

Torres v Sherman Pharm. Corp.
2022 NY Slip Op 34252(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 155744/2020
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 155744/2020

CLARA TORRES,

Plaintiff,

MOTION SEQ. NO. 002

- v -

SHERMAN PHARMACY CORP, SHERMAN 232 LLC,
GOOD CARE PHARMACY INC., SHERMAN PHARMACY 2
INC., AND BRONSTEIN PROPERTIES, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Clara Torres, defendants Good Care Pharmacy Inc. (“GCP”) and Sherman Pharmacy 2 Inc. (“SP2”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes 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, commenced on July 27, 2020, arises from an incident on December 23, 2019 in which plaintiff was injured when a shelving unit and its contents toppled onto her inside a pharmacy located at 232-A Sherman Avenue, New York, New York. Doc. 1. The pharmacy was allegedly owned, operated, managed, controlled, and/or maintained by defendants Sherman Pharmacy Corp. (“SPC”), Sherman 232 LLC (“Sherman 232”), GCP, SP2, and Bronstein Properties, LLC (“BP”). Doc. 1. SPC, Sherman 232 and BP joined issue by their answer filed

March 4, 2021. Doc. 19. GCP and SP2 joined issue by their answer filed March 17, 2021. Doc. 22. Plaintiff filed a note of issue and certificate of readiness on June 14, 2022. Doc. 32.

GCP and SP2 now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Docs. 33-44. In support of the motion, they assert that GCP is not liable herein since it sold the pharmacy prior to the date of the alleged incident. Doc. 44 at 7-8. Additionally, they assert that SP2 never owned or operated the store. Doc. 44 at 8. In support of the motion, GCP and SP2 submit, inter alia: a printout from the New York State Office of the Professions reflecting that GCP d/b/a Sherman Pharmacy was transferred to Sherman Pharmacy Corp./Sherman Pharmacy in September 2016 (Doc. 40); a November 2018 Asset Sale Agreement (“ASA”) between GCP d/b/a Sherman Pharmacy, as seller, and Sherman Pharmacy Corp., as buyer (Doc. 41); and a closing statement for the sale of assets from GCP to Sherman Pharmacy Corp. Doc. 42.

In opposition, plaintiff argues that the motion is untimely since it was filed more than 120 days after the filing of the note of issue. Doc. 47. Plaintiff further asserts that the motion must be denied because GCP and SP2 fail to submit a statement of material facts, as required by 22 NYCRR 202.8-g. Doc. 47.

LEGAL CONCLUSIONS

Plaintiff correctly asserts that the motion is defective since it does not contain a statement of material facts as required by 22 NYCRR 202.8-g(a) and Part 58 Rule 2(C). Doc. 48. Additionally, the exhibits annexed to the motion violate Part 58 Rule 2(H), which requires that “[a]ll motion papers and exhibits thereto must be e-filed separately and must contain a concise and accurate description of the document filed on NYSCEF” and that the failure to comply with the Rule may result in denial of the motion. Doc. 48. Although this Court would ordinarily deny a motion with leave to renew upon proper papers under these circumstances pursuant to 22

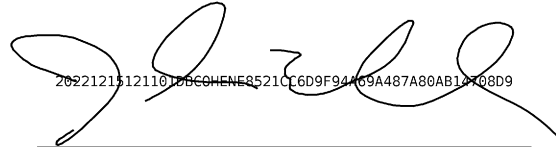
NYCRR 202.8-g (e) (*see, e.g., Torchia v Manhattan Plaza*, 2022 N.Y. Misc. LEXIS 7500, at *5 [Sup Ct, NY County Aug. 4, 2022, No. 160177/2020]), this Court is constrained to dismiss the instant motion outright for the following reasons.

Initially, as plaintiff asserts, the motion is untimely. The preliminary conference order directed that any dispositive motions were to be filed within 120 days after the filing of the note of issue (Doc. 24), which deadline is also set forth in Part 58 Rule 2(C). Doc. 48. Although the note of issue was filed on June 14, 2022 (Doc. 32), the instant motion was filed on October 14, 2022, two days late, thereby warranting denial of the application (*See Connolly v 129 E. 69th St. Corp.*, 127 AD3d 617, 618 [1st Dept 2015] [motion for summary judgment denied where it was filed *one day* after the time to file expired]). Given that the motion was not filed in a timely fashion, it was incumbent upon GCP and SP2 to set forth good cause for their lateness and, since they failed to do so, their motion must be denied (*See Corchado v City of NY*, 64 AD3d 429, 429 [1st Dept 2009] citing *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Even assuming, arguendo, that the motion were timely, it would still be denied on the merits. The printout from the website of the New York State Office of the Professions submitted by GCP and SP2 is neither certified nor authenticated, and is not supported by a factual foundation demonstrating its admissibility as a business record (*See Faulkner v Best Trails & Travel Corp.*, 203 AD3d 890, 892 [2d Dept 2022] [citations omitted]). Additionally, the ASA submitted by the movants (Doc. 41) has numerous blank spaces and, although it bears certain signatures, it is unclear whether it is fully executed and, even if it were, this Court cannot discern from the document on whose behalf the signatures were made.

Accordingly, it is hereby:

ORDERED that the motion by defendants Good Care Pharmacy Inc. and Sherman Pharmacy 2 Inc. seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is denied.



20221215121101056COHEN852106D9F94769A487A80AB17708D9

12/15/2022

DATE

DAVID B. COHEN, 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