

Kornreich v Honeyman

2022 NY Slip Op 34997(U)

December 23, 2022

Supreme Court, Queens County

Docket Number: Index No. 720140/2020

Judge: Mojgan C. Lancman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

-----X
MACLYNN KORNREICH,

Plaintiff,

-against-

Index No.: 720140/2020

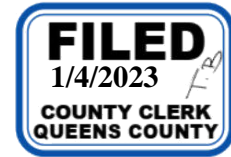
Motion Seq. No.: 22

Motion Date: 8.10.2022

Motion Cal. No.: 17

BRIAN HONEYMAN, POURITAL LTD.,
POURITAL., LTD, d/b/a 3 and Out, UNIQUE HAIR UNIQUE
HAIR SALON, INC. MOOI YONG HEAH, JOANNA YU
LEE, and VINCENT LEE,

Defendants.
-----X



The e-filed papers bearing NYSCEF document numbers 167-187, 192-215 and 217-222 were read on: (1) the motion of the defendants Unique Hair Salon, Inc. (“Unique”) and Mooi Yong Heah (“Heah”) for summary judgment; and (2) the cross-motion of the defendants Brian Honeyman (“Honeyman”), and Pourital, Ltd. and Pourital, Ltd d/b/a 3 and Out (collectively, “Pourital”) for summary judgment. The moving parties shall be referred to collectively as the “Defendants.” The relevant facts and procedural history are drawn from the parties’ submissions and the Court’s file, judicial notice of which is taken.

The Plaintiff commenced this action seeking monetary damages for personal injuries allegedly sustained in an accident that occurred on May 14, 2015 (the “Accident”). According to the bill of particulars the Plaintiff verified on April 14, 2016, the Accident took place “[u]pon walking into the rear doorway of the bar known as ‘Recovery Room’ [she] was caused to lose her balance because of an unreasonably illegally constructed and poorly lit ramp, at the rear entrance to the bar. The doorway, which opened over the ramp was also negligently constructed, and in part caused this accident.”

Presently before the Court are a motion and a cross-motion for summary judgment filed by the Defendants to dismiss the Plaintiff’s complaint and all cross-claims. For the following reasons, the motions are granted, and the complaint and all cross-claims against the Defendants are dismissed.

I. Factual Background and Procedural History

The Plaintiff alleges that the Accident took place at “the threshold at the rear entrance to 135-24 Booth Memorial Avenue, Flushing, New York” (the “Premises”). The Premises was

operated as the “Recovery Room” sports bar. The Accident occurred as the Plaintiff was reentering the Premises via the back entrance. In essence, the Plaintiff contends that she lost her balance while attempting to reenter the Premises.

Heah is the president and sole principal of Unique. Unique owned the Premises at the time of the Accident. In June 2010, Unique and Pourital entered into a lease for the Premises (the Lease”), which was in effect on the date of the Accident. Heah signed same for Unique, as president, and Honeyman signed same for Pourital, Ltd. as president.

This cause were previously discontinued as to the defendants Joanna Yu Lee and Vincent Lee.

II. Preliminary Considerations

Preliminarily, and contrary to the Plaintiff’s contention, the motion and cross-motion are timely. The Plaintiff filed an amended note of issue on January 18, 2022. The motion and cross-motion were made when they were filed via NYSCEF on May 18, 2022, which is 120 days from the date the amended note of issue was filed. Both motions were thus filed timely.

However, the motions were subsequently rejected by NYSCEF. The Defendants were advised of the rejection, and they then refiled the motions on May 23, 2022. The motions were refiled within three days after counsel was advised of the rejection thereof for technical reasons. The case of *Esdaille v Whitehall Realty Co.*, 61 AD3d 435, 435-436 [1st Dept 2009]), supports the finding that the present motions are timely: “[t]he court properly found that the motion for summary judgment was timely, as it was served within the time dictated by the court. The 10–day delay in re-noticing the motion was due to the Clerk's office rejection of the original motion papers because the case had been transferred to another part that required motions to be brought by order to show cause” [citations omitted]; *see also Mayer v New York City Transit Authority*, 39 AD3d 349 [1st Dept 2007]).

Second, the Court shall not consider the affidavit of the Plaintiff’s expert, Harold Krongelb (“Krongelb”), a professional engineer, because it was served after the Court-imposed deadline to do so and in a grossly untimely manner, and only in opposition to the Defendants’ motions for summary disposition.

“While a specific time frame for providing expert witness disclosures is not set forth in [CPLR 3101(d)(1)(i)], a trial court has discretion, under its general authority to supervise disclosure deadlines, ... [to] impose a specific deadline ... for the disclosure of experts and to impose appropriate sanctions if a party fails to comply with the deadline. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with [CPLR 3101(d)(1)(i)]” (CPLR 3101[d][1][i])” (*Freeman v State*, 206 AD3d 1102, 1105 [3rd Dept 2022] [internal quotation marks, brackets and citations omitted]).

In *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095 [3d Dept 1095], *lv denied* 31 NY3d 906 [2022], the Court concluded that expert witness affidavits should be disregarded where discovery deadlines relative to expert disclosure have passed; the affidavits are submitted for the first time in opposition to a summary judgment motion; and good cause for the delay is not advanced (*see also Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 139 AD3d 1192 [3rd Dept 2016]).

The Plaintiff's counsel admits to the delay in serving expert witness disclosure in an affirmation dated August 10, 2022 (see NYSCEF doc. no.: 220). Here, he states as follows:

The delay in disclosing plaintiff's expert's CPLR §3101(d) disclosure was not intentional or willful, and it has not been prejudicial to the defendants, who three times failed to timely file a motion for Summary Judgment. This court was closed for a good portion of the pandemic and to a great extent, is still closed for trials, after 2 ½ years. Your affiant, because of illness in my family, and among office personnel, had no choice but to close my office of over 25 years. The difficulty of closing an office after 25 years, by a sole practitioner, cannot be understated. The difficulty of having to wait until re-establishing a law office after a long delay, is worse.

The excuse for the delay is unavailing for the following reasons.

First, Krongelb visited the scene of the Accident on March 29, 2016 and his report was affirmed on April 22, 2016. Thus, the visit to the scene and preparation of his affirmed report occurred approximately *four years* before the COVID-19 pandemic and approximately *six years* before the present motions were filed.

Second, in her amended note of issue (*see* NYSCEF doc. no.: 106), filed on January 18, 2022, the Plaintiff made it clear that discovery, including expert disclosure, was complete, except for "the exchange of the defendant's [sic] medical reports" and a non-party deposition. In the Plaintiff's words:

7. Discovery now known to be necessary is completed [X] (See #8 below) except for outstanding EBT of non-party.
8. There are no outstanding requests for discovery, except for exchange of defendant's medical reports, and non party EBT. A copy of Justice Buggs' decision of 10/15/2021, filed 10/19/2021 directing the EST of non-party Seibhur 45 days before trial, is attached hereto.
9. There has been a reasonable opportunity to complete the foregoing proceedings, except for the EBT of Seibhur.
10. There has been compliance with any order issued to Pre calendar Rules (22 NYCRR 202.1.

Despite the foregoing statements, the Plaintiff served expert disclosure pursuant to CPLR § 3101 [d] on July 29, 2022, approximately six months after filing a note of issue that, *inter alia*, indicated that expert discovery was complete, and approximately two months after the present summary judgment motions were accepted for filing.

Third, pursuant to a Compliance Conference Order dated May 9, 2016, which all parties, including the Plaintiff signed, all outstanding discovery demands were to have been responded to by June 8, 2016.

Fourth, the Honorable Justice Buggs by Order dated August 22, 2018, directed that all discovery was to have been completed on or before October 5, 2018.

The Court further observes that the Accident took place on May 14, 2015; that this cause was commenced in July 2015; that Krongelb visited the scene of the Accident on March 29, 2016 and that his report was affirmed on April 22, 2016. Since the Plaintiff had Krongelb's affirmed report for *years* before the COVID-19 pandemic, and pandemic-related restrictions ended a significant amount of time ago, it is unclear how the pandemic can justify the egregious delay in serving expert disclosure. Moreover, it bears reiterating that the Plaintiff served expert witness disclosure and the expert's report only in response to the motions for summary disposition.

III. Discussion

Upon searching the record, the Court concludes that the individual defendants Heah and Honeyman are entitled to summary judgment because the Plaintiff is unable to pierce the corporate veil against them.

In *Rockefeller v Statement Services, Corp.*, 204 AD3d 920, 922 [2d Dept 2022], it was recently held as follows on the issue of piercing the corporate veil:

Equity will intervene to pierce the corporate veil and permit the assertion of claims against the individuals who control the corporation in order to avoid fraud or injustice. The party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances.

The record reveals that the lease for the Property that was in effect on the date of the Accident was between Unique and Pourital. The lease was signed by Heah, as the president of Unique, and Honeyman, as president of Pourital. No factual or legal grounds are advanced by the Plaintiff for the piercing the corporate veil of either Unique or Pourital so as to impose personal liability upon either Heah or Honeyman (*see id.*). Accordingly, Heah and Honeyman are granted summary judgment dismissing all claims against them.

In any event, all Defendants establish *prima facie* entitlement to summary judgment. Here, among other things, the affidavit of their expert, Joseph A. Lucchesi, P.E., states that the conditions at the Accident site were not dangerous, defective, hazardous or unsafe. In opposition, the Plaintiff fails to raise a triable issue of fact. Here, she admitted at her deposition that she lost her balance, causing her to fall.

“In a trip and fall case, a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall. Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation [internal quotation marks and citations omitted]” (*Mallen v Dekalb Corp.*, 181 AD3d 669, 669 [2d Dept 2020]) [internal quotation marks and citations omitted].”

Similarly, in *Conners v LMAC Management LLC*, 189 AD3d 2071, 2072 [4th Dept 2020], it was held that:

In a trip and fall case, a defendant may establish its *prima facie* entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation. If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation. That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. It only means that a plaintiff's inability to establish the cause of his or her fall—whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence [internal quotation marks and citations omitted].

The Plaintiff's opposition fails to raise a triable issue of fact. Here, the Plaintiff is unable to identify the cause of her fall through her deposition testimony (*see Vojvodic v City of New York*, 148 AD3d 1086, 1087 [2d Dept 2017]), and, as explained above, the Court shall not consider her expert's affidavit.

IV. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the motion for summary judgment of the defendants Unique and Heah is granted; and it is further,

ORDERED, that the cross-motion for summary judgment of the defendants Honeyman and Pourital is granted; and it is further,

ORDERED, that the Plaintiff's complaint is dismissed as to the defendants Unique, Heah, Honeyman and Pourital; and it is further,

ORDERED, that the cross-claims asserted by Unique, Heah, Honeyman and Pourital are dismissed.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
December 23, 2022



MOJGAN C. LANCMAN, J.S.C.

