

Bates v Zuba LLC

2024 NY Slip Op 32486(U)

July 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 526314/2019

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
COREY L. BATES;

Plaintiff;

-against-

ZUBA LLC, GULF OIL CORPORATION, SUNOCO LLC,
and NEW LOTS LAUNDROMAT INC.

Defendants.

-----X
SUNOCO, LLC, (i/s/h/a) SUNOCO INC.
SUNOCO LLC

Third-Party Plaintiff,

-against-

SANEX CORP

Third-Party Defendants.

-----X
NEW LOTS LAUNDROMAT INC.,

Second Third-Party Plaintiff,

-against-

SANEX CORP, HUSEYIN KURTULDU, FINGER HOME
NAIL SPA, INC., and MEI GUO MING

Second This-Party Defendants.

-----X
HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice
of Motion for Summary Judgment submitted March 7, 2024.

Papers	Numbered
Notice of Motion and Affirmation for Summary Judgment.....	1&2 [Exh. A-E]
Affirmation in Opposition.....	4
Affirmation n Reply.....	5 [Exh. A-C]
Memorandum of Law.....	3;6

Plaintiff commenced this negligence and personal injury action due to an alleged trip and fall that occurred on August 28, 2018, at 719 New Lots Avenue, Brooklyn, New York (hereinafter "subject premises"). The plaintiff commenced suit against Sunoco LLC (hereinafter "Sunoco"), the property owner, Zuba LLC (hereinafter "Zuba"), and the entity that leased the subject premises, New Lots Laundromat (hereinafter "New Lots"). Sunoco then filed a third-party complaint against Huseyin Kurtuldu and his company Sanex Corp (hereinafter "Sanex") asserting causes of action for common law indemnification, contribution, breach of contract, and contractual indemnification. Mr. Kurtuldu subleased from New Lots, and Sanex is the entity that operated and maintained the gas station at the subject premises. Sunoco (franchisor) and Sanex (franchisee) entered into a franchise agreement for said gas station.

Sunoco moves for an order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint against Sunoco and dismissing all cross-claims and/or counter-claims against Sunoco. Sunoco argues that it did not owe the plaintiff a duty of care and cannot be held liable for negligence as it did not own, occupy, or control the subject premises. Plaintiff and New Lots oppose Sunoco's motion for summary judgment on the grounds that: (1) the affidavit of Sunoco's Liability Risk and Claims manager, Ginny Murphy, does not provide the requisite foundation to authenticate the Franchise agreement; (2) the affidavit is deficient since it was not notarized within the State of New York nor accompanied by a certificate of conformity; (3) the lease agreement between Zuba and New Lots was not authenticated; (4) Sunoco owed the plaintiff a duty to maintain the premises based upon control, dominion, and special use that Sunoco retained under the franchise agreement; and (5) Sunoco failed to provide proof that they did not create the condition that caused the plaintiff's accident.

Discussion

In support of its motion for summary judgment, Sunoco has submitted the following: the deed for the subject premises with Zuba listed as the owner (Exh. "A"); the lease agreement between Zuba and New Lots (Exh. "B"); the sub-lease agreement between New Lots and Mr. Kurtuldu (Exh. "C"); the dealer supply franchise agreement between Sunoco and Sanex (Exh. "D"); and the affidavit of Ginny Murphy, the Liability Risk and Claims manager of Sunoco (Exh. "E"). In opposition, the plaintiff and New Lots argue that the plaintiff failed to make a prima facie case since plaintiff's managing member lacked personal knowledge of the franchise agreement by not being a signatory on the agreement and lacked personal knowledge of the facts surrounding plaintiff's incident as she did not witness the incident. It is further argued that Ms. Murphy's affidavit was prepared exclusively based upon her personal knowledge, rather than any review of Sunoco's business records, or otherwise. As such, Sunoco cannot rely on Ms. Murphy's understanding of the franchise agreement to establish that Sunoco was not responsible for supervising Sanex's operation and maintenance of the premises.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care. See, Forbes v Aaron, 81 A.D.3d 876, 918 N.Y.S.2d 118 (2nd Dept., 2011). As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. See, Kydd v Daarta Realty Corp., 60 A.D.3d 997, 877 N.Y.S.2d 352 (2nd Dept., 2009). To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable", such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Karpovich v City of New York, 162 A.D.3d 996, 80 N.Y.S.3d 364 (2nd Dept., 2018).

