

Davidson v 247 West 37th St. Assocs., LLC
2012 NY Slip Op 30932(U)
March 20, 2012
Sup Ct, New York County
Docket Number: 113177/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

STEVEN DAVIDSON AND SANDRA DAVIDSON,

Plaintiffs,

- against -

INDEX NO. 113177/10

MOTION SEQ. NO. 002

247 WEST 37TH STREET ASSOCIATES, LLC,
NEWMARK & COMPANY REAL ESTATE, INC.,
JEFFBAR, INC., LEE MAN FASHION INC., FALCON
ENGRAVING CO., INC., AND IMPERIAL NETWORK
PRINTING, LTD.,

Defendants.

FILED

APR 10 2012

NEW YORK

The following papers, numbered 1 to 6, were read on this motion to dismiss by defendants Falcon Engraving Co., Inc. and Imperial Network Printing, LTD., pursuant to CPLR §§ 3212, 3211(a)(1).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo) _____	<u>5, 6</u>

Cross-Motion: Yes No

Plaintiff Steven Davidson (Davidson) brings this personal injury action against the defendants to recover for injuries allegedly sustained when he slipped and fell on water in the hallway on the 8th floor within the premises known as 247 West 37th Street, New York, NY (premises). Discovery has not been completed and the Note of Issue has not been filed.

Defendants Falcon Engraving Co., Inc. (Falcon) and Imperial Network Printing, LTD. (Imperial) (collectively, moving defendants) now move pursuant to CPLR §§ 3212 and 3211(a)(1), for summary judgment dismissing the complaint and all cross-claims asserted against them.

Plaintiffs Steven Davidson and Sandra Davidson (collectively, plaintiffs), as well as defendants 247 West 47th Street Associates, LLC (247 West), owner of the premises, Newmark & Company Real Estate, Inc. (Newmark), and Jeffbar, Inc (collectively, non-moving defendants) are all in opposition to the motion.

BACKGROUND

On or about October 5, 2010, plaintiffs commenced this action by the filing of a Summons and Complaint. On or about November 5, 2010 issue was joined when non-moving defendants interposed an Answer. Moving defendants interposed an answer on or about December 21, 2010. Before the Court is moving defendants' motion to dismiss all claims asserted against them.

In support of their motion, moving defendants submit an Affirmation of their attorney Danielle Goldstein, plaintiffs' Summons and Complaint, moving defendants' Answer, non-moving defendants' Answer, plaintiffs' Bill of Particulars, affidavit of Falcon's President, Howard Swerdloff (Swerdloff Affidavit), moving defendants' lease agreement, and Affidavits of Imperial's President, Jeffrey Weintraub (Weintraub), dated March 18, 2011 and June 24, 2011, respectively.

The relevant portion of plaintiffs' complaint alleges that moving defendants leased, controlled, maintained and managed the hallways on the 8th floor of the premises. According to the Swerdloff Affidavit, moving defendants "jointly and severally" leased a portion of the 8th floor of the premises where plaintiff allegedly sustained his injury, and said lease was in effect at the time of plaintiff's injury (Affirmation in Support, ¶ 9). This lease agreement was between Newmark as agent for 247 West as owner, and Imperial, Falcon and Precision Engraving Co., Inc.¹ as tenants. The lease agreement was signed by Weintraub on behalf of Imperial and by Swerdloff on behalf of Falcon. Moving defendants aver that pursuant to said lease, the portion of the 8th floor leased by moving defendants did not include any portion of the common hallway/elevator lobby, which is where plaintiff allegedly fell. Furthermore, moving defendants proffer that under the lease agreement, they did not have any duties or responsibilities

¹ Precision Engraving Co., Inc. (Precision) is a party to the lease but not a party to the herein action, nor do any of the parties mention Precision in their papers.

whatsoever to maintain the common hallway/elevator lobby because this was outside of their leased premises. In support of this claim, moving defendants point to the lease agreement as well as the affidavits of Weintraub and Swerdloff which state that the common hallway/elevator lobby of the 8th floor was not under moving defendants' control, nor was it the responsibility of the moving defendants to maintain that area. Moving defendants also proffer that they did not cause or contribute to the defective condition which allegedly caused plaintiff to fall.

