

**Washington v Soledad O'Brien & Brad Raymond
Found. Inc.**

2022 NY Slip Op 31739(U)

June 1, 2022

Supreme Court, New York County

Docket Number: Index No. 152193/2016

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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GLORIA WASHINGTON,

Plaintiff,

- v -

SOLEDAD O'BRIEN & BRAD RAYMOND FOUNDATION INC., SAPIR REALTY MANAGEMENT CORP., EAGLE TRANSFER CORP., ARTHUR DIGIANNO, INC., ARTHUR DIGIANNO, INC. D/B/A ADI INSTALLATIONS, VJ DELIVERY SERVICE, INC., 11 MADISON AVENUE LLC, ALLIEDBARTON SECURITY SERVICES LLC,

Defendant.

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INDEX NO. 152193/2016
MOTION DATE 04/27/2021
MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 254, 257, 275, 277, 285, 286, 287, 288, 289, 290, 291, 292, 312

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, defendant AlliedBarton Security Services, LLC's motion for summary judgment granted and defendant Eagle Transfer Corp.'s cross-motion1 for summary judgment is granted2.

Background

On June 22, 2013, plaintiff, then an employee of non-party Credit Suisse First Boston Corporation (Tenant), sustained injuries after she was struck in the head and neck while volunteering at an event being held at the premises located at 11 Madison Avenue, New York City (11 Madison). Although plaintiff did not see what struck her, she was subsequently informed that the object was a conference room divider, described by deponents as piping through drapery. At

1 Although defendant's cross-motion was made as to motion sequence 005, the Court will address it here.

2 The Court would like to thank Joyce D. Campbell Priveterre, Esq. for her assistance in this matter.

the time of plaintiff's incident, Tenant had standing contracts with defendant AlliedBarton Security Services, Inc. (AlliedBarton) and defendant Eagle Transfer Corp. (Eagle) to provide security and conference room setup services, respectively, at 11 Madison.

Plaintiff alleges that she was injured because the defendants were careless, reckless and negligent. AlliedBarton avers that summary judgment is warranted because there are no triable issues of fact whether 1) it owed a duty to plaintiff, 2) plaintiff was intended as a third-party beneficiary of its contract with Tenant and 3) it was involved in the installation or maintenance of room dividers at 11 Madison. Eagle cross-moves for summary judgment because it contends there are no triable issues of fact whether 1) it owed a duty to plaintiff and 2) plaintiff can establish the cause of her accident.

Summary Judgment Standard

Courts have held that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] *citing Moskowitz v Garlock*, 23 AD2d 943. However, only the existence of a *bona fide* issue raised by evidentiary facts and not conclusory allegations will suffice to defeat summary judgment. *See Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290; *Rosenberg v Del-Mar Div., Champion Int. Corp.*, 56 AD2d 576, 577.

Eagle's Cross-Motion for Summary Judgment

Plaintiff's brief in opposition to Eagle's cross-motion avers that "Eagle has not proven as a matter of law that it did not breach a duty owing to plaintiff." See NYSCEF Doc. 278 ¶37.

However, the assertion that defendant has failed to demonstrate that it did not breach a duty to plaintiff, is wholly incongruous with settled caselaw which requires plaintiff to establish that a duty was owed to her in the first instance. *See Akins v Glens Falls City School Dist.*, 53 NY2d

325, 333 [1981]. It is black-letter law that a plaintiff alleging a negligence cause of action has the burden to demonstrate through evidence adduced at bar of 1) the existence of a duty owed to plaintiff by defendant, 2) a breach of this duty and 3) an injury to the plaintiff as a result of the breach. See Prosser, Torts [4th ed], § 30, p 143; *see also Rodgers v Vasquez*, 2022 N.Y. Misc. LEXIS 2100, *3 *citing Pasternack v Laboratory Corp. of America Holdings* 27 NY3d 817).

Eagle's witness, Anthony Patalano, testified that Eagle was responsible for setting up conference and party rooms for the Tenant at 11 Madison. *See* NYSCEF Doc. 225 at page 8, 16-18, page 28, 16-25. However, Mr. Patalano testified that Eagle would not have used room dividers in 2013 (the year plaintiff was injured) because Tenant had separate rooms for functions so there was no need to partition a single room. *See* NYSCEF Doc. 225, page 49, lines 1-13. Moreover, Eagle's witness testified that he did not recall using the drapery over piping room dividers at 11 Madison. *See* NYSCEF Doc. 246 at page 55, lines 15-25.

Taken in the light most favorable to plaintiff, and assuming, *arguendo*, that plaintiff had demonstrated that she had been struck by a room divider, she has proffered no evidence suggestive of a triable issue of fact concerning whether Eagle owed her a duty concerning the installation or maintenance of the room divider. Additionally, the record is bereft of any evidence of a triable issue of fact whether the room divider was installed or maintained in a negligent manner by Eagle (or any other defendant). Plaintiff can defeat a motion for summary judgment by proving "that it was 'more likely' or 'more reasonable' that the alleged injury was caused by the defendant's negligence than by some other agency." *Affenito v PJC 90th St. LLC*, 5 AD3d 243, 245 [1st Dept 2004] *citing Gayle v City of New York*, 92 NY2d 936, 937 [1998] [citation omitted]). Plaintiff's reliance on *Gayle* is misplaced because she has demonstrated no facts proving it more likely than not that her injury was caused by Eagle's negligence.

AlliedBarton's Motion for Summary Judgment

As a threshold matter, plaintiff asserts that AlliedBarton's motion must be denied based upon procedural defects because of its failure to submit a statement of material facts, a memorandum of law and a word count certification in compliance with 22 NYCRR § 202.8-g, 22 NYCRR § 202.8-a and 22 NYCRR § 202.8-b, respectively. Additionally, plaintiff avers that defendant's motion cannot survive because the Affidavit from witness Mangar Willie (Willie Affidavit), which plaintiff regards as the lynchpin of defendant's argument that no duty was owed, did not provide a certificate of conformity as required by CPLR § 2309(c) since the document was executed in New Jersey. AlliedBarton's Reply annexes a certificate of conformity for the Willie Affidavit.

This Court is persuaded that AlliedBarton's belated submissions of a word count certification and certificate of conformity have corrected those defects in a form consistent with the requirements of CPLR § 2101(f). *See* NYSCEF Doc. 132. *See also Medallion Bank v Chopper Taxi Inc.*, 2021 N.Y. Misc. LEXIS 6355. Moreover, the Court finds that all of these technical defects should not impede movants prima facie showing of its entitlement to judgment as a matter of law, especially where they were drafted with the aim of judicial economy. It would certainly violate those aims if a motion were to be denied, and have to be refiled, or a matter go to trial that otherwise could have been resolved at the summary judgment stage, and where the motion was otherwise timely filed.

Discussion

An action for negligence cannot stand where a defendant has no duty to a plaintiff, nor any notice of the purported defect that caused plaintiff's injury. *Gilson v Metropolitan Opera*, 5 NY3d

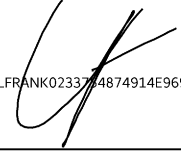
574, 590 [2005]. Eagle sustained its initial burden of establishing their entitlement to judgment as a matter of law dismissing the complaint against it and plaintiff has not demonstrated by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for her failure so to do. *See Zukerman v City of New York*, 49 NY2d 557, 560 [1980]. Accordingly, Eagle's cross-motion for summary judgment is granted.

Moreover, an examination of the record and in particular, the Willie Affidavit proffered by AlliedBarton, establishes that this defendant's responsibility at 11 Madison Avenue was to provide security services. *See* NYSCEF Doc. 250 at page 2, line 2. Further, AlliedBarton had no responsibility concerning the operation or maintenance of any room dividers at 11 Madison Avenue. *See* NYSCEF Doc. 250 at page 2, line 4, page 3, line 5. As with Eagle, plaintiff has proffered no triable issues of fact suggestive of any duty owed to her by AlliedBarton. Indeed, in its capacity as a security firm, AlliedBarton's involvement with the purported cause of plaintiff's injury was even more attenuated than Eagle's, and plaintiff's bald speculation that a security guard may have bumped into the room divider causing it to strike her, does not create a triable issue of fact. It is well-settled that, in deciding a summary judgment motion, a court may search the record and grant summary judgment to the nonmoving party on any related claim. *See A.C. Transp., Inc. v Bd. of Educ. of City of NY*, 253 AD2d 330, 338 [1st Dept 1999]. Accordingly, the Court finds that AlliedBarton is entitled to summary judgment dismissing the complaint and all cross-claims asserted against it. It is therefore

ORDERED that defendant AlliedBarton's motion for summary judgment pursuant to CPLR §3212 is granted; and it is further

ORDERED that defendant Eagle's cross-motion for summary judgment pursuant to CPLR §3212 is granted and plaintiff's verified complaint and all cross claims against Eagle are dismissed.

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6/1/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE