

Foss v BPP St Owner LLC

2024 NY Slip Op 30228(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 151561/2021

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

-----X

SUSAN FOSS,

Plaintiff,

- v -

BPP ST OWNER LLC, CRRE TOWN AND VILLAGE LLC
D/B/A STUYTOWN PROPERTY SERVICES, HANCHETT
ENTRY SYSTEMS, INC., HANCHETT ENTRY SYSTEMS,
INC. D/B/A SECURITRON MAGNALOCK CORP.,
BAYVIEW CUSTOM COMMUNICATIONS, LTD.,
FORTRESS SECURITY, LLC, AMERICAN SECURED
FENCING CORP.,

Defendant.

-----X

FORTRESS SECURITY, LLC

Plaintiff,

-against-

ALLCOM GLOBAL SERVICES INC.

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595898/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 55

were read on this motion to/for

JUDGMENT – SUMMARY

The instant motion (motion sequence no. 001) was filed under *Foss v Bayview Custom Communications*, Index no. 157381/2022, which was consolidated into this matter by order dated June 2, 2023. See NYSCEF doc. no. 48. Further, the motion was transferred to Justice Leslie A. Stroth pursuant to the order of Justice Dakota D. Ramseur, dated July 7, 2023. **This decision and order hereby resolves motion sequence no. 001 filed under index no. 157381/2022 on January 19, 2023.**

Susan Foss (plaintiff) brought this instant action for alleged personal injuries sustained on September 2, 2019, when she pulled open a security gate located within a playground (the playground) within the Stuyvesant Town apartment complex (Stuyvesant).

Pursuant to the summons and complaint, Stuyvesant Town is owned by defendant BPP St Owner, LLC (BPP). BPP hired defendant American Secured Fencing Corp. (American) to install gates at the playground. Bayview Custom Communications, Ltd. (Bayview) entered into a contract with BPP to provide communications wiring for the subject security gate, while defendant and third-party plaintiff Fortress Security Inc. (Fortress) allegedly maintained the gate's control systems.

American moves for summary judgment pursuant to CPLR 3212 on the issue of liability, dismissing plaintiff's complaint and all cross-claims asserted against it. Plaintiff and defendants BPP and Bayview oppose. Fortress takes no position on the motion.

I. Procedural History

This matter involves two actions, which were consolidated following the filing of the instant motion. This motion was filed on January 19, 2023 in the matter of *Foss v Bayview Custom Communications*, index no. 157381/2022 (the 2022 action). On June 2, 2023, following the filing of the motion, this action was consolidated with the instant action, *Foss v Bayview Custom Communications*, index no. 151561/2021 (the 2021 action). Although no depositions were held in the 2022 action, plaintiff appeared for a deposition in the 2021 action prior to consolidation. It is uncontested that discovery is not complete in this matter, and no note of issue has yet been filed.

II. Facts

In support of its motion, American submits a copy of plaintiff's deposition transcript, which was held on March 15, 2022, under the 2021 action and prior to the commencement of the 2022

action. In her deposition, plaintiff testified that on September 2, 2019, she was entering playground number 5 (the playground) at the Stuyvesant Town Houses for the purpose of meeting a friend at the pickleball courts. She testified that in order to enter the playground, she had to scan her key card. Upon scanning her key card, a green light would go on and a buzzer would sound. She would then pull open the security gate and enter.

However, on the date of the accident, plaintiff testified that after she scanned her card and the green light and buzzer activated, the gate would not open as she pulled on it. As she pulled harder, the gate unlocked and the lock plate located on the gate struck her head, resulting in injury. She could not recall any prior instance where she encountered difficulty opening the security gate. She also testified that the scanner and lock were installed sometime in the summer of 2019.

American also submits an affidavit of its office manager, Donna King. Ms. King attests that American was hired by BPP:

...to install security gates to various areas within the development. More importantly, it only involved installing the security gates and at no time were we hired to install the security scanner, locks or the necessary electrical work. Upon information and belief, BPP ST OWNER, LLC, subsequently hired another company to install those items on all the security gates. NYSCEF doc. no. 17 at ¶ 3.

Further, American annexes the invoice for the work in question, which shows that the gates were installed in October 2018, almost one year prior to the accident. *See* NYSCEF doc. no. 18.

III. Analysis

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material

questions of fact on which [its] claims rest.” *Ferber v Sterndent Corp.*, 51 NY2d 782, 783 (1980). Further, pursuant to CPLR 3212 (f), “...should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion...”

American argues that the cause of the alleged accident was the door lock failing to disengage. As American installed the gates, not the scanner and lock, American contends that it is not liable for plaintiff’s accident. American maintains that BPP contracted with another contractor to install the scanner and locks, which were installed a year after American was hired to construct the security gates. American points to plaintiff’s deposition testimony, in which she testified that she could not recall any issue with the gate prior to the installation of the security locks.

In opposition, BPP and plaintiff argue that American’s motion is premature, as discovery is incomplete. They further maintain that the deposition transcript submitted by American is inadmissible pursuant to CPLR 3116, as it is unsigned by the deponent. Moreover, plaintiff argues that American may face potential third-party vendor liability for potentially creating a dangerous condition or launching an instrumentality of harm, but proof to support these facts cannot be stated due to the incomplete nature of the discovery in this matter. *See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 137 (2002).

Bayview also opposes the motion. Notably, Bayview was not a party to the 2021 action, under which index number plaintiff’s deposition was held. It therefore has not had the opportunity to depose plaintiff, or any party. In fact, Bayview has not engaged in any discovery in this matter, as American filed its motion three days after filing its answer, thereby staying all discovery.

In light of the incomplete stage of discovery, American’s motion is premature. Here, there has been limited exchange of documents, and all parties have not yet had the opportunity to depose

plaintiff. Such limited discovery precludes the determination of dispositive issues, such as how the accident occurred and whether the lock or the gate caused the accident. *See Contreras v MDG Design & Constr. LLC*, 210 AD3d 407, 408 (1st Dept 2022); *Guzman v City of New York*, 171 AD3d 653 (1st Dept 2019). Plaintiff's unsigned deposition transcript, in which not all parties participated, and Ms. King's bare bones affidavit is insufficient demonstrate American's entitlement to judgment as a matter of law.

As the facts essential to justify opposition may exist but cannot be stated, American's motion is denied as premature. *See CPLR 3212 (f)*.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of American Secured Fencing Corp. is denied; and it is further

ORDERED that the matter shall be scheduled for a discovery conference on February 27, 2024 at 2:15 p.m. in Room 328 at 80 Centre Street, New York, New York.

The foregoing constitutes the decision and order of the Court.

1/12/2024
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	