Lansen v SL Green Realty Corp.

2012 NY Slip Op 30683(U)

March 20, 2012

Supreme Court, New York County

Docket Number: 112719/2009

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/21/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 112719/2009
LANSEN, DESSA
VS.
SL GREEN REALTY
SEQUENCE NUMBER : 003
AMEND CAPTION/PARTIES

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

FILED
MAR 21 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

and compliance conf
scheduled for May 10 2012 @ 9:30 am
Part 10 Rm 232, 60 Centre

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

Dated: MAR 20 2012

______, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .... MOTION IS: ☒ GRANTED ☒ DENIED cross motion ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

---X

Dessa Lansen,

Plaintiff (s),

-against-

SL Green Realty Corp. and Outback Steakhouse-NYC Ltd.,

Defendant (s).

---X

DECISION/ ORDER
Index No.: 112719-09
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m (amend) w/BJS affirm, exhs	1
SL Green x/m (3212) w/DM affirm, RA affid, exhs	2
Pltf's opp to SL Green and reply w/BJS affirm, SF affid, exhs	3
SL Green reply to opp w/DM affirm, exhs	4
Various stips	5

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This action is for personal injuries. Issue was joined by SL Green Realty Corp. ("Realty") and Outback Steak House-NYC Ltd. ("Outback"). Outback was dismissed from the case by stipulation among the parties. Presently before the court is plaintiff's motion to serve an amended complaint. SL Green has cross moved for summary judgment. The note of issue has not been filed. Since summary judgment relief is available once issue has been joined, this motion can be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

The following facts are established or unrefuted:

Facts

Plaintiff Dessa Lansen ("plaintiff") claims to have suffered personal injuries when she fell on the sidewalk abutting the building located at 919 Third Avenue, New York, New York ("building"). The accident occurred March 3, 2007 and this action was timely commenced with the filing of the summons and complaint on September 8, 2009, well before the applicable three (3) year statute of limitation expired on March 3, 2010 (CPLR § 214 [5]).

Plaintiff now seeks to amend her complaint to add claims against two new defendants that have since been identified as possibly having an ownership interest in the building. Those entities are Metropolitan 919 3rd Avenue LLC ("Metropolitan") and SL Green Management LLC ("Green Management").

Plaintiff claims SL Green Realty Corp ("Green Realty") a named defendant, is a holding company with a 51% controlling interest in Metropolitan and that Green Management is the property manager of the building. This information was, according to plaintiff, obtained when it deposed Ralph Ardolina, an employee of Green Management, on June 23, 2010, after the statute of limitations had run. Thereafter, on December 28, 2010, plaintiff served Green Realty with a Notice to Admit. In its response dated February 7, 2011, Green Realty admitted that Metropolitan was the owner of the building and Green Realty owned 51% of Metropolitan on the date of the accident. Plaintiff contends the amendment should be allowed because the claims arise from the same occurrence, the party to be joined is united in interest with Green Realty, but for the plaintiff's mistake, the action would have been timely commenced

against the intended defendants and Metropolitan and Green Management should have reasonably anticipated being hauled into court.

In opposition, Green Realty states that it denied ownership of the building in its answer, well before the statute of limitations expired, but that plaintiff delayed in making this motion. Thus, Green Realty argues that plaintiff made no "mistake" in styling this case as it has. Green Realty provides correspondence that it sent to plaintiff dated May 7, 2010. That letter notifies plaintiff's lawyer that "Metropolitan 919 3rd Avenue was the owner of certain premises known as 919 Third Avenue, New York on or about March 3, 2007. In addition, upon information and belief, 818 Group Lease LLC owned 216-220 East 56th Street, New York, New York, a portion of the land known as 919 Third Avenue, New York, New York on or about March 3, 2007." Thus, Green Realty alleges that not only did plaintiff fail to timely move, now that she has this information, she should discontinue her claims against Green Realty.

In support of its cross motion for summary judgment, Green Realty raises several arguments. First, that plaintiff cannot prove that she fell because of a defect in the sidewalk or because there was snow and/or ice on it. Green Realty provides meteorological reports and the statement of Ardolina to support its claim that it had not snowed in the days before the accident and, it had, in fact rained, meaning that any possible accumulation of snow or ice was washed away. Ardolina testified about Green Management's practice of snow and ice removal, stating that Green Management always does "a complete job." He also testified he never saw any kind of defect on the sidewalk although he walked along it frequently. In a later sworn affidavit, Ardolina states that he personally measured the "defect" plaintiff testified about and that it was

no bigger than 3/8 of an inch near one of the joints. Outback proprietor, Jeffrey Abbate was deposed about the condition of the sidewalk. He denies there was any unevenness in it or that anyone had made complaints about a dangerous condition.

There is testimony by Stephanie Lollo, a friend who attended a bachelorette party with plaintiff. Lollo testified she could not recall seeing any rain, snow mist or sleet on the sidewalk nor did she notice anything like a hole or crack. Though recalling that plaintiff was wearing heels that evening and they were "happy" when they left the party, Lollo could not recall exactly how much they had to drink.

