Saleeby v City of New York
2013 NY Slip Op 33829(U)
October 8, 2013
Supreme Court, Kings County
Docket Number: 10822/2004
Judge: Carl J. Landicino
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At an IAS Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of October, 2013.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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SAMIR SALEEBY,

Index No.: 10822/2004

Plaintiff,

- against -

DECISION AND ORDER

THE CITY OF NEW YORK AND JOHN PSARAS,

Defendants.

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JOHN PSARAS,

Index No.:75529/2006

Third-Party Plaintiff,

- against -

BLUSH SALON, LYNN V. SANDERS and NATALIYA ANTONOVSKI,

Third-Party Defendants.

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2, 3/4, 5/6, 7/8
Opposing Affidavits (Affirmations)	9, 10, 11, 12
Reply Affidavits (Affirmations)	13, 14, 15, 16
Memorandum of Law	17

After oral argument and upon review of the papers in this matter, the Court finds as follows:

The instant action results from a slip and fall incident that allegedly occurred on January 6, 2003. On that day the Plaintiff Samir Saleeby (hereinafter "the Plaintiff") allegedly injured himself after slipping and falling on the sidewalk fronting 8705 3rd Avenue, Brooklyn, New York. In his Examination Before Trial (EBT), the Plaintiff states that the condition of the sidewalk was such that "from the first of the building to the end of the building was ice." (See Affirmation of John Psaras Exhibit G, Page 38).

The Plaintiff now moves to extend the time to file a note of issue. The note of issue was originally due by September 12, 2012. The Plaintiff failed to appear for a prior motion seeking an extension to file the Note of Issue scheduled for October 12, 2012 and the motion was marked off the calendar. The Plaintiff also moves by separate motion pursuant to CPLR §§203, 1009, and 3025 to amend the Complaint to assert direct claims against Third Party Defendants Blush Salon, Lynn V. Sanders, and Nataliya Antonovski.

In opposition, the owner of the subject premises adjacent to the sidewalk where the alleged incident occurred, Defendant John Psaras (hereinafter "Defendant Psaras"), opposes the motion to extend the note of issue made by the Plaintiff. Defendant Psaras argues that the Plaintiff has not provided a reasonable excuse for failing to appear for the previous motion, and that the Plaintiff has not properly substituted counsel.

In opposition to the Plaintiff's other motion seeking to assert direct claims against the Third Party Defendants, Third Party Defendants Blush Salon, Lynn V. Sanders, and Nataliya Antonovski (hereinafter "Blush Salon") oppose that motion and argue that the statute of limitations has expired. Also, Blush Salon argues that the Plaintiff has not sufficiently shown that the claims made by the Plaintiff related back to the Third Party Defendants on the grounds that there is no evidence that they caused the alleged condition at issue.

Defendant Psaras also cross moves for an order pursuant to CPLR § 3212 granting summary judgment, and dismissing the Complaint on the ground that Defendant has breached no duty owed to the Plaintiff from which his injuries allegedly flowed. Specifically, Defendant Psaras avers that given that this accident occurred prior to September 14, 2003, 7-210(b) of the Administrative Code of the City of New York (the Sidewalk Law) does not apply and liability can only result if it can be shown that Defendant Psaras caused and created the subject defect. Defendant Psaras also moves separately pursuant to CPLR §3126, for an Order striking third-party defendants answer or precluding third-party defendants from testifying at trial.

As an initial matter, the Court finds that the Plaintiff has provided a reasonable excuse for failing to file the Note of Issue and for failing to appear for the previous motion. The prior motion was marked off the calendar on or around October 12, 2012, less than two months prior to the instant motion. What is more, when a party moves to restore a pre-note of issue case that has been marked off and was never

properly dismissed, such a motion should be freely granted. *See Arroyo v. Bd. of Educ. of City of New York*, 2011-04742, 2013 WL 3927634 [2nd Dept, 2013].

Also, the Court denies the motion made by Defendant Psaras pursuant to CPLR §3126 seeking to strike the Answer of the third-party defendants because the conduct of the Third Party Defendants was not willful and contumacious. However, the Court finds that the Affidavit from Nataliya Antonovski was not sufficiently responsive. Accordingly, the Third Party Defendants are directed to provide the last known address, last known cell phone number, date of birth, and any family or friend contact or in the alternative a more detailed explanation as to their alleged inability to do so, within sixty days of the date of this Decision and Order. In the event that the Third Party Defendants fail to provide this information or a reasonable response within the aforestated period of time, Defendant Psaras may renew their motion to strike the Answer of the Third Party Defendants.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994]. As the Court of Appeals made clear in *Andre v. Pomeroy* "when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial

Calendar and thus deny to other litigants the right to have their claims promptly adjudicated." *Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]; *see also McElwain v. Olashansky*, 220 A.D.2d 394, 395, 631 N.Y.S.2d 886, 886 [2nd Dept, 1995].

Prior to the enactment of the Sidewalk Law the standard was that "an abutting landowner will not be liable to a pedestrian passing by on a public sidewalk unless, insofar as is relevant here, the landowner created the defective condition or caused the defect to occur because of some special use." *Gaynor v. City of New York*, 259 A.D.2d 733, 687 N.Y.S.2d 421, 422 [2nd Dept, 1999]. Moreover "[a]n owner or lessee is under no duty to pedestrians to remove ice and snow that naturally accumulates upon the sidewalk in front of his or her premises." *Hsia v. City of New York*, 295 A.D.2d 565, 566, 744 N.Y.S.2d 887 [2nd Dept, 2002]. "Although Administrative Code of the City of New York § 16–123 does require the owners to remove snow and ice from an abutting public sidewalk, it does not specifically impose tort liability for a breach of that duty." *Booth v. City of New York*, 272 A.D.2d 357, 358, 707 N.Y.S.2d 488, 489 [2nd Dept, 2000]; *See, Norcott v. Cent. Iron Metal Scraps*, 214 A.D.2d 660, 661, 625 N.Y.S.2d 260, 261 [2nd Dept, 1995]; *See also, Conlon v. Vill. of Pleasantville*, 146 A.D.2d 736, 737, 537 N.Y.S.2d 221, 222 [2nd Dept, 1989].

Turning to the merits of the motion made pursuant to CPLR §3212 by Defendant Psaras, the Court finds that the evidence provided in support of the motion demonstrate, *prima facie*, that Defendant Psaras was not liable for the alleged incident. In support of the motion, Defendant Psaras relies on the Examination Before Trial (EBT) testimony of the Plaintiff, the EBT testimony of John Psaras, the EBT testimony of Third Party Defendant Lynn Sanders, the EBT testimony of Third Party Defendant Natalya Antnovoski, and the lease agreement between Defendant Psaras and the Third Party Defendants. In his testimony, John Psaras testified that under the lease agreement he entered into with the tenants, they were responsible for clearing the sidewalk in front of the store and that as a result he did not engage in snow or ice removal at the subject premises.

In opposition, the Plaintiffs and the City have failed to raise an issue of fact. There is no evidentiary proof presented that at the time of the alleged incident the subject sidewalk had been cleared by Defendant Psaras. Prior to the establishment of the Sidewalk Law, an owner of a commercial property would not liable "unless it is shown that the defendant made the sidewalk more hazardous." *Stewart v. Haleviym*, 186 A.D.2d 731, 589 N.Y.S.2d 792 [2nd Dept, 1992]. Defendant Psaras testified that the

building did not have a superintendent and the Third Party Defendants Blush Salon, Lynn V. Sanders, and Nataliya Antonovski were responsible for clearing the sidewalk in accordance with their lease agreement.

Although defendants Blush Salon, Lynn V. Sanders, and Nataliya Antonovski assumed responsibility under the subject lease to clear snow and ice from the sidewalk, the commercial tenants were under no duty to pedestrians to remove ice and snow that naturally accumulated on the sidewalk in front of the leased premises. *See Sheehan v. Rubenstein*, 154 A.D.2d 663, 664, 546 N.Y.S.2d 663, 664 [2nd Dept, 1989]. What is more, both Lynn V. Sanders and Nataliya Antonovski testified that they only cleared snow from the sidewalk on the days that they were open for business, and that they were not open on Sundays or Mondays. The alleged incident occurred on a Monday and no evidence was submitted that would create an issue of fact as to whether the commercial tenants cleared the sidewalk on that day. "The plaintiff's speculation that a commercial tenant must have shoveled the sidewalk on the property owner's behalf was insufficient to raise an issue of fact as to whether the property owner undertook snow removal efforts, or created a more hazardous condition." *Crudo v. City of New York*, 42 A.D.3d 479, 480, 839 N.Y.S.2d 232, 234 [2nd Dept, 2007].

