

Hernandez v Royal Charter Props., Inc.

2013 NY Slip Op 33230(U)

December 17, 2013

Supreme Court, New York County

Docket Number: 118169/09

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Sabann Scarpulla
Justice

PART 19

Angel Hernandez

INDEX NO. 118169/09

-v-

MOTION DATE _____

Royal Charter Properties, Inc.

MOTION SEQ. NO. 03

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 determined in accordance
with the accompanying decision and order and the
interim order dated August 14, 2013.

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

REC
DEC 19 2013

FILED

DEC 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/17/13

Sabann Scarpulla J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED 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: CIVIL TERM: PART 19

-----X
ANGEL HERNANDEZ,

Plaintiff,

Index No: 118169/09
Submission Date: 8/14/13

-against-

DECISION AND ORDER

ROYAL CHARTER PROPERTIES, INC.,

Defendants.

----- X

For Plaintiff:
Robert Blossner
20 Vesey Street, Suite 1210
New York, NY 10007

For Defendants:
Platzer Luca & Pearl, LLP
148 Madison Avenue, 11th Floor
New York, NY 10016

FILED

DEC 20 2013

Papers considered in review of the motion for summary judgment:

- Notice of Motion 1
- Affidavit in Opp 2
- Reply 3

COUNTY CLERK'S OFFICE
NEW YORK

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Royal Charter Properties, Inc. ("Royal") moves for summary judgment dismissing the complaint.

On May 9, 2009, at approximately 7:40 p.m., plaintiff Angel Hernandez ("Hernandez"), a Department of Sanitation worker, sustained a laceration on his leg when he allegedly lifted a trash bag from the sidewalk in front of Royal's premises located at 641 West 169th Street in Manhattan, in order to place it into a garbage truck. The trash bag contained a sharp object which tore through the bag and cut Hernandez's leg.

In or about August 2009, Hernandez commenced this action seeking to recover damages for the injuries he sustained to his leg. He alleged that Royal was negligent in placing a sharp object in an opaque black garbage bag, instead of the required blue garbage bags for recyclables including plastic, metal and glass. As a result of this negligence, Hernandez was not aware that the sharp object was in the trash bag that he lifted, and he was hurt.

Royal now moves for summary judgment dismissing the complaint, arguing that the location described by Hernandez at his examination before trial as the place where his accident occurred is not Royal's property. Specifically, Royal refers to Hernandez's examination before trial testimony that the building was a "double building...you go up a couple of steps then you go into either side of the building" and "there is that one building that has two sides, like A and B. It has some little fountain looking park or something. It is a big entrance. It is not the door. There is a like a little park." He further explained, "it is not a fountain. It is like a mural. It has got flowers and stuff." According to Hernandez, both sides to the building had the same address.

Royal contends that in a letter dated June 21, 2010, it provided Hernandez's attorneys with two photographs of the entrance to 641 West 169th Street, explaining that they did not match the description given by Hernandez in his testimony. It asked Hernandez's attorneys for a voluntary discontinuance but received no response.

Royal further refers to the affidavit of its senior vice president Martin Cohen (“Cohen”) who explained that the entrance to 641 West 169th street consisted of a narrow walkway leading to a single entrance, with no park, no flowers, and no separate entrances.

Finally, Royal submits the Department of Sanitation Unusual Occurrence Report and the Department of Sanitation Incident Report completed as a result of the subject incident. On the Unusual Occurrence Report, the incident location is listed as 641 West 169th Street in two separate locations, however, at Hernandez’s examination before trial, when he was asked whether it looked like “6” in 641 could have been changed from a “5” to a “6” in both locations on the form, he replied “Yes.” Royal also points to the statement in the Incident Report that no unsafe condition and no unsafe action existed at the scene of the accident, as well as the superintendent’s comment that Hernandez “should be more careful while performing duties.”

In opposition, Hernandez argues that his description of the area where the incident occurred was consistent with the appearance of 641 West 19th Street. He explains that he picked up the garbage from the side door to the building and points to his examination before trial testimony that “they don’t ever put garbage in any of the buildings, right in front of the entrance to the building. But in the side door, they have a little walkway to the basement. That’s where they take out the garbage.”

Hernandez also submits an affidavit in which he explains that part of his description of the premises where his accident occurred was erroneous, because he

“mentally combined images from [his] memories of several of the many different buildings on the various routes that [he] had been assigned to over the years,” but part of his description was correct. He claims that there was a front door that could be seen from the street, that there were a few steps leading up to the front door, and that there were flowers when you walk in. He explains that his faulty memory was due to the fact that he was asked about the description of the premises three years after the incident occurred, without being shown any photographs of the subject location. He submits new photographs taken of the subject location, and identifies the side door where he and his co-workers picked up the garbage.¹

Discussion

A movant seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and offer 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 to 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, 562 (1980).

Here, the evidence presented raises issues that can only be resolved by a trier of fact. *See generally Mullin v. 100 Church LLC*, 12 A.D.3d 263 (1st Dept. 2004); *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106 (1st Dept. 1996). The

¹ Hernandez also submits an Environmental Control Board notice of violation for the subject premises dated May 9, 2009.

photographs of the subject location, Hernandez's testimony and affidavit, the Incident Report, the Unusual Occurrence report, and Cohen's affidavit, raise issues of fact as to whether the incident occurred in front of Royal's premises.

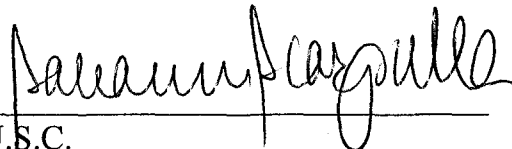
In accordance with the foregoing, it is hereby

ORDERED that defendant Royal Charter Properties, Inc.'s motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 17, 2013

ENTER:


J.S.C.

FILED
DEC 20 2013
COUNTY CLERK'S OFFICE
NEW YORK