

Toribio v GVS Props. II, LLC
2022 NY Slip Op 33138(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 452095/2021
Judge: David B. 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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DEBBIE TORIBIO,

Plaintiff,

- v -

GVS PROPERTIES II, LLC,RITE HEALTH PHARMACY,
VERIZON CORPORATE HEADQUARTERS

Defendant.

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INDEX NO. 452095/2021

MOTION DATE 04/27/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149

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

This is a negligence action wherein the plaintiff claims she was injured as a result of a slip and fall inside a Rite Health pharmacy located at 3885 Broadway, New York, New York. The plaintiff was an employee of the pharmacy. She claims she was injured when she slipped on a pool of water allegedly caused by a broken or leaky pipe. The pipe was in a bathroom located in the back of the pharmacy. The plaintiff alleges that employees of Verizon punctured the bathroom wall with a wall screw in order to install fiberoptic cable and that this puncture caused the pipe to rupture or break and leak water into the area where she fell.

Originally, the named defendants were GVS Properties II LLC ("GVS"), the owner of the premises, Rite Health Pharmacy ("RHP"), the tenant, and Verizon Corporate Headquarters ("Verizon"). The action was commenced in Queens County but venue was later changed to this Court. By decision and order dated March 31, 2022, this Court granted summary judgment dismissing all claims and crossclaims asserted against GVS. This Court determined that, since GVS was as an out-of-possession landlord which was not responsible under the lease for general

maintenance of the premises, it could not be held liable for a transitory condition, i.e., water on the floor, which was not caused or created by any significant structural or design defect related to the wall or pipe. In the same decision, this Court denied RHP's motion for summary judgment on the ground that issues of fact existed concerning whether the plaintiff, as an alleged employee of RHP, was eligible for benefits under the Workers' Compensation Law.

Verizon now moves for summary judgment dismissing all claims and crossclaims asserted against it. The plaintiff cross-moves for leave to serve a Supplemental Summons and Amended Complaint to reflect the proper name of the Verizon defendant, Verizon New York, Inc., as well as to set forth the correct date of the accident.

The motion for summary judgment is denied and the cross-motion to amend is granted. The correct name of the Verizon corporate defendant is Verizon New York, Inc., and it is evident that the naming of the said defendant as Verizon Corporate Headquarters was a misnomer. Leave to amend the complaint to correct misnomers should be freely granted absent any prejudice to the defendant. Pursuant to CPLR 305 (c), where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that two criteria are met. The first criterion is that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect. The second criterion is that the intended but misnamed defendant would not be prejudiced by the amendment (*see, Stuyvesant v Weil*, 167 NY 421, 425-426 [1901]; *Simpson v Kenston* 154 AD2d 526 [2d Dep't 1999]). Here, the allegations in the complaint fairly apprised Verizon New York, Inc., that it was the party the plaintiff intended to sue based on its performance of cable installation work at the subject premises where the accident occurred. The plaintiff also has

demonstrated that it properly served Verizon New York, Inc., through its agent. Accordingly, leave to amend the complaint to correct the misnomer is granted, especially since the correct defendant has been involved in the litigation from the onset (*see Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]).

In support of its motion for summary judgment, Verizon argues that it cannot be held responsible for the plaintiff's accident because the leaky pipe that was allegedly burst by the Verizon technicians was improperly installed too close to the bathroom wall. Verizon asserts that the pipe was a structural defect that violated the Building Code and, therefore, its co-defendant GVS is solely responsible for any damages caused by the leaky condition. Verizon also asserts that it was GVS's failure to repair, inspect and/or properly maintain the subject premises that was the proximate cause of the accident. However, these arguments are identical to those made by Verizon in opposition to GVS's motion for summary judgment and were rejected by this Court in granting said application. Therefore, Verizon has failed to establish its prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, it is hereby:

ORDERED that Defendant Verizon's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross motion seeking leave to serve a Supplemental Summons and Amended Complaint and to amend the caption is GRANTED; and it is further

ORDERED that the Clerk is directed to amend the caption of this case to read as follows:

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DEBBIE TORIBIO,

Plaintiff,

-against-

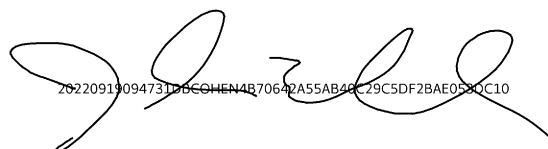
GVS PROPERTIES II, LLC, RITE HEALTH
PHARMACY and VERIZON NEW YORK INC.,

Defendants
-----X

and it is further;

ORDERED that the Supplemental Summons and Amended Complaint in the proposed form annexed to the plaintiff's cross motion as NYSCEF Doc. 142 shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the Amended Complaint or otherwise respond thereto within 20 days after plaintiff serves them with a copy of this order with notice of entry.



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DAVID B. COHEN, J.S.C.

9/19/2022

DATE

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