

Mojica v Church of the Immaculate Conception
2022 NY Slip Op 30043(U)
January 10, 2022
Supreme Court, New York County
Docket Number: 154451/2021
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. DAVID B. COHEN****PART****58***Justice*

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INDEX NO. 154451/2021

RAFAELINA MOJICA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CHURCH OF THE IMMACULATE CONCEPTION, 404
CONDO, LLC, BDC RESTAURANTS LLC DBA
MCDONALDS, and MCDONALDS CORPORATION,**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17,
18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30, 31

were read on this motion to/for

DISMISS

In this personal injury action commenced by plaintiff Rafaelina Mojica against defendants Church of the Immaculate Conception (“the Church”), 404 Condo, LLC (“404”), BDC Restaurants LLC d/b/a McDonald’s (“BDC”) and McDonald’s Corporation (“MDC”) (collectively “defendants”), MDC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Plaintiff and 404 oppose the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on September 5, 2020 in which plaintiff was allegedly injured when she slipped and fell on a sidewalk adjacent to a McDonald’s restaurant (“the restaurant”) located at 414 East 14th Street (“the premises”) in Manhattan. Doc. 1.

In January 1994, nonparty MIR Ground, Inc. (“MIR”), as landlord, entered into a store lease with MDC pursuant to which MDC was to operate the restaurant on the ground floor at the premises (“The MIR/MDC lease”). Doc. 24 at par. 2. The lease was to expire in June 2029. Doc. 24, supplement to lease. Paragraph 4 of the MIR/MDC lease required MDC to “take good care of the demised premises and the fixtures and appurtenances therein and the sidewalks 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...and to keep sidewalks and curbs free from ice, snow and rubbish.” Doc. 24 at par. 4. The MIR/MDC lease addendum required MDC to “keep[] the sidewalk in front and rear of the [d]emised [p]remises clean and free of all trash, snow, and debris of [any] nature.” Doc. 24 at par. 74 to lease addendum. Although the MIR/MDC lease addendum allowed MDC to assign the premises to a franchisee, MDC “agree[d] that it w[ould] remain fully obligated and liable under every provision in th[e] [MIR/MDC] [l]ease.” Doc. 24, MIR/MDC lease addendum at par. 45.

In June 2014, McDonald’s USA, LLC (“MDUSA”) entered into a franchise agreement with Bruce D. Colley pursuant to which the latter was granted “the rights necessary to operate the [r]estaurant.” Doc. 17. The franchise agreement provided, inter alia, that Colley was to be “an independent contractor responsible for all obligations and liabilities of, and for loss or damage to, the [r]estaurant and its business, including . . . all claims or demands based on . . . injury, illness, or death of any person or persons, directly or indirectly, resulting from the operation of the [r]estaurant. Doc. 17 at par. 16.

The operator’s lease attached as exhibit A to the franchise agreement, dated May 30, 2014 and entered into by MDUSA, as landlord, and Colley, as tenant, provided, inter alia, that Colley was obligated, at his own expense, to “keep the entire [p]remises . . . in good repair, order or

condition”, including “all repairs, whether ordinary or extraordinary, including structural repairs to the foundation, floors, walls and roof.” Doc. 20 at par. 4.02. The lease allowed MDUSA to “enter the [p]remises at all times during reasonable business hours for the purpose of inspecting [the same].” Doc. 20 at par. 7.01. Further, the lease required Colley to indemnify and hold harmless MDUSA from any suit arising from “any act occurring on the [p]remises, or by reason of an omission with respect to the business or operation of the [restaurant].” Doc. 20 at par. 7.02.

At or about the same time as the franchise agreement was executed, Colley assigned the franchise to BDC, a company he owned. Doc. 18.

On May 6, 2021, plaintiff commenced the captioned action against defendants. Doc. 1. In her complaint, plaintiff alleged that the Church and 404 owned, managed, controlled, operated, and/or maintained the sidewalk where she fell, and that they negligently failed to maintain it by allowing it to become cracked, uneven and depressed. Doc. 1. She further asserted that BDC and MDC owned or leased a street level commercial unit at the premises and breached their duty to maintain the sidewalk by allowing it to fall into disrepair. Doc. 1.

