Sullivan v Arthritis Health Assn. PLLC
2021 NY Slip Op 33377(U)
April 1, 2021
Supreme Court, Tioga County
Docket Number: Index No. 2018-60000
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 1st day of March, 2021.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TIOGA

TERESA SULLIVAN,

Plaintiff,

vs.

ARTHRITIS HEALTH ASSOCIATION PLLC,
HUB PROPERTIES TRUST,
CROWN PROPERTIES, and
TROU MANAGERS LLC,

Defendants.

DECISION AND ORDER

Index No. 2018-60000
RJI No. 2018-0198-M

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

There are two motions pending before the Court in regard to this case. The first is a motion by Defendant Crown Properties ("Crown") for Summary Judgment pursuant to CPLR §3212, and the second is also a motion for summary judgment, filed by Defendant Arthritis Health Association, PLLC ("Arthritis Health"). Plaintiff, Theresa Sullivan, filed opposition papers to both motions on February 9, 2021.[1] The parties appeared for oral argument, conducted virtually on March 1, 2021. After due deliberation, this constitutes the Court's Decision and Order.

BACKGROUND FACTS

Sullivan commenced this action by the filing of a Summons and Complaint on May 23, 2018, alleging that she sustained injuries as the result of a trip/slip and fall on May 19, 2017 on a sidewalk at property located at 5794 Widewaters Parkway, Dewitt, New York. Crown interposed its Answer on June 28, 2018, and, among other things, Crown denied that it owned, maintained or controlled the premises. Defendant Arthritis Health Association interposed an Answer on July 13, 2018, which included a Cross Claim for apportionment against the other Co-Defendants.

This matter was previously before the Court to address a motion by Plaintiff for default judgment against Hub Properties Trust and Trou Managers, LLC, and a cross-motion by Crown for summary judgment. In this Court's Decision and Order dated December 3, 2018, Plaintiff's motion for default judgment was granted as to the other two defendants, and Crown's motion for summary judgment was denied without prejudice. The Court concluded that Plaintiff should be allowed additional time to conduct discovery, and once disclosure was complete, Crown could supplement and/or renew its request for summary judgment. The parties were directed to complete depositions within 90 days, although it took much longer than that for the depositions to be conducted.

[1] All the papers filed in connection with this motion are included in the electronic case file maintained by NYSCEF, the contents of which have been considered by the Court.

Crown filed a Note of Issue on October 5, 2020, and Plaintiff made a motion to strike the Note of Issue on the basis that discovery was not complete. The Court denied Plaintiff's motion by Order dated November 6, 2020. Thereafter, Crown filed the instant motion for summary judgment on November 9, 2020.

DISCUSSION AND LEGAL ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York,* 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the non-movant to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see*, *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

The "threshold question" in any negligence action is whether a defendant owes "a legally recognized duty of care to plaintiff." *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001); *see, Espinal v. Melville Snow Contrs.,* 98 NY2d 136 (2002); *Pulka v. Edelman*, 40 NY2d 781 (1976); *Daversa v. Harris*, 167 AD2d 810 (3rd Dept. 1990). The existence and scope of duty present a "legal issue for the courts to decide." *Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 735 (2017); *see Espinal v. Melville Snow Contrs. Inc.*, 98 NY2d 136; *Di Ponzio v. Riordan*, 89 NY2d 578 (1997); *Moons v. Wade Lupe Constr. Co., Inc.*, 43 AD3d 501 (3rd Dept. 2007). "In the absence of a duty, there is no breach and without a breach there is no liability." *Pulka* at 782; *Bacon v. Mussaw*, 167 AD2d 741, 742 (3rd Dept. 1990) (citation omitted). "Negligence in the air, so to speak, will not do." *Pulka* at 782, *quoting* Pollock, Torts (13th ed), p.468. To make out a claim for negligence, a plaintiff must "demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon v. City of New York*, 66 NY2d 1026, 1027 (1985) (citation omitted); *Vogle v. North Country Prop. Mgt., LLC*, 170 AD3d 1491, 1492 (3rd Dept. 2019); *Keating v. Town of Burke*, 86 AD3d 660, 660-661 (3rd Dept. 2011).

In a premises liability action, recovery "is predicated on 'ownership, occupancy, control or special use of [a] property' where a dangerous or defective condition exists." *Martuscello v. Jensen*, 134 AD3d 4, 8 (3rd Dept. 2015) *quoting Seymour v. David W. Mapes, Inc.*, 22 AD3d 1012, 1013 (3rd Dept. 2005); *Semzock v. State of New York*, 97 AD3d 1012 (3rd Dept. 2012). A lessee (or licensee) is not liable for conditions in a common area where it does not exercise control or have a right of possession. *Bridgham v. Fairview Plaza*, 257 AD2d 914 (3rd Dept. 1999).

