Govenar v Brushstroke
2017 NY Slip Op 31116(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 160114/2013
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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JODY GOVENAR,

Plaintiff,

-against-

BRUSHSTROKE, BOJI D/B/A BRUSHSTROKE, BOULEY DUANE STREET D/B/A BOULEY RESTAURANT, ACTION CARTING ENVIRONMENTAL SERVICES, INC., ONE HUDSON PARK ASSOC LLC, ABBEVILLE PRESS INC, ONE HUDSON PARK INC, A&L CESSPOOL SERVICE CORP., SCIENTIFIC FIRE PREVENTION CO., NEW YORK NAUTICAL INSTRUMENT & SERVICE CORP., THE ANDREWS ORGANIZATION, INC.

Defendants.
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DECISION & ORDER
Index No. 160114/2013

Mot. Seq. 019

The motion by defendant The Andrews Organization, Inc. (Andrews) for summary judgment is granted and all claims against Andrews are severed and dismissed.

Background

This action arises out of alleged injuries suffered by plaintiff on the sidewalk near 30 Hudson Street, New York, New York on July 28, 2013. Defendant Brushstroke operates a restaurant at 30 Hudson Street. Plaintiff contends that she slipped on an oily greasy substance on a Sunday morning. The parties dispute the origin of this alleged grease.

Andrews, the managing agent for the building where plaintiff was allegedly injured, claims that it did not own, occupy or control the area in which plaintiff slipped and fell. Andrews

insists that it performed day-to-day operations for the building owned by defendant One Hudson Park, Inc. and that Andrews did not do janitorial services for the sidewalk near 30 Hudson Street. Andrews also insists that it did not have actual or constructive notice of the slippery substance that caused plaintiff to slip.

In opposition, plaintiff insists that there is conflicting testimony regarding whether Andrews owed plaintiff a duty, whether Andrews had constructive notice of the dangerous condition, and whether Andrews was the proximate cause of the accident by failing to remedy the condition. Plaintiff points to various deposition testimony in which witnesses were unable to describe Andrews' responsibilities regarding maintenance of the building.

Defendant Action Carting also opposes Andrews' motion and contends that Andrews has not met its prima facie burden on a motion for summary judgment. Action says that there is an issue of fact regarding how long the condition– the oily grease– may have existed because Andrews' witness testified that at least a day had passed since the sidewalk was inspected.

In reply, Andrews emphasizes that the super for the residential building, Mr. Rodriguez, does not work for Andrews– instead he is employed by One Hudson Park, Inc.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"A managing agent not in complete and exclusive control is not liable for mere nonfeasance" (*Dempsey v Mt. Ebo Assocs., Inc.*, 262 AD2d 229, 229-30, 692 NYS2d 344 [1st Dept 1999] [citation omitted]).

Andrews' witness, Mr. Wilkofsky, testified that Andrews managed a property at 30 Hudson Street (Wilkofsky tr at 16-17). According to Wilkofsky, the residential address for the building was 16 Hudson Street and that the five stores on the ground floor all had their own separate addresses (*id.*). Wilkofsky insisted that there was a super at the residential address named Alvaro Rodriguez (who went by Ivan) and that he swept only in front of the residential address (*id.* at 18). Wilkofsky further testified that Rodriguez was employed by the co-op (*id.* at 18-19). Wilkofsky stated that the restaurant and the stores were responsible for cleaning other areas (*id.* at 21). The testimony of Wilkofsky satisfied Andrews' prima facie burden on its

motion for summary judgment that Andrews did not have a duty to clean the sidewalk in front of 30 Hudson Street.

Plaintiff, and defendant Action, failed to raise an issue of fact sufficient to compel this Court to deny Andrews' motion. Plaintiff relies, in part, on Wilkofsky's testimony about hiring Bayside Contracting to remove oil and grease. But Wilkofsky testified that he had not hired Bayside to remove oil and grease prior to July 2013 (*id.* at 24-25) and, therefore, Wilkofsky's testimony does not create an issue of fact.

Plaintiff also cites to the testimony of defendant Brushstroke's witness, Brian McAnneny, who claimed that he did not know who was responsible for the sidewalk in front of 30 Hudson Street (McAnneny tr at 40-41). The fact that McAnneny stated that the 'building' shared responsibility with Brushstroke over the sidewalk does not create an issue of fact. Referencing the building does not mean that Andrews had a duty to maintain the sidewalk. As stated above, the managing agent must be in complete and exclusive control of the premises and plaintiff cannot show that Andrews had a duty to maintain the sidewalk in front of 30 Hudson Street. Although Rodriguez swept the sidewalk in front of the residential address, he was employed by the co-op and not by Andrews.

Plaintiff also claims the testimony of Michael O'Donnell, site manager for Action, presents issues of fact. However, plaintiff did not upload a complete copy of O'Donnell's deposition transcript (plaintiff's version contains pages 1-29) and plaintiff relies on a quote from page 69. In any event, the quote plaintiff relies on only shows that Action had a duty to keep the sidewalk free from garbage and debris; it does not show that Andrews had a duty.

Plaintiff also relies on the testimony of Mr. Abrams on behalf of defendant One Hudson Park Assoc, LLC. Abrams claimed that One Hudson Park Assoc, LLC leased retail space for the building located at 16 Hudson Street, New York, New York and then subleased the retail space to commercial tenants including the restaurant Boji and New York Nautical (Abrams tr at 10). Abrams claimed that he was "not sure" what Andrews' responsibilities were and that he did not know if Andrews had a duty to maintain the sidewalks in front of the building (*id.* at 17-18). Abrams further testified that it was the responsibility, according to the lease, of One Hudson Park, Inc. and the subtenants to maintain the sidewalk (*id.* at 18). This testimony does not create an issue of fact either.

To be clear, confusion about who was responsible to maintain a clean sidewalk does not equal a material issue of fact for a managing agent. There is no contract or testimony to show that Andrews was responsible for doing anything with the sidewalk prior to plaintiff's accident. Speculation that Andrews was responsible for the sidewalk is not enough.

Because Andrews did not have a duty to maintain the sidewalk where plaintiff fell, Andrews cannot be liable to plaintiff. Andrews also established that it did not have actual or constructive notice of the greasy substance that plaintiff slipped on because it did not have an office at the subject location and Wilkofsky said he never saw grease outside Brushstroke's restaurant prior to plaintiff's accident (Wilkofsky tr at 29). There is also no evidence that Andrews was the proximate cause of plaintiff's alleged injuries.

Accordingly, it is hereby

ORDERED that Andrews' motion for summary judgment dismissing plaintiff's complaint against it is granted and all claims and cross-claims against Andrews are severed and dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: May 19, 2017
New York, New York

ARLENE P. BLUTH, JSC