalk repairs unless specifically implied or imposed by the lease (see *Mahon v David Ellis Real Estate, L.P.*, 2016 NY Misc LEXIS 3363 at *14).

Additionally, under the special use doctrine, if the tenant "derives a special benefit from the abutting [sidewalk] unrelated to public use . . . it bears a 'duty to repair and maintain the special structure or instrumentality,' constituting the benefit, provided that said [tenant] has express or implied access to, and control of the instrumentality or structure." (*Weiskopf*, 2016 WL 5394208, at *4, *quoting Patterson v City of New York*, 1 AD3d 139, 140 [1st Dept 2003] *and Kaufman v Silver*, 90 NY2d 204, 207-08 [1997].) A tenant parking garage's use of a sidewalk as a driveway constitutes a special use of the sidewalk. (*Boneventura v 60 West 57 Realty LLC*, 157 AD3d 502 [1st Dept 2018] [denying summary judgment where issue of fact existed as to whether lessee parking garage's use of sidewalk as a driveway constituted a special use, and whether such special use caused the sidewalk defect]; *see also Katz v City of New York*, 18 AD3d 818, 819 [2d Dept 2005] ["A driveway constitutes a special use"].)

Here, Sherman moves to dismiss the complaint on the grounds that it owed no duty to maintain the sidewalk pursuant to New York Admin. Code § 7-210 and thus owed no duty to Plaintiff. In support, Sherman contends that it entered into a management agreement with Caroline Holdings, LLC for the parking garage located at 546-558 West 207th Street, and with The Caroline Apartments Co. for the parking garage located at 210 Sherman Avenue, and maintains that the agreements are co-terminus and virtually identical, except for differing street addresses and two

provisions irrelevant to this action. (NYSCEF Doc No. 8, ¶ 6.) Sherman submits that the management agreements do not obligate it to maintain the sidewalk or the street-entrance driveway and that Sherman is only responsible for managing the underground parking garage. (NYSCEF Doc Nos. 10, 11.) The agreements provide that "[Sherman] acknowledges and agrees that its engagement in the Garage shall be as Manager, . . . that this Agreement shall not vest a leasehold interest in the Garage[, and] Manager is acting in the capacity of an independent contractor." (*Id.* at 1.)

Sherman maintains that it owed no duty to Plaintiff and none is imposed by the terms of the management agreements; it contends that the management agreements are not leases, and that neither management agreement obligates Sherman to maintain the sidewalk or the street-entrance driveway. Moreover, it contends that unlike the management agreements, the lease agreement between Caroline Holdings, LLC and Co-Defendant La Casa del Mofongo for the property at 546-558 West 207th Street, New York, New York, explicitly imposes the duty to maintain and clean the sidewalk and curb area surrounding the premises upon Defendant La Casa. (NYSCEF Doc. No. 12, pp. 13-14.)

In opposition, Plaintiff argues that the motion is premature, as discovery is outstanding and depositions have not been held, and that a question of fact exists as to whether the area of the sidewalk in which she fell was used by Sherman as a driveway to the parking garage, constituting a special use. (NYSCEF Doc No. 27.) Sherman replies that whether such special use existed is irrelevant, as Sherman "was not in legal possession of the sidewalk", and as such, it could not be in possession of any special use of the sidewalk. (NYSCEF Doc No. 36 at ¶ 7.) However, the management agreements provide that

> Manager, at its sole cost and expense, covenants that it will comply with all laws, statutes and ordinance (including building codes and zoning regulations and

> ordinances) and the orders, rules, regulations, directives, and requirements of all Federal, State, county, city and borough departments, bureaus, boards, agencies, offices, commissions and other subdivisions thereof, or of any official thereof, or any governmental public or quasi-public authority, whether now or hereafter in force, *which may be applicable to* the Land or the Building or the Garage or any part thereof, or *the sidewalks, curbs or areas adjacent thereto* and all requirements, obligations and conditions of all instruments of record.

(*Id.* at 7-8 [emphasis added].)

The court finds that Sherman has not met its burden for dismissal. Sherman relies on the management agreements to support its contention that it owes no duty of care to the plaintiff, but fails to address in its submissions the sections of the management agreements outlined above stating that it will comply with all laws . . . which may be applicable to the sidewalks, curbs or areas adjacent thereto". (*Id.*) Moreover, Plaintiff maintains that no discovery has taken place and that Defendants are in exclusive control of discovery relating to ownership, operation, maintenance, management and control of the subject premises, as well as discovery relating to special use and whether Sherman created the alleged condition at issue. The record before the court is insufficient to establish whether Sherman made special use of the sidewalk as a driveway to the parking garage and as such, the motion to dismiss is premature as discovery related to these issues has not yet occurred. (*Boneventura*, 157 AD3d at 502.) Thus, accepting all alleged facts in the complaint as true, Defendant's motion to dismiss is denied as the court finds that Plaintiff has sufficiently stated a claim.

Motion sequence number 002

In motion sequence number 002, Plaintiff moves for default judgment against La Casa and to set the matter down for an inquest of damages. The motion has been submitted unopposed.

On a motion for leave to enter a default judgment, "the applicant shall file proof of service of the summons and the complaint … and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party[.]" (CPLR 3215 [f]; *see also SMROF II 2012-I Tr.*

v Tella, 139 AD3d 599 [1st Dept 2016].) "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." (*Bianchi v Empire City Subway Co.*, 2016 WL 1083912 [Sup Ct, NY County 2016], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003].)

Here, Plaintiff submits two affidavits of service alleging that La Casa was properly served on December 16, 2020, pursuant to CPLR 311, when a process server personally served an individual authorized to accept service, and again on March 1, 2021, by mailing a copy of the motion papers to La Casa's place of business. (NYSCEF Doc Nos. 17, 19.) To date, La Casa has failed to appear.

In addition, Plaintiff submits an affidavit of merit. However, despite La Casa's failure to appear, the court finds that Plaintiff's affidavit is insufficient to support the entry of default judgment.

> While a defendant in default is deemed to have admitted all traversable allegations in the complaint (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *Browny Rosedale Nurseries, Inc.*, 259 AD2d 256 [1st Dept 1999]), "CPLR § 3215 does not contemplate that default judgments are to be rubberstamped once jurisdiction and a failure to appear has been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Feffer v Malpeso*, 210 AD2d 60, [1st Dept 1994]. As such, a movant must submit an affidavit of the facts that does more than just make conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]), it must state sufficient factual allegations to enable the Court to determine that a viable cause of action exist (*Woodson*, supra at 70-72).

(*Hall v Holland Contracting Corp.*, 2011 WL 11061091, at *1 [Sup Ct, Bronx County 2011].)

The affidavit of merit contains only six paragraphs of boilerplate recitals directed at La Casa, unsupported by any specific factual allegations. Accordingly, Plaintiff has not met her burden in submitting "some proof of liability." (*Feffer*, 210 AD2d at 61.) Thus, the motion for default judgment is denied.

Motion sequence numbers 003 and 004

In motion sequence numbers 003 and 004, Plaintiff moves to consolidate this action with a prior related action, bearing the caption *Destiny Charles v Caroline Apartments Preservation, LP, Caroline Holdings, LLC, Sherman Parking, and La Casa Del Mofongo & Piano Bar*, and index number 159825/2019 (Action No. 1). (NYSCEF Doc Nos. 21, 30.) Both motions are submitted to the court unopposed.

Motion sequence numbers 003 and 004 seek identical relief, the only difference appearing to be that in motion sequence number 003, Plaintiff erroneously states that both actions bear the same index number. (*See* NYSCEF Doc No. 22 at ¶¶ 3-4.) The error is corrected in motion sequence number 004. (NYSCEF Doc No. 30 at ¶¶ 3-4.) Because the motions seek identical relief, motion sequence 003 is denied as duplicative. (*See Flores v 54th St. Auto Center, Inc.*, 2017 WL 3868593, at *1 [Sup Ct, Bronx County 2017].)

CPLR 602 grants the court the power to consolidate "actions involving a common question of law or fact[.]" "Consolidation is generally favored in the interest of judicial economy and ease of decision-making ... unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right." (*Firequench, Inc. v Kaplan*, 256 AD2d 213, 213 [1st Dept 1998] [internal citations omitted].) "A motion to consolidate is directed to the sound discretion of the court, and the court is given wide latitude in the exercise thereof. The primary purpose of consolidation is to eliminate technicalities, multiplicities of actions and delays and to protect substantial rights." (*Inspiration Enterprises, Inc. v Inland Credit Corp.*, 54 AD2d 839, 839 [1st Dept 1976] [internal citations omitted].)

The court finds that there are common questions of law and fact pertaining to both actions, as they both arise out of the same incident, and that no party demonstrates prejudice to a substantial right. Accordingly, motion sequence number 004 to consolidate is granted. Thus, it is hereby

ORDERED that Defendant Sherman Parking's motion sequence number 001 to dismiss the complaint is denied; and it is further

ORDERED that Plaintiff Destiny Charles' motion sequence number 002 for a default judgment against Defendant La Casa Del Mofongo & Piano Bar is denied; and it is further

ORDERED that Plaintiff's motion sequence number 003 to consolidate is denied as duplicative; and it is further

ORDERED that Plaintiff's motion sequence number 004 to consolidate is granted, and the above-captioned action is consolidated with *Destiny Charles v Caroline Apartments Preservation, LP, et al*, Index No. 159825/2019; and it is further

ORDERED that the consolidation shall take place under Index No. 159825/2019 and the consolidated action shall bear the following caption:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
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DESTINY E. CHARLES
Plaintiff,

Index No. 159825/2019

-against-
CAROLINE APARTMENTS PRESERVATION, LP.,
CAROLINE HOLDINGS, LLC, SHERMAN PARKING,
and LA CASA DEL MOFONGO & PIANO BAR,
Defendants.
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And it is further;

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol*.

05/27/21
DATE

W. FRANC PERRY, J.S.C.

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