Hightower v EXG 332 W44 LLC
2018 NY Slip Op 31437(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 161024/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CANDICE HIGHTOWER

INDEX NO. 161024/15

MOT. DATE

- v -

MOT. SEQ. NO. 001

EXG 332 W44 LLC, *et al.*

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

Defendants move for summary judgment (CPLR § 3212). Plaintiff opposes the motion and cross-moves for an order striking defendants answer for failure to respond to plaintiff's post-EBT demands, refusing to provide a former employee's birth date and social security number and refusing to produce witnesses, or alternatively, to, *inter alia*, compel defendants to provide same. Defendant opposes the cross-motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The following facts are based upon plaintiff's deposition testimony. Plaintiff claims that on August 30, 2015, at approximately 10:30pm, she was injured when she was struck by a parking gate arm (the "accident") in the parking garage located at West 44th Street between Eighth and Ninth Avenues in Manhattan (the "garage"). At the time of her accident, plaintiff was working at the garage for an entity named Cavalry Staffing ("Cavalry") as an Operations Manager. Plaintiff testified that Cavalry is a "[f]leet staff company" that "move[s] vehicles … for rent-a-car companies."

The accident occurred on the first day that plaintiff worked at the garage. Plaintiff was working outside the garage, and then decided to enter it to go to the restroom. Plaintiff was walking toward "an open space" when she "was hit in the head by the gate." Plaintiff identified photographs of the gate at her deposition. Plaintiff testified that a photograph marked exhibit "B" at her deposition (which has been provided to the court) depicts the gate arm which struck her. In that photograph, the gate arm is severed/broken, with approximately half of it on the ground. On the broken portion of the gate is the words "NOT A WALK WAY". Plaintiff claims that she didn't see the gate or the writing on the gate arm before the accident. Further, plaintiff never saw the gate arm in the downward position prior to her accident. After plaintiff was struck, she testified that she "fell unconscious" and "didn't see anything, eyesight was gone, everything was gone."

Dated: 6/29/18

HON. LYNN R. KOTLER, 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**

Defendants are EXG 332 W44 LLC (the "owner"), which owned the premises where the garage was located. Defendants Edison NY Parking, LLC, Edison Parking Corporation and Park Fast and Edison Properties, LLC, leased the garage from the owner. Defendants produced Jorge Orellana for deposition. Orellana testified as follows. Orellana was employed by Edison Parkfast and worked at the garage as a facility manager on the date of plaintiff's accident. Orellana admitted that if the gate arm was in the upward position, a pedestrian would not be able to read the words "NOT A WALK WAY" on it.

When Orellana was asked how the gates work, he testified as follows:

A. Well, you know, in order for the gate to go up it needs to sense the metal of the vehicle otherwise it won't go up. So let's say a person is standing right there in front of the gate, it won't go up. It won't work because it's not sensing the weight in the middle of the vehicle. And it will go down once the vehicle passes that point so it can come down. It's not feeling the weight in the middle of the vehicle.

Q. Have you experienced malfunctions at your location which would be 332 West 44th Street prior to August 2015, of the gates?

A. Yes.

Q. How often would there be malfunctions with the gates at 332 West 44th, in that three-year period?

...

A. Probably six.

...

Q. And how many times did the exit gate, the ones that are depicted in Defendants' Exhibit A and B, malfunction?

Mr. Pozzuto: I think he answered that.
Mr. Yankowitz: Between 43rd and 44th.
Mr. Pozzuto: Oh. Specific to 44th.

A. Probably four times.

...

Q. Can you remember what happened [when the gate malfunctioned]?

A. Most of the times, its, you know, the gates is broken.

Q. What do they break on besides, you said, cars? Anything else or anyone else?

A. No. Just cars.

Q. Have they ever broken on a pedestrian?

A. No.

Also at his deposition, Orellana testified that the gate arm could get stuck in the up or down position. He further admitted that the defendants did not keep a log of malfunctions with respect to the gate, but only created work orders.

Meanwhile, defendants have provided a sworn affidavit by Orellana in support of the motion, wherein he states that "[p]rior to August 30, 2015, defendants never received any claim, complaint, report or notification that the parking gate arm at issue was malfunctioning in such a way that it would descend upon an individual while an automobile was not in the area."

Defendants also produced Victor Bergrin for deposition. At the time of plaintiff's accident, Bergrin worked for Edison Properties, LLC as a field service supervisor in the revenue control department. Bergrin testified that it was his job to maintain low voltage equipment through the company, including CCTV, access control, alarm systems, and mechanical gates.

Bergrin testified that he was one of the installers that installed the gate system. He further testified about how the gate worked. When a car runs up to a "ticket gobbler", a machine that accepts tickets, the car runs over a "loop in the ground", right before the gate, which detects the car. There is also a treadle, which detects the pressure of the tires. The car driver then enters a ticket into the gobbler or uses a proxy card, and the gate will raise. The gate should not raise unless a car is present, according to Bergrin, even if a ticket was fed to the gobbler. Bergrin admitted that the gate arm could be stuck in either the up or down position, but testified that it shouldn't come down unless "somebody does something."

In support of the motion, plaintiff has provided the sworn affidavit of Andrew Polite, who was plaintiff's coworker on the date of the accident. Polite states in pertinent part therein that at the time and place of plaintiff's accident:

> [He] witnessed a mechanical gate arm come down and strike [plaintiff's] head and then break into multiple pieces....
>
> There was nothing blocking [Polite's] view of [plaintiff] at the time of the accident. There were no cars entering or exiting the garage at the time of the accident. There were no cars driving on the street in front of [Polite], to the left of [him] or to the right of [him] at the time of the accident.