In support of its motion, Crown points to an affidavit of Eveline Brown, Vice President of Finance for Crown, dated August 23, 2018, as well as deposition testimony from Plaintiff and Matt Lefkowitz, a representative of Crown. Ms. Brown's affidavit was also submitted in support of Crown's prior motion. Ms. Brown stated that Crown does not own any portion of the property located at 5794 Widewaters Parkway in Dewitt, New York and did not own any portion on the date of Plaintiff's accident. She also stated that Crown does not own, operate, control, manage, maintain, lease or otherwise occupy those premises now, nor at the time of Plaintiff's fall. Mr. Lefkowitz was deposed on October 1, 2020. He is a co-managing principal for Crown and stated that Crown does not own any property in Dewitt or Syracuse, New York. He also testified that

Crown does not now, nor has it ever, operated or managed the property located at 5794 Widewaters Parkway.

Based on the evidence, Crown has met its *prima facie* burden of showing it owed no duty to the Plaintiff because it has no connection to the property where she allegedly sustained injury. The affidavit of Ms. Brown was presented to the Court previously, and while it supported a conclusion that Crown has no involvement with the premises, the Court determined that there were sufficient allegations set forth in the Complaint which merited an opportunity for discovery. It does not appear that testimony was obtained from Ms. Brown, but the deposition testimony of Mr. Lefkowitz corroborates the assertions of Ms. Brown's affidavit and both support a conclusion that Crown did not owe a duty to Plaintiff. Thus, the burden is shifted to Plaintiff to raise a triable issue.

In opposition, Plaintiff submitted an affirmation from her attorney, but no other evidence. In order to defeat a motion for summary judgment, the non-moving party must produce evidentiary proof in admissible form, or an acceptable excuse for not doing so. A bare affirmation by an attorney "who demonstrated no personal knowledge of the manner in which the accident occurred ... is without evidentiary value and thus unavailing." *Zuckerman v. New York*, 49 NY2d 557, 563 (1980). Accordingly, Plaintiff has failed to rebut Crown's *prima facie* showing.

Even if the Court were to consider Plaintiff's arguments in opposition to Crown's motion, it would not change the result. The affirmation argues that the action should not be dismissed under CPLR 3211 (a) because Crown has not submitted documentary evidence justifying dismissal. The motion before the Court is not a motion to dismiss under CPLR 3211, but a motion for summary judgment under CPLR 3212. The Court deemed the earlier motion premature because discovery had not been completed, but now it has, and the case is ripe for a summary judgment determination. Documentary evidence can be one component of a movant's case, but affidavits and depositions can also suffice and Crown has submitted Ms. Brown's affidavit and Mr. Leftkowitz's testimony. While Plaintiff continues to argue that Ms. Brown's affidavit is self-serving and she has not been subject to cross-examination, more than ample time has elapsed for any depositions and Plaintiff has not provided evidence of any attempts to depose Ms. Brown, so her affidavit is unchallenged.

Plaintiff also claims that Crown has failed to rule out its ownership, possession or control over the subject sidewalk, and that Crown should be required to provide all documents "pertaining to its possession and use of the subject sidewalk, so that [Crown's] responsibility in neglecting to maintain the sidewalk in a safe condition may be determined through discovery." (Affirmation of Emily K. Lavelle, Esq., 2/9/21 at ¶13). Again, Plaintiff has had sufficient time for any discovery she desired. Crown has submitted admissible evidence that it has no connection with the property; therefore, it would not have any documentation about the property. The absence of documentary proof is of no assistance to the Plaintiff. Crown cannot be placed in the position of having to provide documentation of a lack of ownership. Furthermore, Plaintiff does not cite to any evidence obtained through discovery that provides even the slightest hint that Crown has any ownership or control over the subject premises. Plaintiff may as well have chosen an entity at random and claimed that the entity was responsible for Plaintiff's fall.

Plaintiff's opposition affirmation also makes reference to the circumstances of Plaintiff's fall and the alleged dangerous or defective condition at the property. However, in the absence of a duty owed by Crown to the Plaintiff, there is no basis to find any negligence, and the existence of any defective condition is irrelevant. Plaintiff provided deposition testimony, but she did not make any statements about the ownership or lease of the property. The opposition papers do not make reference to Plaintiff's deposition or claim that she has any personal knowledge regarding Crown's potential involvement.

Therefore, the Court concludes that Plaintiff has failed to raise a triable issue of fact with regard to Crown's motion for summary judgment. Accordingly, Crown's motion will be granted.

The Court will now turn to the motion for summary judgment filed by Arthritis Health. In support of that motion, Arthritis Health submitted an attorney's affirmation and an affidavit of Colleen Taylor, a Practice Administrator at Arthritis Health, which leases a portion of the premises at 5794 Widewaters Parkway. A copy of the lease was included with the affidavit. Ms. Taylor was also deposed on October 1, 2020. Per the lease, Arthritis Health rented one floor in the building from Upstate Portfolio, LLC.[2] The lease states that the premises is the space on the first floor within the building and that Tenant is responsible to maintain the Premises (emphasis

[2] Upstate Portfolio, LLC was not named as a Defendant in this case.

added). On its face, the lease does not obligate the Tenant to maintain the sidewalk or parking lot areas.

Ms. Taylor also testified in this matter and stated that Upstate Portfolio is responsible for maintaining the sidewalk and entrance area. If Arthritis Health noticed a potentially hazardous condition in that area, they would contact Upstate Portfolio to remedy it. Repairs or renovations are also overseen and approved by Upstate Portfolio, which has the ultimate decision-making authority.

As noted above, premises liability is generally predicated on ownership, occupancy, control or special use of the property. The premises described in the lease as Tenant's responsibility are limited to the inside of the building. The parking lot and sidewalk can be utilized by other tenants, and the public in general. The parking lot and sidewalk would be common areas, and even though Arthritis Health and its patients used them both, ownership and control remained with the landlord (per the lease and Ms. Taylor's testimony). *See Vander Veer v. Henderson*, 267 AD2d 584 (3rd Dept. 1999). Based on the lease, the affidavit of Ms. Taylor and her testimony, Arthritis Health has "met its initial burden by submitting evidence that it did not own, occupy or have the right to control or maintain the area of the parking lot where [Plaintiff] fell … and that it owed 'no duty of care with respect to any unsafe condition existing there.'" *Gross v. Hertz Local Edition Corp.*, 72 AD3d 1518, 1520 (4th Dept. 2010) *quoting Masterson v. Knox*, 233 AD2d 549, 550 (3rd Dept. 1996).

Plaintiff argues that Ms. Taylor was deposed in October 2020, and that her affidavit for this motion was prepared in January 2021, but Plaintiff has not had an opportunity to cross-examine Ms. Taylor on statements made in that affidavit. There is no requirement that a witness's affidavit precede a deposition, or that the non-moving party be permitted to cross-examine on an affidavit supported in support of a motion. If that were the case, there would be an endless circle of submissions for summary judgment with supporting affidavits, and then depositions to challenge those assertions. Instead, this motion followed the procedure of almost every summary judgment motion. Discovery followed by the compilation of evidence and affidavits to support the motion for summary judgment. Plaintiff has already been afforded the opportunity to question Ms. Taylor in her deposition. The Court finds that Arthritis Health has made out a *prima facie* case, and the burden is shifted to Plaintiff.

In opposition, Plaintiff once again relies only on an attorney's affirmation, which is not admissible evidence and cannot be considered to deny summary judgment. Accordingly, Plaintiff has failed to rebut Arthritis Health's *prima facie* showing.

If the Court considers the arguments made in Plaintiff's attorney's affirmation, it still does not support a different conclusion. "While ordinarily a tenant in a building served by a common parking lot bears no responsibility for any unsafe condition existing therein, liability may be found where there is some indication that the tenant 'created the dangerous condition, owned or retained any control over the parking lot, or had the authority to correct the condition.'" *Vander Veer v. Henderson*, 267 AD2d at 586, *quoting Masterson v. Knox*, 233 AD2d at 550.

Plaintiff argues that the lease should not be considered because she was not a signatory to the lease. However, contracts are the type of documents that can be considered by a court on a motion to dismiss or a motion for summary judgment, and can be relied upon to establish the parameters of any duty of a landlord and/or tenant to any patrons/patients who visit the premises. There is no reason to disregard the contractual relationship between this tenant and landlord because this Plaintiff did not sign the agreement. There is no conceivable way that potential visitors could be ascertained and required to sign the lease agreement between landlord and tenant.

Plaintiff also claims that Arthritis Health owed a duty to Plaintiff because of its occupancy of the premises. As discussed above, more than mere occupancy is required, and Plaintiff has not provided any evidence to show a question of fact as to whether Arthritis Health created the condition, or had ownership, control or authority over the parking lot and sidewalk. Absent any such evidence, Plaintiff has failed to rebut Arthritis Health's claim that it owed no duty to the Plaintiff in the parking lot and sidewalk area, and Arthritis Health's prima facie showing with regard to summary judgment. The Court concludes that Plaintiff has failed to raise a triable issue of fact with regard to Arthritis Health's motion for summary judgment, and accordingly, the motion will be granted.

CONCLUSION

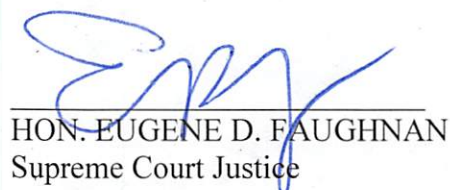
Based on all the foregoing, it is hereby

ORDERED, that Crown's motion for summary judgment is GRANTED; and it is further

ORDERED, that Arthritis Health's motion for summary judgment is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: April 1, 2021
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice