

Brown v Howard Hughes Corp.
2022 NY Slip Op 31944(U)
June 21, 2022
Supreme Court, New York County
Docket Number: Index No. 152940/2021
Judge: J. Machele Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

NAIMAH BROWN,

Plaintiff,

- v -

THE HOWARD HUGHES CORPORATION, SOUTH STREET SEAPORT LIMITED PARTNERSHIP, SEAPORT MARKETPLACE LLC, THE SEAPORT DISTRICT NYC, SEAPORT ASSOCIATES LP, THE CITY OF NEW YORK,

Defendants.

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THE HOWARD HUGHES CORPORATION, SOUTH STREET SEAPORT LIMITED PARTNERSHIP, SEAPORT MARKETPLACE LLC

Plaintiffs,

-against-

DEZAI0 PRODUCTIONS, INC., D/B/A CENTER STAGE PRODUCTIONS

Defendants.

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INDEX NO. 152940/2021

MOTION DATE 06/25/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party
Index No. 595873/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Pending before the court is a motion wherein defendants/third party plaintiffs THE HOWARD HUGHES CORPORATION and SEAPORT MARKETPLACE LLC (collectively, the “Movants”) seek an order (i) dismissing plaintiff’s complaint, pursuant to CPLR 3211 (a)(1), based on documentary evidence and (ii) dismissing plaintiff’s complaint pursuant to CPLR 3211(c).

In the complaint, plaintiff alleges, *inter alia*:

64. That on or about December 26, 2019, at approximately 7:30 p.m., Plaintiff was lawfully present and walking with due care and caution at the Seaport District Holiday Tree at Fulton Street, at or near its intersection with Water Street; between the premises known as 201 Front Street (a/k/a Block 96, Lot 12); 205 Front Street (a/k/a Block 96, Lot 8); N/A Front Street (a/k/a Block 96, Lot 13); 89 South Street (a/k/a Block 74, Lot 1); 207 Front Street (a/k/a Block 96, Lot 5) and 94 South Street (a/k/a Block 96, Lot 1) all located in the City and State of New York in the borough of New York when she was caused to slip, trip and fall through a hole, gap or opening between wood or other composite platforms, bridge, stage or other composite erected thereat and encircling the holiday tree, inviting the public or other invitees [...]

[...]

66. Upon information and belief, the defendants THE HOWARD HUGHES CORPORATION, SOUTH STREET SEAPORT LIMITED PARTNERSHIP, SEAPORT MARKETPLACE LLC, THE SEAPORT DISTRICT NYC & SEAPORT ASSOCIATES LP, their agents, servants or employees were careless and negligent in the erection, installation, maintenance and operation of the Seaport District, the Seaport District Holiday Tree; the Seaport District Holiday Tree area, The Seaport District Holiday Tree platform, stage, walkway or other structure and all of its appurtenances and adjoining areas erected, installed or constructed thereat.

Standard on a Motion to Dismiss

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by Parties

The Movants argue that did not have any ownership interest, possession, or control of the premises at Fulton Street at or near its intersection with Water Street, New York, New York and State of New York. They argue that the Movants were not responsible for the erection or maintenance of the holiday tree or the composite platforms, bridge, stage or other composite erected in the area at issue, and therefore have no liability for plaintiff's alleged accident.

In support of their argument, they attached the sworn Affidavit of Todd Drake, (NYSCEF Document #15), which states, in part:

1. I am Senior Assistant General Counsel for THE HOWARD HUGHES CORPORATION ("HOWARD HUGHES").
2. I reviewed the March 24, 2021 Summons and Complaint naming THE HOWARD HUGHES CORPORATION and SEAPORT MARKETPLACE LLC as defendants.
3. SEAPORT MARKETPLACE LLC is a wholly owned indirect subsidiary of HOWARD HUGHES.
4. On December 26, 2019, the date of the alleged accident, neither HOWARD HUGHES nor SEAPORT MARKETPLACE LLC was the owner or lessee of 89 South Street, 201 Front Street, 205 Front Street, 207 Front Street or 94 South Street, New York, New York.
5. Furthermore, on the date of the alleged accident, neither HOWARD HUGHES nor SEAPORT MARKETPLACE LLC was the development manager of 89 South Street, 201 Front Street, 205 Front Street, 207 Front Street or 94 South Street, New York, New York, was not responsible for maintenance of any of those properties, nor did either company maintain any presence on or around those premises on the date of the alleged accident.
6. Moreover, on the date of the alleged accident, neither HOWARD HUGHES nor SEAPORT MARKETPLACE LLC was responsible for the erection or maintenance the holiday tree or the composite platforms, bridge stage or other composite erected in the area at issue.
7. Neither HOWARD HUGHES nor SEAPORT MARKETPLACE LLC was otherwise involved in the area at issue.

The only opposition was filed by plaintiff, who argues that the platform itself was erected around a holiday Christmas Tree and part of an annual tree lighting event called "Winterland," and that the Movant's names were explicitly and publicly stated on all the advertisements and publicity notices about the event.

In support of her argument, plaintiff submits several exhibits that she purports are advertised promotions about the event. They include:

Exhibit 2 (NYSCEF Document #22), purports to be a printout from the website <https://www.seaportdistrict.nyc/explore/esents/tree-lighting-2019.html> which states, on its face:

Winterland
Annual Holiday Tree Lighting
December 2
6-8 PM
FULTON & WATER STREET
[...]

Seaport District Founding Partners
Howard Hughes

(emphasis added)

Exhibit 4 (NYSCEF Document #24), purports to be a printout from the website <https://www.howardhughes.com/properties/seaport>. This printout states, on its face:

Properties
[...]
The Seaport
New York, NY
[...]
THE SEAPORT
The Seaport is New York's original commercial hub, located on the East River in Lower Manhattan with unparalleled views of the Brooklyn Bridge, the Statue of Liberty and the city skyline [...]
[...]
Highlights include Pier 17, a one-of-a-kind entertainment destination with a 1.5-acre rooftop that serves as a year-round community amenity and cultural and event space. The Rooftop at Pier 17 transforms seasonally from a Winterland experience, complete with the city's first open-air rooftop ice skating rink, to an outdoor performance venue named "Best New Concert Venue" by Pollstar that hosts the Seaport's annual Summer Concert Series
[...]

(emphasis added)

Exhibit 5 (NYSCEF Document #25), purports to be a printout of a news article from the website <https://www.amny.com/news/balled-out-seaport-christmas-tree-moving-to-pier-17-to-make-room-for-orbs-of-colored-lights>. On its face, the article states:

Balled out: Seaport Christmas tree moving to Pier 17 to make room for orbs of colored lights

[...]

The Seaport Christmas tree is moving from Fulton Street this year, ending an annual tradition that has lasted more than three decades.

A Christmas tree will continue to be part of the holiday tradition at the Seaport, but this year the **Howard Hughes Corporation will relocate the lavishly decorated tree to the recently opened Seaport Square adjacent to the new Pier 17 building**.

[...]

“The Howard Hughes Corporation is excited to be expanding this year’s holiday experience at the Seaport District with a new winter light installation,” the company’s spokesperson told Downtown Express.

(emphasis added)

Movants did not file any Reply, and informed the court in writing on June 3, 2022 that no Reply was intended.

Conclusions of Law

To the extent that Movants seek to dismiss this case, pursuant to CPLR 3211(a)(1), based on documentary evidence, the New York Court of Appeals held in Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314 (2002):

Turning to defendants' CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [...]. Defendants produced documentation illustrating the 30-day trial period and the contractual terms and conditions, including the product disclaimer. These documents do not, however, bar plaintiffs' claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law. Plaintiffs assert that the service they purchased was defective due to malfunctions largely or wholly within defendants' control. They further assert that defendants knew this to be the case and that defendants' promotional representations were therefore knowingly deceptive. As pleaded this is sufficient. Thus, defendants' motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) was improperly granted as to the New York plaintiffs and their General Business Law §§ 349 and 350 claims should be reinstated.

A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable” (VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (Sup. Ct. App. Div. 1st Dept 2019)). Further, *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22 [2005 ed]* provides:

For dismissal, the proffered documents must “utterly refute” the allegations in the plaintiff's complaint, “conclusively establishing a defense as a matter of law” [...]. Note the extremism of the burden of proof—that the documentary evidence not only refute the allegations of the plaintiff's complaint, but “utterly” do so, and that defense not only be established as a matter of law, but that it “conclusively” do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute [internal citations omitted].

Here, the only “documentary evidence” submitted by Movants is an Affidavit from the Senior Assistant General Counsel for Howard Hughes Corporation. This Affidavit claims that Movants did not own the property on which plaintiff fell, did not erect the platform through which plaintiff fell, and were not “otherwise involved” in the area at issue. However, Movants filed no Reply, and did not refute or even address the allegations made by plaintiff in her opposition, namely, that the Movants’ names are explicitly on the documents promoting the “Winterland” event and tree lighting at which plaintiff was injured. This court finds that Movants have failed to meet the burden required for an order granting dismissal of the complaint as against them, pursuant to CPLR 3211(a)(1).

To the extent that Movants seek to dismiss this case, pursuant to CPLR 3211(c), this section provides:

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion 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, and failure to make such *prima facie* showing requires a


denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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 v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Here, as noted above, there are clear questions of fact as to whether Movants owned or controlled the property where plaintiff fell and whether Movants owned or controlled the platform through which plaintiff claims she fell.

Conclusion

Accordingly, it is hereby **ORDERED** that this motion is DENIED in its entirety.

<p><u>6/21/2022</u> DATE</p>			 <hr/> <p>J. MACHELLE SWEETING, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE
<p>152940/2021 BROWN, NAIMAH NURI vs. HOWARD HUGHES CORPORATION Motion No. 001</p>			<p>Page 8 of 8</p>