On June 23, 2021, 404 joined issue by its answer, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against the Church, BDC, and MDC for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 6. 404’s cross claims against BDC and MDC were subsequently discontinued, thereby leaving only its cross claims against the Church viable. Doc. 29.

MCD and BDC joined issue by their respective answers filed July 13, 2021, in which they denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Docs. 7 and 9.

The Church joined issue by its answer filed July 20, 2021, in which it denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against 404, BDC, and MDC, in effect, for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 6.

MDC now moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against it. Docs. 13-20. In support of the motion, counsel for MDC argues that the said defendant did not own or occupy the premises at the time of plaintiff's accident but rather that 404 owned the premises and that the restaurant was owned and operated by BDC. Doc. 14. Counsel also asserts that, even if MDC was contractually obligated to repair the sidewalk, it would owe no duty to a pedestrian who fell on the sidewalk unless it created or made special use of the sidewalk. Doc. 14. Further, counsel maintains that the instant motion is not premature since discovery will not result in the exchange of any evidence reflecting that MDC had a duty to maintain the restaurant and/or to plaintiff.

In support of the motion, Colley submits an affidavit in which he represents that: he owns BDC; MDC does not operate, manage, supervise, maintain, repair or control the restaurant; MDC did not hire, employ, or supervise any of the workers at the restaurant; BDC owned, operated and maintained the restaurant; and all employees working at the restaurant at the time of the accident were employees of BDC. Doc. 19.

In opposition to the motion, counsel for 404 argues that MDC was responsible for maintaining the premises, including the sidewalks, pursuant to paragraph 4 of the MIR/MCD lease. Docs. 23-24. at par. 4. Counsel emphasizes that, although the MIR/MDC lease addendum allowed MDC to assign the premises to a franchisee, MDC agreed that, in the event of such an assignment, "it w[ould] remain fully obligated and liable under every provision in th[e] [l]ease." Doc. 24,

MIR/MDC lease addendum at par. 45. Counsel urges that, during the time MDC was responsible for maintaining the premises, “it could have had actual and/or constructive notice of the defective sidewalk condition.” Doc. 23 at pars. 12-13.¹ Thus, urges counsel, it would be premature to grant MDC’s motion without determining, through depositions, MDC’s possible knowledge of the defective condition which caused plaintiff to fall, as well as the degree of control it exerted over the premises. Doc. 23.

Counsel for 404 further maintains that MDC is vicariously liable for plaintiff’s injuries because it retained control of the premises. Doc. 23. Specifically, urges counsel, although the MIR/MDC lease allowed MDC to assign or sublet the premises, MDC agreed “it would remain fully obligated and liable under every provision” of the said agreement. Doc. 24 at par. 45 to lease addendum. Additionally, notes counsel, the franchise agreement between MDC and BDC required BDC to comply with “all business policies, practices, and procedures imposed by [MDC],” as well as maintaining the premises “in compliance with designated standards as may be prescribed from time to time by [MDC].” Doc. 17 at par. 12(a). Additionally, argues counsel, the franchise agreement allowed MDC to “inspect the [r]estaurant at all reasonable times to ensure that [BDC’s] operation thereof is in compliance with the standards and policies of the McDonald’s System.” Doc. 17 at par. 12. The franchise agreement also prohibited BDC from making any changes to the premises without MDC’s consent. Doc. 17 at par. 12(d).

Plaintiff also opposes the motion, asserting that the franchise agreement allows MDC to inspect the restaurant at all reasonable times to ensure that BDC is in compliance with MDC’s standards and policies, including repairs or replacements in order to maintain the premises. Doc. 17 at par. 12(e), Doc. 26. Plaintiff’s counsel argues further argues that MDC is not entitled to

¹ Although counsel for 404 suggests that MDC was, at one time, responsible for maintaining the premises, he does not state when it ceased being so responsible, or under what circumstances this occurred.

dismissal since paragraph 4 of the MIR/MDC lease requires MDC to maintain the sidewalk adjoining the restaurant. Doc. 24 at par. 4, Doc. 26. In any event, argues plaintiff's counsel, even if the MIR/MDC lease had been assigned, MDC was, as noted previously, to remain fully obligated to perform the terms of the agreement. Doc. 24 at par. 45 to lease addendum. Counsel for plaintiff further asserts that the motion must be denied as premature since discovery must be conducted regarding MDC's knowledge of the dangerous condition as well as its control, if any, over the sidewalk. Doc. 26.

