

Sullivan v Warner Bros. Tel.

2013 NY Slip Op 32620(U)

October 17, 2013

Supreme Court, New York County

Docket Number: 100504/12

Judge: Paul Wooten

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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: HON. PAUL WOOTEN
Justice

PART 7

VIRGINIA SULLIVAN,

INDEX NO. 100504/12

Plaintiff,

- against-

MOTION SEQ. NO. 001

FILED

OCT 24 2013

WARNER BROS. TELEVISION, A DIVISION OF
WB STUDIO ENTERPRISES, INC., 17TH STREET
PRODUCTIONS, INC., and RANDY J. MANION,

Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

The following papers were read on this motion by defendants for summary judgment pursuant to CPLR 3212.

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

Cross-Motion: Yes No

This is a negligence "trip-and-fall" action to recover damages for injuries allegedly sustained on March 9, 2011, when Virginia Sullivan (plaintiff) tripped and fell on the sidewalk on Claremont Avenue between 122nd Street and LaSalle Place in New York, New York. Plaintiff alleges that she tripped on a wooden frame left on the sidewalk by defendants Warner Bros. Television, a division of WB Studio Enterprises, Inc. (Warner Bros.), and 17th Street Productions, Inc., (17th Street) who were engaged in the filming of the television series "Gossip Girl" pursuant to a shooting permit issued by the City of New York which listed defendant Randy J. Manion (Manion) as the location manager.

Now before the Court is a motion by the defendants for partial summary judgment dismissing the complaint as against 17th Street and Manion, pursuant to CPLR 3212, on the basis that plaintiff has failed to establish a *prima facie* case of negligence against said defendants. Plaintiff is in opposition to defendants' motion. Discovery is not complete and Note

of Issue has not been filed.

STANDARD

Summary judgment is a “drastic remedy” (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]), and “the ‘proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case’” (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). A 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 the proponent of the motion meets this requirement, “the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of triable issues of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 [1st Dept 2002]).

DISCUSSION

I. *Summary Judgment as to Manion*

In support of their motion, defendants attach an affidavit of Manion, in which he states that he was not employed on behalf of Warner Bros. for “Gossip Girl” nor was he involved with the show in any way on March 9, 2011, the date of plaintiff’s injury (see Notice of Motion, exhibit C), and as such, he maintains that he cannot be held responsible for plaintiff’s injuries. Manion maintains that he terminated his employment as the location manager with Warner Bros. and “Gossip Girl” on March 4, 2011, and was thereafter employed full-time on behalf of another production company. He states that on March 9, 2011 he was employed as the Second

Assistant Director for a television program entitled "Prime Suspect" (*id.*).

In opposition, plaintiff submits, *inter alia*, affidavit of plaintiff; Crew Call Sheet for Gossip Girl listing Manion as on call as a "Add'l 2nd AD" for the date of the accident; the Official City of New York, Mayor's Office of Film, Theater and Broadcasting, Shooting Permit (Permit) for the location motion picture shooting for the television show "Gossip Girl" (see Opposition, exhibit A, C and E). The Permit was unamended and valid from January 3, 2011 through March 18, 2011, and lists Manion as the location manager at the alleged accident site on the day of the accident (*id.*). Plaintiff asserts that defendants' motion should be denied as further discovery is necessary. Specifically, plaintiff proffers that she cannot cross-examine an adverse party's affidavit as no discovery has taken place in this matter, and that further discovery will reveal the nature of Manion's involvement at the accident site.

In reply, Manion now submits an alleged Gossip Girl Daily Production Report, which was prepared after the March 9, 2011 shoot, which purports to list the cast and crew who were present on the set on March 9, 2011. Manion proffers that since his name is not listed on the Daily Production Report, that evidences that he was not on set on the date of plaintiff's accident, which rebuts the Crew Call Sheet attached to plaintiff's opposition papers which lists Manion's name as being on call.

The Court in viewing the evidence in the light most favorable to the plaintiff, and in giving the plaintiff the benefit of all reasonable inferences that can be drawn from the evidence, (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978], *supra*), finds that the plaintiff has raised a triable issue of fact as to the involvement of Manion at the accident site on the day of the accident. Moreover, the Court notes that the Daily Production Report submitted in reply is inconclusive to establish as a matter of law that Manion was not present on the shoot on the date of plaintiff's accident. As such, the portion of defendants' motion for summary judgment dismissing the complaint as against Manion is denied.

II. *Summary Judgment as to 17th Street*

Plaintiff alleges in her complaint that Warner Bros. and 17th Street produced "Gossip Girl" and were engaged in the shooting of "Gossip Girl" at locations outside their dedicated studios (Amended Complaint ¶¶ 7, 9). In support of its motion, 17th Street attaches the affirmation of Adam Silverman (Silverman), "Vice President, Legal & Business Affairs at Alloy Media + Marketing" (Alloy), which states that Alloy is a successor in interest of 17th Street (Notice of Motion, exhibit D at ¶ 7). Silverman states that Alloy, as owner of the "Gossip Girl" book series, entered into an Option and Literary Purchase Agreement (Agreement) with Warner Bros. In the Agreement Warner Bros. contracted to acquire the rights to, among other things, produce a television program based on the "Gossip Girl" book series, which it later exercised (*id.* at 8). Pursuant to the Agreement it was Warner Bros who was producing "Gossip Girl" and 17th Street had no physical involvement with the production (*id.* at 10).

The Court finds that 17th Street has failed to meet its *prima facie* burden of establishing entitlement to summary judgment as a matter of law. Specifically, Silverman as an attorney licensed in New York, is statutorily permitted to use such affirmations (*see* CPLR 2106), however the use of an affirmation is only authorized for non-parties (*see John Harris P.C. v Krauss*, 87 AD3d 469 [1st Dept 2011], citing *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 [1981] ["even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action"]). Additionally, the affirmation was not notarized (*see* CPLR 2309), and as such Silverman's affirmation is not probative as he would not be answerable to perjury should he make a false statement (*see* Penal Law, § 210.00, subd. 1). Accordingly, the Court need not address the arguments in opposition or reply (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *supra*) and as such the portion of defendants' motion seeking to dismiss the complaint as against 17th Street Productions, Inc. is denied.

CONCLUSION

Accordingly, it is

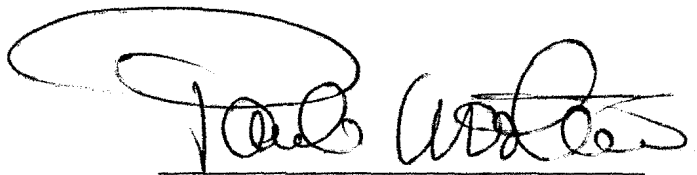
ORDERED that defendants' motion seeking summary judgment dismissing the complaint as against 17th Street Productions, Inc. and Randy J. Manion, pursuant to CPLR 3212, is denied; and it is further,

ORDERED that counsel for plaintiff Virginia Sullivan is directed to serve a copy of this Order with Notice of Entry upon the defendants; and it is further,

ORDERED that all parties are directed to appear for a Preliminary Conference on December 4, 2013 at 11:00 a.m., at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court

Dated: Oct. 17, 2013


PAUL WOOTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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OCT 24 2013
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