Sarg v Twelfth St. Corp.

2012 NY Slip Op 30339(U)

February 9, 2012

Supr Ct, NY County

Docket Number: 102278/09

Judge: Louis B. York

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SCANNED ON 2/14/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK, Justice, J.S.C.   PART ______

Sang
- v -
Twelfth Street, et ano.

INDEX NO. 100978/09
MOTION DATE ______
MOTION SEQ. NO. 003
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/9/12   LOUIS B. YORK, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/JUDG. [ ] SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------X

MICHAEL SARG, JR ., M.D.,

Plaintiff

INDEX NO.
102278/09

-against-

UNFILED JUDGMENT

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TWELFTH STREET CORP., and
FAYA S. COHEN

Defendants.

----------X

LOUIS YORK, J.:

In this personal injury action, defendant Twelfth Street Corporation moves for summary judgment, dismissing the complaint and any cross claims against it. In response, defendant Faya S. Cohen, the landlord, cross moves for summary judgment, dismissing plaintiff's complaint. Plaintiff Michael Sarg, Jr. opposes both motions and cross moves for a deposition of Faya S. Cohen.

Background

Defendant Faya S Cohen ("Ms. Cohen") is the owner of the property located at 225 West 12th Street, New York, New York ("the property"). JC Dwight Inc. is the managing agent. On January 13, 1999 the managing agent leased the first floor of the property to defendant Twelfth Street Corp. ("Twelfth Street") that does business as the Village Den ("the restaurant").

Plaintiff was allegedly injured on August 13, 2008 at

approximately 1:15 pm, when he fell to the floor while attempting to sit down in his chair at an outside table of the restaurant. Plaintiff claims that the plastic chair that he sat in moved to the right, when he stood up to retrieve his wallet from his right hip pocket, at the end of the meal. Plaintiff subsequently initiated this action against both the tenant and the landlord of the premises, alleging that they negligently permitted the lightweight "flimsy" plastic chairs to be part of the outdoor area of the restaurant and negligently set up the tables and chairs, creating a "hazardous and trap-like condition", and failed to warn plaintiff of the danger (see, Verified Bill of Particulars, dated July 13, 2010, annexed to Affirmation of Warren T Harris (Harris Aff.) dated July 11, 2011, Ex B, Defendant's Cross Motion). Plaintiff alleges that the tenant's and landlord's negligence caused him to suffer severe, permanent personal injuries from which he continues to suffer pain.

Discussion

The landlord seeks summary judgment predicated on the argument that she has no duty of care to plaintiff to maintain the non-structural portion of the premises because she is an out-of-possession landlord with a limited right of re-entry. She maintains that the lease demonstrates that she relinquished control of the premises and placed responsibility for every day maintenance and repairs on the tenant.

The proponent of a motion for summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (see CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10,11 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Prudential Securities Inc., v Rovello*, 262 AD2d 172 [1st Dept 1999]).

To establish a prima facie case of negligence, plaintiff must prove that the defendants owed him a duty of care, and breached that duty, and that the breach proximately caused her injury (see *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). Where a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected (*Juarez v Wavecrest Mgt Team*, 88 NY2d 628,646 [1996]; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410 [2nd

Dept 2004]; *Guiffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). An out of possession landlord is generally not liable for a third parties' injuries on the premises unless it had notice of the defect and contractually consented to be responsible for maintenance or to make repairs (*Velazquez v Tyler Graphics*, 214 AD2d 489 [1st Dept 1995]). Notice can also be constructive, when the landlord reserves a right to reenter under the terms of the lease, for the purpose of inspection and repair and specific statutory violation exists (*Gomez v 192 east 151st Street Associates, LP*, 26 AD3d 276 [1st Dept 2006]). However, in that case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support the imposition of liability against the landlord (see *Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008]); see also *Juarez v Wavecrest*, 88 NY2d 628, 647 [1996]; *Guzman v Haven Plaza*, 69 NY2d 559, 566-567 [1987]). Breach of a general duty to keep premises in good repair pursuant to Administrative Code Sections 27-127 and 27-128 or Multiple Dwelling Law 78 alone are not enough (see *Boateng v Four Plus Corp.*, 22 AD3d 323 [1st Dept 2005]; *Javier v Ludin*, 293 AD2d 448 [2nd Dept 2002]).