In reply, MDC argues that, since 404 discontinued its cross claims against it, the branch of its motion seeking dismissal of said cross claims must be denied as moot. Doc. 30. MDC further asserts that it is entitled to summary judgment since it owed no duty to plaintiff. Doc. 30.

LEGAL CONCLUSIONS

On a motion for summary judgment, the movant "must 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 NY2d 320, 324 [1986]). Once this showing is made, "the burden shifts 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 NY2d at 324). A movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Initially, since 404 has discontinued its cross claims against MDC, the branch of MDC's motion seeking summary judgment dismissing those claims is denied as moot.

However, MDC has failed to establish its prima facie entitlement to summary judgment dismissing the complaint as well as the cross claims against it by the Church. As noted above, MDC was obligated by the MIR/MDC lease to maintain the sidewalk adjoining the premises, which is where plaintiff was injured. The said lease was executed in 1994 and was to expire in 2029. There is nothing in the motion papers reflecting that the MIR/MDC lease was terminated and, thus, no indication that MDC is no longer a tenant at the premises with the obligation to maintain the sidewalk. Indeed, there is nothing in the motion papers indicating how or when 404 took possession of the premises, which were evidently obtained from MIR, and whether this transfer affected MDC's rights and/or obligations under the MIR/MDC lease.

In seeking summary judgment, MDC relies heavily on Colley's affidavit. Colley represents, inter alia, that: he owns BDC; MDC does not operate, manage, supervise, maintain, repair or control the restaurant; MDC did not hire, employ, or supervise any of the workers at the restaurant; BDC owned, operated and maintained the restaurant; and all employees working at the restaurant at the time of the accident were employees of BDC. Doc. 19. Tellingly, however, Colley's affidavit is silent regarding the maintenance and/or repair of the sidewalk adjoining the premises, which is where plaintiff allegedly fell. Given the vague and conclusory nature of Colley's affidavit, MDC has failed to establish its prima facie entitlement to summary judgment and thus the motion must be denied regardless of the sufficiency of the opposing papers (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]; *Greystone Staffing, Inc. v Green Key, LLC*, 186 AD3d 1339, 1341 [2d Dept 2020]).

Additionally, as plaintiff asserts, it would be premature to grant summary judgment at this juncture since discovery is in its nascent stage and depositions are necessary to explore MDC's role, if any, in maintaining the sidewalk adjoining the restaurant, the degree to which it may have

controlled the day-to-day operations of BDC, and its relationship, if any, to MDUSA, the entity which entered into the franchise agreement with Colley (*Elango Med. PLLC v Trump Palace Condominium*, 194 AD3d 543, 544-545 [1st Dept 2021]). Indeed, a preliminary conference has yet to be conducted in this action.

Curiously, in seeking summary judgment, MDC relies, inter alia, on *Alonzo v McDonald's Corp.*, 282 AD2d 395 (1st Dept 2001). In that case, the Appellate Division held that McDonald's was entitled to dismissal because, as "an out-of-possession landlord, [it could not] be held liable for injuries caused by a defective condition on its premises absent evidence it had agreed to be responsible for maintenance or repair" (*Id.* at 395). Here, however, MDC was not a landlord but rather a tenant of MIR pursuant to the MIR/MDC lease. Additionally, MDC agreed pursuant to that lease to keep the sidewalk in good repair. Thus, *Alonzo* does not warrant the granting of summary judgment in MDC's favor.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendant McDonald's Corporation seeking summary judgment dismissing all cross claims asserted against it by defendant 404 Condo LLC is denied as moot; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are to appear for a preliminary conference via Microsoft Teams on February 1, 2022 at 3:00 p.m.

1/10/2022
DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE