

Ocasio v Nicolia's, LLC
2017 NY Slip Op 33399(U)
June 16, 2017
Supreme Court, Nassau County
Docket Number: Index No. 602167-16
Judge: Daniel Palmieri
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

-----X
GLADYS E. OCASIO and ANGEL OCASIO,

TRIAL/IAS PART 16

Index No.: 602167-16

Plaintiffs,

-against-

Mot. Seq. 002

Mot. Date: 5-10-17

Submit Date: 5-31-17

**NICOLIA'S, LLC, PORCELANOSA NEW YORK, INC.
PORVEN, LTD. AND ENTERPRISE RENT-A-CAR,**

Defendants.

-----X
NICOLIA'S, LLC,

Third Party Plaintiff,

-against-

S&J, INC.,

Third Party Defendant.

-----X
The following papers have been read on this motion:

- Notice of Cross Motion, dated 5-2-17.....1**
- Affirmation in Opposition, dated 5-9-17.....2**
- Affirmation in Opposition, dated 5-26-17.....3**
- Affirmation in Reply, dated 5-26-17.....4**

The "cross motion" by defendant Enterprise Rent-A-Car ("Enterprise") pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims asserted against it is denied.

Initially, the Court agrees with plaintiffs that a cross motion is procedurally improper here, as this application was not served upon, and no relief is sought of, the

party that made the initial motion, third-party defendant S&J, Inc., a snow removal contractor. *See* CPLR 2215. However, as no prejudice to the opposing parties is apparent the Court disregards the error and will deem and review this application as what it is in substance, a motion directed to those opposing parties. CPLR 2001; *see Kleeberg v City of New York*, 305 AD2d 549 (2d Dept. 2003).

As stated in this Court's Decision and Order on motion sequence 001, decided simultaneously herewith, Gladys E. Ocasio and her spouse allege that she sustained personal injuries on January 22, 2015, when she tripped and then fell on a alleged slippery condition in front of premises located at 775 Old Country Road in Westbury, New York. Defendant and third-party plaintiff Nicolía's LLC ("Nicolía's") is the owner of the property at that location.

Enterprise, a stated tenant of Nicolía's, seeks summary judgment based on its assertion that it leased premises at 775-A, which was not the location of the plaintiff's accident as alleged in plaintiff's Supplemental Bill of Particulars, and that in any event it had no obligation to maintain the areas it leased and where plaintiff fell.

In support of its motion, Enterprise annexes not only the Supplemental Bill of Particulars, but the affidavit of Teresa Matera, a Regional Operations Coordinator employed by non-party ELRAC, one of two LLCs which rent motor vehicles under the trade name of Enterprise Rent-A-Car. She states that Enterprise leases space at 775-A Old Country Road in Westbury, New York, which is located on the Eastern side of the complex at the corner of Old Country Road and Dayton Street, whereas the plaintiff Gladys Ocasio fell on property identified as 775 Old Country Road, by Carlton Street, on the West side of the property. She avers that Enterprise did not lease or maintain that

area. Further, Nicolia's is responsible for snow removal, not it, annexing to her affidavit invoices from third-party defendant S&J Inc. to Nicolia Industries¹ for the period when plaintiff fell.

In opposition, both the plaintiffs and co-defendant Nicolia's LLC argue that the motion is premature, the former raising CPLR 3212(f), which provides the statutory basis for either denying or adjourning the motion based on evidence that is in the hands of the moving party only.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212 (b). This burden cannot be met simply by demonstrating that there are gaps in the adversary's case or that a key factual claim cannot be established by the motion opponent. *See River Ridge Living Center, LLC v ADL Data Systems, Inc.*, 98 AD3d 724 (2d Dept. 2012); *see also Calderone v Town of Cortlandt*, 15 AD3d 602 (2d Dept. 2005). In negligence cases, there may be more than one proximate cause of the injury-causing occurrence (*Lopez v Reyes-Flores*, 52 AD3d 785 [2d Dept. 2008]), and thus the proponent of the motion must establish freedom from comparative negligence as a matter of law. *Pollack v Margolin*, 84 AD3d 1341 (2d Dept. 2011). Absent this initial showing, the court should deny the motion, without passing on the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

1

Although the name on the invoices varies from the name given in this suit, no party has asserted either here or on motion sequence 001 that there is any distinction between Nicolia's LLC and Nicolia Industries, and thus the Court has not addressed it.

If such a *prima facie* case is made, the burden shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

The Court finds that Enterprise has not provided sufficient *prima facie* proof that it had no responsibility for the area of the fall.

Its affiant asserts familiarity with the property, and that she makes her statement based on photographs submitted by the plaintiffs, Enterprise's records and her own personal knowledge. Based thereon she concludes that Enterprise has no ownership, responsibility, control, and/or oversight of the area where plaintiff claims she fell. As noted, she states that the snow removal contractor was engaged by Nicolio's, not Enterprise. However, she does not state the source of her "familiarity" and "personal knowledge" other than her review of documents and photographs. Under such circumstances her employment status adds little weight to her statement. Moreover, and critically, she does not state whether or not there is a lease (although the Court recognizes

that it is highly unlikely that one does not exist in a commercial context), much less attach a copy or profess to have reviewed it. That document, of course, will define a tenant's rights and obligations regarding the property, including a description of the areas leased. There is no explanation offered as to why the lease is not presented.

Further, Ms. Matera does not state that she is an attorney, which is not essential as a general matter, but without presenting a copy of the lease her conclusions regarding Enterprise's legal responsibilities as a tenant cannot be viewed as competent evidence. The address alone is insufficient as a substitute for a legal description of the premises leased, or what rights and/or responsibilities Enterprise had regarding the areas surrounding the building. While the Court has found in its Decision and Order on motion sequence 001 that Nicolia's hired the snow removal contractor, this is not dispositive of Enterprise's own responsibilities.

Accordingly, the Court finds that Enterprise has not made out its *prima facie* case for judgment as a matter of law, requiring the denial of the motion without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr., supra.*

Any contentions not addressed here either are not essential to the result reached or are without merit.

This shall constitute the Decision and Order of this Court.

ENTERED ENTER:

DATED: June 16, 2017
Mineola, NY

JUN 19 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE
HON. DANIEL PALMIERI
Supreme Court Justice



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