According to Green Realty, plaintiff was inebriated and wearing high heels when she fell. Although claiming there was snow and/or on the sidewalk, the temperature was 48 degrees and it had rained which Green Realty claim would have washed away and/or melted any snow and/or ice.

Plaintiff opposes the motion as premature, pointing out that she has not yet filed her note of issue. She contends that weather reports support her case because they show it had snowed 3 days before the accident, tending to raise triable issues about whether any of the defendants improperly cleared the sidewalk of snow and/or ice. While acknowledging she was wearing heels and had drinks that evening, plaintiff testified that it was the defect between two flagstones, coupled with the icy condition that caused her to fall.

Plaintiff also provides the sworn affidavit of her expert ("Fein"), a professional engineer, who did an inspection and looked at photographs. The sidewalk has been repaired but, according to Fein, the photographs show a difference in elevation which is greater than ½ inch.

In addition to opposing the cross motion on the merits, plaintiff maintains the cross motion is defective because none of the transcripts are certified. Thus, plaintiff argues the cross motion should be denied for that reason alone.

Discussion

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise (CPLR § 3025 [b]; Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 [1st Dept.,1990]). A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading (CPLR 203 [f]). The statute of limitations for a negligence action is three (3) years, running from the date of injury (CPLR § 214 [5]). It is undisputed that the statute of limitations expired on March 3, 2010.

CPLR § 203 codifies the "relation back doctrine." This doctrine allows an otherwise untimely claim asserted against a defendant in an amended filing to "relate back" to timely claims asserted a co-defendant, provided "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits 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." (Buran v. Coupal, 87 N.Y.2d 173, 178 [1995]

Since the new defendants have not been served, Green Realty's cross motion for summary judgment is premature as to them since summary judgment is not available unless and until issue is joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1st Dept. 1982]). Evidently both sides intend the court to decide the cross motion on its merits, because issue was joined by Green Realty. Significantly Green Realty has not moved on the basis that it is an improper party, but on the merits of plaintiff's claims. The cross motion must be denied for the reasons that follow:

It is hornbook law that the court's function in deciding a motion for summary judgment is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable, then summary judgment must be denied.

At best, Green Realty's cross motion underscores the many factual disputes that exist in this case. The issue of whether plaintiff's fall was due to her own instability is for the jury to decide. Similarly, disputes about whether there was or was not any snow and/or ice on the sidewalk in the early morning of March 3, 2007 cannot be resolved on a flat record but also presents factual disputes. While the weather reports are prima facie evidence of the weather conditions on a particular day, they do not establish the conditions that existed on the sidewalk at the time of the accident.

Green Realty's argument, that Fein is an unreliable expert, asks that the court

evaluate his credibility. Fein has set forth his sworn affidavit stating his opinion and his opinion is supported by facts that are in the record and his own observations (*see* Hambsch v. New York City Transit Authority, 63 N.Y.2d 723 [1984]). Whether Fein's opinion is reliable and trustworthy is for the jury to decide.

Other issues raised by Green Realty about whether the imperfection in the sidewalk is "trivial" or not and related issues about notice have not been proved by Green Realty. In opposing defendant's motion, plaintiff does not have to prove that Green Realty had notice of the dangerous condition alleged, rather it is the burden of the moving defendant to prove the lack of notice (Spinner v. 1725 York Owners Corp., 56 A.D.3d 324 [1st Dept 2008]). Defendants have also failed to show the defect is trivial, as a matter of law. Importantly, they did not provide photographs of the sidewalk, only Androlino's statement he had measured it (Sokolovskaya v. Zemnovitsch, 89 A.D.3d 918 [2 Dept. 2011]). Whether a dangerous or defective condition exists on the property "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (Trincere v. County of Suffolk, 90 N.Y.2d 976 [1997]). The photographs plaintiff has provided show something a reasonable juror could find to be more than a mere trivial defect.

Plaintiff's argument, that the cross motion is fatally defective because the transcripts provided are not in admissible form is rejected and not the basis for Green Realty's motion being denied. Frequently motions for summary judgment are supported by sworn deposition transcripts as they are evidence in admissible form, satisfying the evidentiary requirements of CPLR § 3212 (CPLR §§ 3116 [a] and 3212). A certified transcript may be used in lieu of a signed transcript (CPLR § 3116 [a]).

In accordance with the foregoing reasons, Green Realty's cross motion for summary judgment must be denied. Since this case was adjourned without a date but new defendants are being added, the court hereby schedules a **compliance conference for May 10, 2012 at 9:30 a.m.** to allow the new defendants to be served and appear.

Conclusion

It is hereby

ORDERED that the motion by plaintiff to serve an amended complaint to add new defendants is granted and such claims shall relate back to the commencement date of this action (CPLR § 306); and it is further

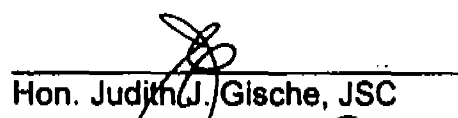
ORDERED that the cross motion of defendant SL Green Realty Corp. for summary judgment is denied; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 20, 2012

So Ordered:



Hon. Judith J. Gische, JSC

FILED
MAR 21 2012
COUNTY CLERK'S OFFICE
NEW YORK