The Court also finds that the Plaintiff's motion seeking to amend the Complaint in order to add the third party defendants Blush Salon, Lynn V. Sanders, and Nataliya Antonovski, should not be granted. In the event that the statute of limitations has run, and a litigant seeks to amend the pleadings, the "relation back" doctrine will apply. The "relation-back doctrine," generally permits a plaintiff to interpose or add a new party when, although it would ordinarily be time barred, it can be shown that "(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 by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against him or her as well." *Alvarado v. Beth Israel Med. Ctr.*, 60 A.D.3d 981, 982, 876 N.Y.S.2d 147, 149 [2nd Dept, 2009]; *see Buran v. Coupal*, 87 N.Y.2d 173, 178, 638 N.Y.S.2d 405, 661 N.E.2d 978 [1995]; *see also Schiavone v. Victory Mem. Hosp.*, 292 A.D.2d 365, 365–366, 738 N.Y.S.2d 87 [2nd Dept, 2002].

In as much as the claims against the Third Party Defendants arise out of the alleged events of January 6, 2003, the claims against the Third Party Defendants arise out of the same transaction or occurrence. Also, the Plaintiff arguably satisfy the second element because the commercial tenants were named as Third Party Defendants. However, the Plaintiff cannot satisfy the third element of the relation back doctrine, since the failure to name the Third Party Defendants was not the result of a mistake as to the identity of the correct Defendants, and the Third Party Defendants had no reason to think that he would have been named in the related action but for a mistake as to his identity. *See Nani v. Gould*, 39 A.D.3d 508, 510, 833 N.Y.S.2d 198, 200 [2nd Dept, 2007]; *Cardamone v. Ricotta*, 47 A.D.3d 659, 661, 850 N.Y.S.2d 511, 514 [2nd Dept, 2008]. What is more, there has been no evidence showing that Third Party Defendants cleared the sidewalk pursuant to the lease agreement with Defendant Psaras.

While the Court has granted the summary judgment motion of Defendant Psaras, the Third Party Complaint for claims relating to indemnification and contribution has not been necessarily summarily determined by this holding.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion to extend time to file the Note of Issue is granted. The Plaintiff's motion seeking to add the Third-Party Defendants as direct defendants is denied.
Defendant Psaras' motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment accordingly dismissing the complaint as against Defendant Psaras.
Defendant Psaras' motion to strike the answer of the third party defendants is denied and the Third-Party Defendants are directed to respond as outlined herein within 60 days of the date hereof.

The foregoing constitutes the Decision and Order of the Court.

Date: October 8, 2013

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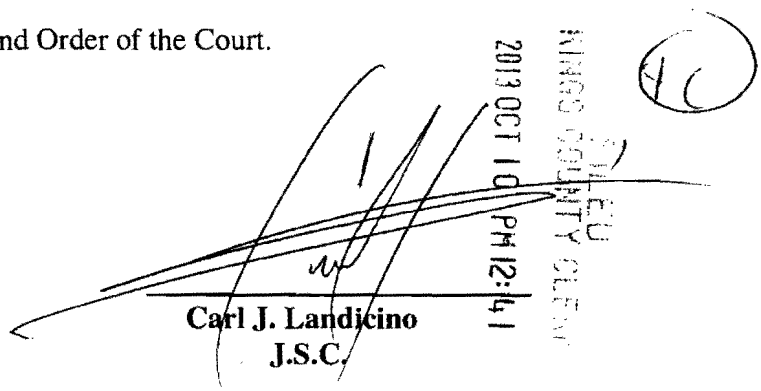

Carl J. Landicino
J.S.C.