

Ronay v FTG Co. USA, Inc.

2023 NY Slip Op 33464(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 153983/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 153983/2022

OLEG RONAY,

MOTION DATE 02/16/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

FTG COMPANY USA, INC., 37-39 WEST 17TH OWNER,
LLC, MOINIAN GROUP

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54

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

Upon the foregoing documents, and after oral argument, which took place on June 20, 2023, with Robert J. Eisen, Esq. appearing on behalf of Plaintiff Oleg Ronay (“Plaintiff”) and Joel Scott Ray, Esq. appearing on behalf of Defendant Moinian Group (“Moinian”), Moinian’s motion for summary judgment dismissing Plaintiff’s action against Moinian is denied.

I. Background

Plaintiff initiated the underlying action via Summons and Complaint dated May 9, 2022 (NYSCEF Doc. 1), alleging that on January 22, 2022, he was injured falling on a negligently maintained sidewalk adjacent to 37 West 17th Street (the “Property”). According to the deed to the Property, on the date of Plaintiff’s alleged accident the Property was owned by Defendant 37-39 West 17th Owner, LLC (“37-39”) (NYSCEF Doc. 41). Issue was joined by 37-39 and Moinian with the service of their Answer on October 4, 2022 (NYSCEF Doc. 20). Issue was joined by Defendant FTG Company USA, Inc., d/b/a Yakiniko Futago (“Futago”) with the

service of its Answer on October 6, 2022 (NYSCEF Doc. 22). On November 16, 2022, after service of Defendants' Answers, Futago took over the defense of 37-39 (NYSCEF Doc. 29).

On February 15, 2023, Defendant Moinian brought the instant motion (NYSCEF Doc. 36) pursuant to CPLR 3212, requesting summary judgment dismissing Plaintiff's action as against Defendant Moinian on the grounds that Moinian has no connection to the subject Premises. Moinian contends that the deed to the Property (the "Deed") (NYSCEF Doc. 41), the Lease for the ground floor of the Property (the "Lease")(NYSCEF Doc. 43) and the February 16, 2023 Affidavit of Harry Dreizden, the General Counsel and Executive Vice President of Josephson LLC d/b/a The Moinian Group (the "Dreizden Affidavit")(NYSCEF Doc. 38), establish that 37-39 was the sole owner of the property at the time of Plaintiff's accident (NYSCEF Doc. 37 at ¶24), that Moinian had no interest in the Property on the day of Plaintiff's accident (*Id.* at ¶25) and that Moinian has never managed the Property (*Id.* at ¶26). Moinian filed an attorney Affirmation (NYSCEF Doc. 37) in support of its motion for summary judgment on February 16, 2023.

Plaintiff filed an Affirmation (NYSCEF Doc. 50) in opposition to Moinian's motion on June 6, 2023, arguing that Moinian's motion for summary judgment is premature since no party depositions have yet been taken, Moinian has not had a reasonable opportunity to undertake disclosure, and because there are material issues of fact remaining (NYSCEF Doc. 50)¹. Moinian filed a Reply Affirmation (NYSCEF Doc. 53) in further support of its summary judgment motion on June 17, 2023.

¹ While Plaintiff argues that Moinian's opposition papers should be disregarded as untimely, the Court will consider Moinian's opposition papers as there has been no showing of prejudice toward Plaintiff and Plaintiff submitted a reply affirmation addressing Moinian's arguments on the merits (*see Chrin v Gate of Heaven Cemetery*, 190 AD3d 516 [1st Dept 2021]).

II. Discussion

A. Summary Judgment Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). On a motion for summary judgment, “[t]he function of the court is issue finding, not issue determination” (*Wiener v Ga-Ro Die Cutting*, 104 AD2d 331 [1st Dept 1984]). Moreover, it is axiomatic that “if there be any real doubt as to the existence of an issue, there can be no doubt summary judgment must be denied (*Goshen Litho, Inc. v Interstate Magazine Distrib.*, 43 AD2d 524 [1st Dept 1973]). Once this requisite showing is made by the moving party, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