In opposition, plaintiffs submit Affirmation of their attorney, a copy of their Verified Bill of Particulars and Notice for Discovery and Inspection. In opposition, non-moving defendants submit an Affirmation of their attorney. In opposition, both plaintiffs and non-moving defendants state that this motion is premature as discovery has not yet been completed. Plaintiffs aver that if this motion is granted it should be without prejudice as there are outstanding discovery demands, namely a demand for video surveillance of the area where Davidson fell, that have not been responded to by moving defendants.

In reply, moving defendants state that neither plaintiffs' nor non-moving defendants' opposition papers are sufficient to raise any issues of triable fact as they did not submit proof in admissible form. Specifically, plaintiffs and non-moving defendants do not submit an affidavit of a person with personal knowledge of the incident, and moving defendants cite to CPLR 3212(f) in support of this proposition.

STANDARD

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of

material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).
CPLR 3211(a)(1)

A party may move for dismissal pursuant to CPLR § 3211(a)(1), based upon documentary evidence, and in order to "prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248, 248 [1st Dept. 1995]; see *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept. 1986]). A CPLR § 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326-27 [2002]).

DISCUSSION

The Court finds that the moving defendants have met their prima facie burden of establishing through the submission of documentary evidence, the lease agreement, that the area where Davidson fell was not a part of their leased premises. As such, moving defendants have also shown that they did not have a duty to maintain this area, nor was this area under their control. Said lease agreement states that moving defendants leased from 247 West, "[p]art [of the] 8th Floor, as hatched on attached plan (floor plan)" (Affirmation in Support, exhibit E). The floor plan was attached to and made a part of the lease agreement as a rider (*id.*). The floor plan depicts the 8th floor and marks the portion therein leased by moving defendants. As designated on the floor plan, the said leased premises does not include the interior elevator/lobby area, which is where plaintiff fell. Furthermore, Section 4 of the lease agreement, entitled "Repairs" indicates that the owner has the duty to maintain and repair the public portions of the building, which would include the common hallway and elevator bank of the 8th floor (Affirmation in Support, exhibit E, p. 1).

Moreover, in opposition plaintiffs and non-moving defendants fail to submit evidence which raises material issues of fact which would require denial of moving defendants' motion or which supports their contention that this motion is premature because discovery remains outstanding. Accordingly, moving defendants' motion for summary judgment dismissing the complaint and all cross-claims, if any, asserted against them is granted.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that Defendants Falcon Engraving Co., Inc. and Imperial Network Printing, LTD.s' motion dismissing the complaint and any cross-claims asserted against them is granted; and it is further,

ORDERED that Defendants Falcon Engraving Co., Inc. and Imperial Network Printing,

LTD:s' counsel shall serve a copy of this Order, with Notice of Entry, upon all parties and the Clerk of the Court who is directed to enter judgment accordingly, within 30 days; and it is further,

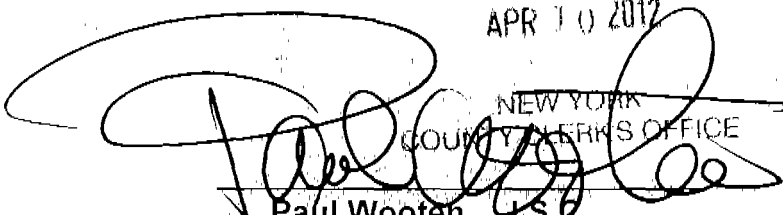
ORDERED that the remaining parties are directed to appear at the already scheduled Status Conference on June 20, 2012, at 2:30 p.m., in Part 7, at 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court.

FILED

APR 10 2012

Dated: 3-30-12


NEW YORK COUNTY CLERK'S OFFICE
Paul Wooten J.S.C.

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