After careful consideration the court finds the Sunoco has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting evidence showing that it did not owe a duty to the plaintiff. The court finds that the absence of a certificate of conformity accompanying Sunoco's affidavit is a mere irregularity without prejudicial effect, not a fatal defect. See, Citimortgage, Inc. v Zagoory, 198 A.D.3d 715, 155 N.Y.S.3d 424 (2nd Dept., 2021). Furthermore, this irregularity has been cured by the recent amendment to CPLR § 2106 permitting anyone to make an affirmed statement in lieu of an affidavit. The plaintiff and New Lots in opposition to the Sunoco' motion failed to raise an issue of fact that would preclude summary judgment from being granted. The plaintiff and New Lots submitted attorney affirmations which argued that the franchise agreement is not authenticated in admissible form because Sunoco's managing member lacked personal knowledge of the franchise agreement and facts surrounding plaintiff's incident, is unavailing.

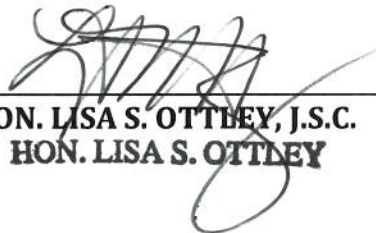
First, the attorney's affirmation lacks probative value and cannot raise a triable issue of fact. See, Unique Funding Solutions LLC v. A-Z Imports Exports, LLC, 78 Misc.3d 1209(A), 183 N.Y.S.3d 727 (Sup. Ct., Nassau Co., 2023), citing, McCovey v. Williams, 105 A.D.3d 819 (2nd Dept., 2013); Morissaint v. Raemar Corp., 271 A.D.2d 586 (2nd Dept., 2000). In addition, as noted in Bank of New York Mellon v. Gordon, 171 A.D.3d 197, 97 N.Y.S.3d 286 (2nd Dept., 2019), the court held that although "the foundation for admission of a business record usually is provided by testimony of the custodian, the author or some other witness familiar with the practice and procedure of the particular business" ..., it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted. In the case at bar, Sunoco's managing member stated in her affidavit that she had personal knowledge of each of the facts set forth therein and provided specific sections and language of the franchise agreement. Accordingly, the franchise agreement evinces the facts for which it is relied upon.

The court finds that Sunoco was not liable based upon its status as a franchisor. In determining whether a defendant, as a franchisor, may be held vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred. See, Khanimov v McDonald's Corp., 121 A.D.3d 1050, 995 N.Y.S.2d 202 (2nd Dept., 2014). Here, Sunoco tendered sufficient evidence in support of their motion to establish, prima facie, that Sunoco lacked the requisite control over the alleged causes of the plaintiff's injuries. For instance, the franchise agreement expressly states that the franchisee is required to maintain the premises in compliance with all applicable laws concerning health and safety, and the franchisee shall have sole responsibility to keep the premises in good order and condition, clean, attractive safe and healthful condition, free of ice, snow, dangerous condition and wrecked, junked and unlicensed vehicles. The plaintiff and New Lots have failed to raise a triable issue of fact in opposition. Moreover, Sunoco established, prima facie, that Sunoco did not own, occupy, control, or have a special use of the subject property at the time of the accident and, thus, could not be held liable for injuries caused by the allegedly dangerous conditions. See, Mitchell v Icolari, 108 A.D.3d 600, 969 N.Y.S.2d 503 (2nd Dept., 2013). In opposition, the plaintiff and New Lots have failed to raise a triable issue of fact and have failed to offer evidence demonstrating that Sunoco created the alleged condition. In addition, Sunoco submitted the lease and sub-lease agreements that conclusively established that it did not own the subject premises on the date that the plaintiff alleges he was injured. See, Forbes, supra.

Accordingly, Sunoco's motion for summary judgment is granted dismissing with prejudice the verified complaint of plaintiff against Sunoco and all cross-claims and/or counter-claims against Sunoco.

This constitutes the decision and Order of this Court.

Dated: Brooklyn, New York
July 10, 2024


HON. LISA S. OTTBEY, J.S.C.
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