B. Defendant Moinian’s Motion for Summary Judgment

Moinian contends that the Deed, the Lease and the Dreizden Affidavit conclusively establish that Moinian has no connection to or interest in the Property (NYSCEF Doc. 37 at ¶20). The Deed states that 37-39 was the owner of the Property at the time of the incident (NYSCEF Doc. 41). The Lease states that 37-39 was the landlord and lessor of the Property at the time of Plaintiff’s accident (NYSCEF Doc. 43). The Dreizden Affidavit states that in 2017, ownership of

the Property transferred to 37-39, that Moinian never took over the Lease or had anything to do with the Lease, and that Moinian never had an ownership interest in the Property, never managed the Property, and never maintained or repaired the property (NYSCEF Doc. 38 at ¶¶ 7-10). In support of the argument that it had no connection to the Property, Moinian references three primary cases in support: *Jackson v Savoy Park Owner LLC*, 183 AD3d 495 (1st Dept 2020); *Halpern v Pick a Bagel BPC, LLC*, 2008 N.Y. Misc. LEXIS 9968 (Sup Ct, NY Cty, 2006); and *Turner v 350 Realty Co., LLC*, 2016 N.Y. Misc. LEXIS 5023 (Sup Ct, NY Cty, 2016).

The case at bar is distinguishable from *Jackson*, *Halpern* and *Turner*. In *Jackson*, the First Department granted dismissal to defendants holding that by presenting the pleadings, a lease and a deposition, the defendants conclusively showed which parties owned and managed the subject building, and established that the defendants had no connection to or interest in the property (*Jackson* at 495). Notably, the *Jackson* Court found that “plaintiff presented no evidence to disrupt...defendants’ showing that they did not have or had completely parted with any possession or control of the premises” (*Jackson* at 495).

Similarly, in *Turner*, a defendant was granted summary judgment dismissing the complaint against it after presenting a deed which showed that another party was the sole owner of the subject property (*Turner* at 6). However, in *Turner*, the plaintiff neither opposed defendants’ argument nor provided any evidence to the contrary (*Turner* at 6).

In *Halpern*, the Court dismissed several defendants from the action after an affidavit and two assignments showed that they had no connection to or interest in the property (*Halpern* at 7-10). The Halpern Court ruled that the defendants’ documents were sufficient because they contradicted the “bare legal conclusions and factual allegations in plaintiff’s complaint (*Halpern* at 10).

Unlike the plaintiffs in *Jackson, Turner and Halpern*, Plaintiff in this case has presented photographic evidence of a sign in front of the Property that reads “Owner / Developer” with “M Moinian” written in large letters below (NYSCEF Doc. 51). The sign at the Property also reads “For Leasing Information 212-808-4000 www.moinian.com” (NYSCEF Doc. 51). As the Court’s function on a motion for summary judgment is issue finding, because Plaintiff has put forth some evidence to disrupt Moinian’s showing that it has no connection to or interest in the Property, material questions of fact remain as to Moinian’s interest in the Property which preclude the issuance of summary judgment at this stage.

C. Defendant Moinian’s Motion for Summary Judgment is Premature

Notwithstanding the remaining questions of material fact which preclude summary judgment, Moinian’s summary judgment motion, at this stage, is premature.

The First Department has held that a motion for summary judgment is premature when “no depositions have yet taken place and depositions are necessary to flesh out the circumstances of the conduct at issue” (*Reid v St. Luke’s-Roosevelt Hosp. Ctr.*, 191 AD3d 545, 547 [1st Dept 2021]). Further, it has been held that “where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied ... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*Baron v Freeport*, 143 AD2d 792 [2D Dept 1988]).

In this case, there has not been any depositions of the parties (NYSCEF Doc. 50 at ¶28). As Moinian stated in their Affirmation in Opposition (NYSCEF Doc. 50 at ¶31), “[t]he defendant and specifically Harry Dreizen need[] to be questioned at a deposition” regarding the

ownership and control of the Property. As Plaintiff in this case has not had an opportunity for disclosure prior to the making of this motion, the Court finds the motion to be premature.

Accordingly, it is hereby,

ORDERED that Defendant Moinian Group’s motion for summary judgment dismissing Plaintiff Oleg Ronay’s action against it is denied in its entirety as premature, with leave to renew upon completion of discovery; and it is further;

ORDERED that the parties are directed to submit a proposed Status Conference Order to the Court on or before October 31, 2023 via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Status Conference Order, the parties are directed to appear for an in-person status conference with the Court on November 1, 2023 at 9:30 a.m. in 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for movant shall serve a copy of this Decision and Order, with notice of entry, on all parties; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

10/5/2023
DATE

Mary V Rosado Jsc
HON. MARY V. ROSADO, 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