

Savitzky v Farrell Leasing Corp.

2012 NY Slip Op 30348(U)

February 9, 2012

Supreme Court, New York County

Docket Number: 104474/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 104474/2010
SAVITZKY, JENNIFER P.
VS.
FARRELL LEASING CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*
decided in accordance with the accompanying
memorandum de cursu.

FILED

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/9/12

Saliann Scarpulla
SALIANN SCARPULLA *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X

JENNIFER P. SAVITZKY,

Plaintiff,

- against-

Index No.: 104474/2010
Submission Date: 11/30/11

FARRELL LEASING CORP. and 91st Street
REALTY, LLC,

Defendants.

----- X

FILED

FEB 14 2012

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For Proposed Defendant Farrell's Limousine Service Corp.:
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Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Notice of Cross Motion 2
- Reply Affirmation 3
- Aff. in Opposition to Plaintiff's
Cross-Motion 4
- Supplemental Aff in Opposition to
Plaintiff's Cross Motion 5
- Aff from Cheryl Fuchs in
Opposition to Plaintiff's Cross-
Motion 6
- Reply 7

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Farrell Leasing Corp. ("Farrell's Leasing") moves for summary judgment pursuant to CPLR § 3212 to

dismiss the complaint against it. Plaintiff Jennifer P. Savitzky (“Savitzky”) cross-moves to amend the complaint to include Farrell’s Limousine Service Corp., Farrell’s Limousine Service, LLC and Farrell’s Limousine Service Corp. (collectively “Farrell’s Limousine”) as defendants. Savitzky also seeks to dismiss defendant 91st St. Realty, LLC (“91st Realty”) from the action and to amend Farrell’s Leasing’s name to Farrell’s Leasing Company, Inc.

This action arises from injuries Savitzky allegedly sustained while walking on a raised and defective portion of a public sidewalk vault. In her complaint, Savitzky alleges that she fell in an area adjacent to 428 and 432 East 92nd Street in Manhattan. Savitzky also alleges that her accident was caused, at least in part, by negligent snow removal in front of the premises.

The deed to the 432 East 91st Street premises lists 91st Street Realty as the owner. The deed to the 428 East 92nd Street premises lists Farrell Limousine Service Corp. as the owner, and identifies the premises as including 428, 430 and 432 East 92nd Street. The New York Department of State website lists the office addresses of both Farrell’s Leasing and Farrell’s Limousine as 430 East 92nd Street.

In support of the motion to dismiss, Marguerite Farrell (“Marguerite”), Farrell’s Leasing’s vice president, attests in an affidavit that Farrell’s Leasing did not own, operate or control the 428 or 432 East 91st Street premises, or the public sidewalk abutting those premises. Marguerite further attests that Farrell’s Leasing did not make special use of the

* 4]
sidewalk, or create, own, operate, maintain or control any sidewalk vault abutting the premises.

Farrell's Leasing argues that because it did not own, control or make special use of the 428-432 premises, or the public sidewalk abutting the premises, it owed no duty to Savitzky. In opposition, Savitzky maintains that there are issues of fact as to whether Farrell's Leasing had a duty to maintain, or made special use of, that sidewalk. Savitzky points out that there is some indication that Farrell's Leasing has a connection to the premises, and Savitzky argues that she is entitled to discovery on the issue.

In its cross-motion to amend the complaint, Savitzky argues that the proposed action against Farrell's Limousine relates back to the complaint against Farrell's Leasing, thus is not time-barred. Savitzky also seeks to discontinue the action against 91st Realty on the ground that it was named in error. In opposition, Farrell's Leasing contends that the amended complaint does not relate back because Farrell's Leasing and Farrell's Limousine are not united in interest. Farrell's Leasing further argues that 91st Realty is the owner of the 432 91st Street premises, which Savitzky identified in her original complaint as the location of the accident, thus the action should not be discontinued against 91st Street Realty.¹

¹Farrell's Leasing does not contest the portion of Savitzky's motion seeking to amend Farrell's Leasing's name to Farrell's Leasing Company, Inc.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Farrell's Leasing has failed to meet its initial burden of showing that it may not be held liable as a matter of law for accidents occurring on the sidewalk in front of 430 91st Street. It is the landowner's nondelegable duty to maintain and repair the public sidewalk abutting its property. *See* Administrative Code of the City of New York § 7-210.

However, a tenant may also be liable pursuant to contract, or if the tenant created the dangerous condition or made special use of the sidewalk. *See Abramson v. Eden Fram, Inc.*, 70 A.D.3d 514, 514 (1st Dept. 2010).

Though Farrell's Leasing is not the owner of the 428-432 East 92nd premises, its office address is listed on the Department of State website as 430 East 92nd Street, where Savitzky attests the accident occurred. Savitzky has not yet deposed a representative of Farrell's Leasing to explore the nature of Farrell's Leasing's occupation of the premises and its relationship to the proposed additional defendants. Clearly, it has a presence at that address, and may have some responsibility for maintenance of the sidewalk.

Moreover, Farrell's Leasing does not directly address whether it uses or maintains the sidewalk vault where plaintiff alleges she fell. In light of the lack of discovery conducted thus far, Marguerite's bare statement in her affidavit that Farrell's Leasing did not make special use of the sidewalk or create or control any sidewalk vault abutting the sidewalk is insufficient to support its motion for summary judgment. *See McCree v. Sam Trans Corp.*, 82 A.D.3d 601, 601 (1st Dept. 2011).

Further discovery is also needed to determine whether the amended complaint against Farrell's Limousine is time-barred. Personal injury actions must be commenced within three years of the date of the accident. CPLR § 214(5). Here, the injury allegedly occurred on or about December 2, 2007, more than three years before Savitzky moved to add Farrell's Limousine as a defendant.

Savitzky maintains that the amended complaint relates back to the original complaint, thus allowing Savitzky to add Farrell's Limousine as a defendant. An amended complaint relates back only if "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant . . . and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Brock v. Bua*, 83 A.D.2d 61, 69 (2d Dept. 1981); *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995).

As Farrell's Limousine concedes, the allegations in the amended complaint arose out of the same occurrence as those in the original complaint. However, Savitzky has not shown by admissible evidence that Farrell's Leasing and Farrell's Limousine are "united in interest." Defendants are united in interest "when one is vicariously liable for the acts of the other." *Raschel v. Rish*, 69 N.Y.2d 694, 697 (1986). Farrell's Leasing and Farrell's Limousine have similar names and may share officers and shareholders, but these commonalities, without further evidence that one controls the daily operations of the other, or that one is contractually obligated to answer for the other, are insufficient to establish that the two entities are "united in interest." See *Raymond v. Melohn Properties*, 47 A.D.3d 504, 505 (1st Dept. 2008); *Feszczyszyn v. GMC*, 248 A.D.2d 939, 940 (4th Dept. 1998). Without more evidence to demonstrate that the parties are "united in interest," the Court is unwilling at this stage to permit amendment of the complaint to add Farrell's Limousine as a defendant.²

Finally, the Court grants that part of Savitzky's cross-motion to discontinue the action as to 91st Realty, as Savitzky now attests that 91st Realty was named in error and

²Savitzky argues that Farrell's Leasing should be estopped from denying its ownership of the 428-432 premises because its insurer, Travelers, referenced the premises in a letter dated December 19, 2008, as "our insured premises." However, earlier in that letter Travelers stated that it had not received evidence from Savitzky specifying where she fell. Further, nowhere in the letter did Travelers reference the address of the premises. Thus, Farrell's Leasing is not estopped from denying ownership here.

that the accident did not occur on the sidewalk abutting 432 East 92nd Street but between 428 and 430 East 92nd Street.

In accordance with the foregoing, it is hereby

ORDERED that defendant Farrell Leasing Corporation's motion for summary judgment to dismiss the complaint against it is denied without prejudice; and it is further

ORDERED that plaintiff Jennifer P. Savitzky's cross-motion to amend the complaint is granted insofar as it seeks to amend Farrell's Leasing Corporation's name to Farrell's Leasing Company, Inc., granted insofar as it seeks to discontinue the action as to defendant 91st Realty, LLC, and denied without prejudice insofar as it seeks to add Farrell's Limousine Service Corp., Farrell's Limousine Service, LLC and Farrell's Limousine Service Corp. as defendants.

This constitutes the decision and order of the Court.

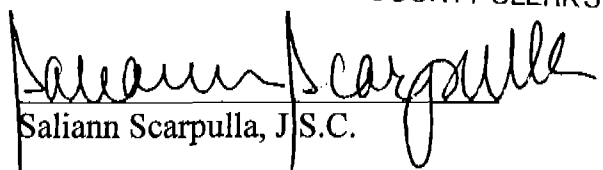
Dated: New York, New York
February 9, 2012

FILED

FEB 14 2012

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Saliann Scarpulla, J.S.C.