The express and unambiguous language of the lease submitted by the landlord clearly establishes that it is an out-of-possession landlord, with limited control over the premises (see

Lease, annexed to Harris Aff. as Ex F). The lease indicates that it is the tenant-restaurant that has control of and is responsible for maintaining the premises, including obtaining all permits for the "the adjacent sidewalks" under Article 4 (see also, Affirmation of Moshe Herman , employee of managing agent, JC Dwight, Landlord's Ex G). Article 13 of the lease provides that the "[Landlord] ... shall have the right (but shall not be obligated)re-enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs ... as [the Landlord] may deem necessary ... ." Thus, nothing in Article 13 entitled "Access" imposes on the landlord any affirmative duty to generally maintain the premises or to make repairs.

The plaintiff and the tenant have failed to submit any documentary evidence or an affidavit from its representatives that conflicts with the clear terms of the lease regarding the landlord's limited right of re-entry (see *Doyle v B3 Deli, Inc.*, 224 AD2d 478 [2d Dept 1996]). The plaintiff's counsel claims that the landlord's motion is premature because although the landlord produced its superintendent for deposition, defendant Faya S. Cohen, individually, was never produced. However, deposition testimony of the individual landlord in this instance is unnecessary to establish that the landlord is an out-of-possession landlord, since the lease terms, attached to the

landlord counsel's affirmation, are clear (see *DeLeon v Port Authority of New York and New Jersey*, 306 AD2d 146 [1st Dept 2003]).

The out-of-possession landlord herein has also made a prima facie showing that plaintiff's injuries were not caused by any significant structural or design defect in violation of a specific safety code so as to render any limited right to re-enter and inspect in the lease a basis for liability. Plaintiff's bill of particulars only alleges that the defendants were on notice that the chair he sat in was "flimsy", or that it was "poorly constructed" and had "short legs" and the restaurant's outdoor seating was "crowded", "unsafe" and "hazardous and trap-like" in violation of New York State and New York City rules and regulations without specificity (see, Plaintiff's Ex C, annexed to Affidavit of Cindy A. Moonsammy dated September 20, 2011). In addition, plaintiff's own deposition testimony, confirms that plaintiff was caused to fall because the chair in which he was sitting was "[l]ightweight" and "flimsy" and as a result, "the chair moved to the right, unbeknownst to me, and I sat down into an area where there was no chair and fell onto the concrete cement floor" (Plaintiff's deposition at 35, annexed to Defendant's Cross Motion as Ex H).

The burden has now shifted to plaintiff to lay bare its proof and demonstrate by admissible evidence the existence of

genuine, not feigned, issues of fact, since sham or frivolous issues will not preclude summary relief (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772 [1st Dept 1983], aff'd 62 NY2d 686 [1984]). The court rejects the contention by expert engineer Stanley Fein in his affidavit dated September 19, 2011, that a genuine issue of fact exists as to whether there was a significant structural defect on the premises that caused plaintiff's injury, based upon the assertion that it appears that the area where the chairs were placed were "sloped". An expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient factual allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered at trial, support a verdict in the proponent's favor (see *Romano v Stanley*, 90 NY2d 444 [1997]). Here, Fein's assertion that "[a]n examination revealed that the walkway on which the chairs were placed was not level but was sloped" (Fein Affidavit, annexed to Plaintiff's opposition, Ex A), assumes that the chair was placed on a sloped area by the curb, a fact not supported by the record and in fact directly contradicted by plaintiff's testimony (Plaintiff's dep at 77, annexed to Landlord's Ex H, where he states that the outside area was essentially "flat") and that only the area by the curb had a slope (see *Cillo v Resjefal Corp.*, 16 AD3d 339 [1st Dept 2005], where a party relies on an expert, the expert cannot assume material facts that are

unsupported). Moreover, the "shadowy semblance of an issue" regarding an asserted defective "slope" will not defeat the motion for summary judgment (*MRI Broadway Rental, Inc v United States Mineral Products Co.*, 242 AD2d 440 [1st Dept 1997], aff'd, 92 NY2d 421 [1998]), since even if the chair was on the sloped area, Fein's affidavit provides no data as to the degree of the purported slope or that any specific code was violated by the landlord and thus, the affidavit is conclusory and is of no probative value(*Green v New York City Housing Authority*, 81 Ad3d 890 [2nd Dept 2011]). In light of plaintiff's failure to provide any affirmative proof to demonstrate a genuine issue of fact of negligence on behalf of the landlord, the landlord's motion for summary judgment against plaintiff is granted.

The tenant also met its prima facie burden of establishing that the it maintained the premises in a reasonably safe condition and there is an absence of an issue that it either created a dangerous condition on the premises or that it failed to remedy one, despite actual or constructive notice (see, *Ragusa v Lincoln Center for the Performing Arts, Inc.*, 39 AD3d 294 [1st Dept 2007]; *Ryan v KRT Property Holdings, LLC*, et al., 45 AD3d 663 [2d Dept 2007]). The tenant's motion is predicated on the argument that the premises were reasonably maintained (see deposition testimony from restaurant manager, Paola Dossman, dated September 16, 2010, annexed to Notice of Cross Motion, Ex

D) and that the evidence from plaintiff himself demonstrates that there was not a "trap-like" condition or dangerous defect in the premises (see plaintiff's deposition testimony dated January 26, 2011, annexed to Cross Motion, as Ex H).

According to plaintiff's testimony, he walked into the restaurant on the day of the accident with a cane and had a brace on his left leg. He decided to walk outside to the restaurant's patio to have lunch as he had done approximately 10 times prior to August 2008 (Plaintiff's dep p 29). Plaintiff did not have any trouble with any of the chairs or tables nor did he make any complaints about them prior to the date of the accident (*id.*) Plaintiff testified that he stood up to retrieve his wallet and the "lightweight flimsy chair moved to the right" (p 35). He did not see the chair move to the right or hear anything prior to the accident (p37). He did not see the chair before he attempted to sit down and did not pay attention to where the chair was (p 41). He did not remember moving the chair when standing up to get his wallet (p 42). When he got up from his chair he used only his cane to assist him (p 75). Plaintiff does not know why the chair moved (p 77), the sidewalk underneath the chair was essentially "flat", although it may slope off to the curb a little bit (*id.*) and he does not believe that there was anyone sitting at the table behind him (p 78) and the outside area of the restaurant was empty (*id.*).

It is now plaintiff's burden to establish that a genuine issue exists (*Barr v Albany County*, 50 NY2d 247 [1980]) as to as to whether when the "unsafe" chair or "trap-like" set up of chairs was a tenant created dangerous condition or that it existed for a sufficient length of time prior to the occurrence of the accident (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]). Fein's affidavit provides no scientific basis for the conclusion that the tenant was on notice that the chair was "unsafe" and "flimsy" with "small legs" located in "close proximity" to other chairs, on a "sloped" sidewalk and thus, the affidavit is rejected as conclusory and unsubstantiated (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] and lacking in probative value (*Green v New York City Housing Authority*, 81 Ad3d 890 [2nd Dept 2011]; *Paladino v Time Warner Cable of NY City*, 16 AD3d 646 [2nd Dept 2005]). In fact, Fein's averment that the chairs were situated "too close together" directly contradicts the plaintiff's testimony that he ate in the patio area of the restaurant many times before, never had a problem with the chairs, and does not know what happened to the chair or why it fell (Plaintiff's dep p 41), and is unsupported by the evidence and insufficient to support summary judgment (*Cillo v Resjefal Corp.*, supra, 16 AD3d 339). Plaintiff's expert affidavit, proffered as the sole evidence to defeat summary judgment, fails to contain sufficient allegations to demonstrate

that the conclusions it contains are more than mere speculation and would, if offered at trial, support a verdict in the proponent's favor (see *Romano v Stanley*, 90 NY2d 444 [1997]). In light of plaintiff's failure to provide any affirmative proof to demonstrate a genuine issue of fact of negligence on behalf of the tenant, the tenant's motion for summary judgment against plaintiff is also granted.

Accordingly, it is

ORDERED and ADJUDGED that defendant, Twelfth Street Corporation's motion for summary judgment dismissing this action is granted with costs and disbursements; it is further

ORDERED and ADJUDGED that defendant, Faya S. Cohen's cross motion for summary judgment dismissing this action is also granted with costs and disbursements.

Dated: February 9, 2012

Enter:

Louis B. York, J.S.C.

UNFILED JUDGMENT

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LOUIS B. YORK
J.S.C.