

Garcia v City of New York

2023 NY Slip Op 30667(U)

February 22, 2023

Supreme Court, New York County

Docket Number: Index No. 158756/2021

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

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BERNABE RIVERA GARCIA,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, THOR GATEWAY I & II OWNER, LLC, DINE BRANDS GLOBAL, INC., IHOP RESTAURANTS LLC, GREATER OMENTUM, LAWRENCE HARLEM FOODS LLC

Defendant.

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INDEX NO. 158756/2021
MOTION DATE 01/26/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 41

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM

Upon the foregoing documents, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC's motion to dismiss the Plaintiff's complaint and all cross-claims pursuant to CPLR §3211(a) is denied in part and granted in part.

This personal injury matter arises out of a November 19, 2020 incident wherein Plaintiff BERNABE RIVERA GARCIA alleges that as he was caused to trip and fall due to a defective sidewalk condition abutting an airshaft grate as he was walking along the sidewalk abutting the premises located at 2082 Lexington Avenue in Manhattan, specifically, the East 126th Street side of the premises. Plaintiff has alleged to have sustained various injuries as a result of the accident.

The Plaintiff's initial complaint was filed on September 23, 2021. (NYSCEF Doc. #1) The Plaintiff served Defendant IHOP RESTAURANTS LLC with the summons and complaint via the New York State Secretary of State pursuant to CPLR §303 on October 13, 2021 (NYSCEF Doc. #4). The Plaintiff served Defendant DINE BRANDS GLOBAL, INC. with the summons and complaint via certified mail pursuant to CPLR §312-a on October 19, 2021 (NYSCEF Doc. #2). The Plaintiff then filed a supplemental summons and amended complaint on November 8, 2021 (NYSCEF Doc. #9, 10). At which time, additional Defendants GREATER OMENTUM and

LAWRENCE HARLEM FOODS LLC were added to the caption. The Plaintiff served Defendant DINE BRANDS GLOBAL, INC. with the supplemental summons and amended complaint via certified mail on November 19, 2021 (NYSCEF Doc. #12). The Plaintiff served Defendant IHOP RESTAURANTS LLC with the supplemental summons and amended complaint via the New York State Secretary of State on November 29, 2021 (NYSCEF Doc. #15).

Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC now move to dismiss the Plaintiff's complaint pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction, pursuant to CPLR §3211(a)(1) upon documentary evidence and pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

In support of the motion, the Defendants submit an affirmation in support, memorandum of law, the summons and complaint, and supplemental summons and amended complaint, the purported affidavit of service of the complaint and amended complaint on Defendant DINE BRANDS GLOBAL, INC. (NYSCEF Doc. #28), and an affidavit of William Taylor, with corresponding exhibits (NYSCEF Doc. #29). No opposition to the Defendants' motion is submitted on behalf of the Plaintiff or any of the other Defendants.

A motion to dismiss a cause of action pursuant to CPLR §3211 may be pursued under the specific enumerated circumstances set forth in CPLR §3211(a). CPLR §3211(e) dictates when such motions should be pursued and when a party, in failing to timely seek such relief, may have waived its objection or defense. Pursuant to CPLR §3211(e), a motion to dismiss a cause of action shall be made "at any time before service of the responsive pleading is required". (CPLR §3211(e)). Where a motion is not filed in accordance with CPLR §3211(e), it is untimely. (*see Han v. New York City Transit Auth.*, 203 A.D.3d 511, 164 N.Y.S.3d 602, 604 [1st Dept. 2022], *U.S. Bank N.A. v. Gilchrist*, 172 A.D.3d 1425, 1426–1427, 102 N.Y.S.3d 625 [2d Dept. 2019]). However, where the motion to dismiss a cause of action has been pursued pursuant to CPLR §3211(a)(2), (7) or (10), the motion "may be made at any subsequent time or in a later pleading". (CPLR §3211(e), *see Han* 203 A.D.3d at 511, *supra.*).

Upon review, based upon the evidence submitted in support of the within motion, and the filings available on NYSCEF, it appears that neither Defendant DINE BRANDS GLOBAL, INC. nor Defendant IHOP RESTAURANTS LLC answered, moved to dismiss or secured a stipulation extending such time following the service of the initial complaint.

However, Plaintiff subsequently filed the amended complaint on November 8, 2021. Plaintiff served Defendant DINE BRANDS GLOBAL, INC. via certified mailing on November 19, 2021. Pursuant to CPLR §312-a, Defendant DINE BRANDS GLOBAL, INC. would have had up to 50 days, or until January 8, 2022, to appear, answer, file a motion, or to secure a stipulation extending its time to appear. Plaintiff served Defendant IHOP RESTAURANTS LLC with the amended complaint pursuant to CPLR §303 via the Secretary of State on November 29, 2021. Pursuant to CPLR §320, Defendant IHOP RESTAURANTS LLC had would have had 30 days, or until December 29, 2021, to appear, answer, file a motion, or to secure a stipulation extending its time to appear. The within motion was filed on January 26, 2022, several weeks after the time expired for both Defendants DINE BRANDS GLOBAL, INC. and Defendant IHOP RESTAURANTS LLC to appear in the action.

Upon review, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC motion to dismiss the Plaintiff's complaint pursuant to CPLR §3211(a)(1), based upon documentary evidence, and pursuant to CPLR §3211(a)(8), for lack of personal jurisdiction, was not filed in accordance with CPLR §3211(e), and is therefore untimely. Accordingly, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC's motion to dismiss the complaint pursuant to CPLR §3211(a)(1) and §3211(a)(8) is denied.

However, as the motion to dismiss the complaint pursuant to CPLR §3211(a)(7) was properly filed pursuant to CPLR §3211(e), this court will entertain that aspect of the motion on its merits.

The Plaintiff asserts claims sounding in negligence against Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC based upon the allegation that they owned, controlled, managed, maintained, operated, repaired, supervised and/or inspected the premises abutting the subject sidewalk.

In support of their motion to dismiss the compliant and amended complaint for failure to state a cause of action, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC argue that they do not owe a legal duty of care to the Plaintiff as they did not own, control, manage, maintain, operate, repair, supervise and/or inspect the subject premises.

In support of this argument, an affidavit of William Taylor, the Executive Director of Risk Management for Defendant DINE BRANDS GLOBAL, INC., which is the parent company of IHOP RESTAURANTS LLC (NYSCEF Doc. # 29) is submitted ["Taylor Affidavit"]. The Taylor

Affidavit avers that Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not own, lease, manage, control or operate the subject property and that they did not have any duty or responsibility to inspect, maintain, supervise or repair the subject premises or its abutting sidewalk.

Specifically, the Taylor Affidavit avers that Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not own the subject premises located at 2082 Lexington Avenue in Manhattan and in fact do not own any property in New York State. The Taylor Affidavit also avers that the Defendant THOR GATEWAY I & II OWNER, LLC actually owns the subject premises; a copy of a February 3, 2017 deed for the premises, which is annexed to the affidavit, appears to reflect that Defendant THOR GATEWAY I & II OWNER, LLC was the owner of the subject premises at the time of this incident (it also appears that Defendant THOR GATEWAY I & II OWNER, LLC admitted its ownership of the subject premises in its March 14, 2022 answer to the compliant [NYSCEF Doc. # 34]).

Additionally, the Taylor Affidavit avers that neither DINE BRANDS GLOBAL, INC. nor IHOP RESTAURANTS LLC were tenants of the subject premises. Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC, entered into a November 21, 2011 franchise agreement with Defendants GREATER OMENTUM and LAWRENCE HARLEM FOODS LLC. Defendants GREATER OMENTUM and LAWRENCE HARLEM FOODS LLC entered into an April 1, 2011 lease agreement to operate a restaurant in a first floor space at the subject premises. The lease agreement, annexed to the Taylor Affidavit, identifies Defendants GREATER OMENTUM and LAWRENCE HARLEM FOODS LLC as the tenant of the subject premises; 125th Street Gateway Ventures, LLC is identified as the landlord, Gateway II Development Partners, LLC is identified as the owner. Moreover, as per the November 21, 2011 franchise agreement, annexed as an exhibit to the Taylor Affidavit, the franchisees, Defendants GREATER OMENTUM and LAWRENCE HARLEM, were responsible for any maintenance, repair and remodeling work to keep the subject premises in good condition and in compliance with all applicable laws.

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting there from”. (*Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294, 1294 [1985]).

Section 7-210 of the New York City Administrative Code “unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure.” (*Sangaray v. W. River Assocs., LLC*, 26 N.Y.3d 793, 797, 48 N.E.3d 933, 935 [2016]). While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210. (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 174, 137 N.E.3d 469, 475 [2019]). Moreover, although a tenant of the property at issue may be held liable, a tenant “... cannot be held liable to a third party in tort absent a showing that (a) it affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a ‘special use’ for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition.” *Kellogg v. All Saints Hous. Dev. Fund Co.*, 146 A.D.3d 615, 617, 46 N.Y.S.3d 30, 33 [1st Dept 2017]).

In evaluating a motion to dismiss for a failure to state a cause of action, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274–75, 372 N.E.2d 17, 20–21 [1977]). “Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action’.” (*Lawrence v. Miller*, 11 N.Y.3d 588, 595, 901 N.E.2d 1268, 1271 [2008] quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]).

Upon review, as Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not own the subject premises, they are not charged with a duty pursuant to Section 7-210 of the New York City Administrative Code “to maintain the sidewalk abutting their property in a reasonably safe condition”. Additionally, as Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not lease the subject premises and as they did not have the responsibility to repair and maintain the premises as pre the franchise agreement,

Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not exert control over the subject premises or its abutting sidewalk and had no responsibility to maintain or repair the subject sidewalk.

Thus, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC did not owe the Plaintiff a legal duty of care and there can be no cause of action "cognizable at law" sounding in negligence against Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC arising from the subject November 19, 2020 incident. Accordingly, Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC's motion to dismiss for failure to state a cause of action is granted.

It is hereby

ORDERED that Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC's motion to dismiss pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(8) is denied; and it is further

ORDERED that Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted and the complaint is dismissed in its entirety as against said defendants, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendants DINE BRANDS GLOBAL, INC. and IHOP RESTAURANTS LLC shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).

2/22/2023

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ
J.S.C.