Parties' arguments

Defendants argue that they are entitled to summary judgment because the gate was working as intended and plaintiff's accident was caused solely by her own negligence. Defendants contend that "in light of plaintiff's claim that the parking gate was 'defective,' a products liability analysis is appropriate..." Defendants further maintain that assuming the accident occurred as plaintiff testified, they did not have notice of a defective condition with respect to the gate.

Meanwhile, plaintiff argues that defendants have not met their burden on this motion. Plaintiff's counsel contends that defendants' expert's affidavit is conclusory and should be rejected. Otherwise, plaintiff maintains that triable issues of fact preclude summary judgment.

With respect to the cross-motion, plaintiff argues that she "should be given the opportunity to take examinations under oath of Dennis Fredrickson, Manuel Villa, Fednel Cadet, Pedro Chaves, Angela Diniz, Guy Fleurantin, Roger French, Eldar Ragimov, Hector Rivas and Christopher Hedge" because "[t]he evidence is overwhelming that these individuals are knowledgeable witnesses and have information regarding the subject accident and the subject gate and its associated equipment. Plaintiff further argues that defendants have failed to properly respond to her post-EBT demand for any and all installations, repair and/or maintenance records pertaining to the garage for two-year prior to the date of the accident. Finally, plaintiff seeks the birth date and social security number of a former employee, Komigan Dossou a/k/a Wisdom KD who was identified in a work order for the subject gate.

The parties both submitted letters after the motion was marked submitted but before oral argument on same, regarding their replies submitted in connection with these motions. Defendant takes issue

with plaintiff's reply on the cross-motion, arguing that it is an improper sur-reply, and if same is considered, defendant seeks an opportunity to submit a sur-reply to same. Meanwhile, plaintiff's counsel maintains that his reply was proper in light of defense counsel's choice "to intertwine and convolute multiple issues in her single document Reply and Opposition."

Both parties' submissions are prolix, and the court, in the exercise of its discretion, denies defense counsel's request for a sur-reply. The parties have had an ample opportunity to brief the issues before the court, and defense counsel has failed to demonstrate that a sur-reply is warranted. The court will now address the parties' substantive arguments.

Discussion

The court will first consider the motion for summary judgment, because the motion must be denied for the reasons that follow, even if the discovery plaintiff seeks was warranted.

The motion-in-chief

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (Schwartz v. Mittelman, 220 AD2d 656 [2d Dept 1995]).

Defendant's motion must be denied because they have not met their burden. While defense counsel claims that "the gate operated exactly as intended", plaintiff has raised a triable issue of fact on this point, based upon her own testimony as well as the affidavit of Polite. Indeed, in trying to raise this argument, defense counsel "assum[es] that there was a vehicle in the gate immediately prior to Plaintiff walking under the arm". However, there are insufficient facts on this record to support such a finding as a matter of law. To reject plaintiff's account of the accident, along with the affidavit of Polite, would require a credibility determination which is not ordinarily the province of a court on a motion for summary judgment.

Otherwise, the court finds that defense counsel's characterization of plaintiff's testimony is not supported by the record. Plaintiff did indeed testify about the details of how the accident happened, and explained that she was under the gate because she see the gate and the "NOT A WALKWAY" warning on it. Defendants' own witness confirmed that a pedestrian would not see the gate if it was in the upright position, which conforms to plaintiff's version of events. Whether plaintiff should have entered the garage in the manner that she did goes to her comparative negligence, and does not mandate summary judgment in defendants' favor.

Further, defendant's expert's affidavit is conclusory and is insufficient to meet their burden. Kenneth Garside, P.E. merely states, without establishing a basis for the opinion, that "[t]here is no evidence in the record that the gate was in any way malfunctioning at the time of the accident, nor did [he] perceive any malfunction during [his] inspection". Garside's conclusion is based upon his review of the

pleadings, deposition transcripts and a physical inspection conducted approximately two years after the accident. Garside has not established that his opinions based on the inspection are reliable. Otherwise, his affidavit fails to demonstrate that on the date of the accident, the gate could not have been stuck in the upright position and suddenly fall down and strike plaintiff as she walked into the garage without a car in the area.

Defendants argue that they did not cause nor create a defective condition nor had notice of the same. However, there is no dispute on this record that defendants' own employees installed and maintained the gate, and Orellana specifically testified that it malfunctioned on prior occasions. The court finds that the defendants have not come forward with proof in evidentiary form which establishes that they were not negligent in the installation/operation of the gate. Indeed, Orellana's affidavit contradicts his prior testimony, wherein he testified that the gate had previously malfunctioned. Orellana fails to distinguish his deposition testimony regarding "malfunctions" and his admission that the gate had previously been stuck up or down with his claims in the affidavit.

In any event, his statement in the affidavit that the gate never fell on a pedestrian before does not establish, as a matter of law, that the gate was never stuck and then suddenly fell. Indeed, a reasonable fact-finder could conclude that defendants were negligent in the maintenance of the gate and had notice of a defective condition by virtue of Orellana's admission that the gate had previously become stuck in the upright position. For at least these reasons, defendants have not established that they neither caused/created a defective condition nor had notice of same.

The cross-motion

Turning to the cross-motion, the court must examine the procedural history in this case, since it is post-note of issue. In a Status Conference Order filed January 12, 2017, the Honorable Joan Kenney specifically stated that the following discovery was outstanding: "post EBT outstanding" and "EBTs parties completed (need additional EBTS)". The 1/12/17 Order further provided that Defendant was directed to respond to plaintiff's post EBT demands within 15 days of service of same, and Judge Kenney directed that "post-note discovery shall be permitted and completed w/in 60 of NOI date (2-21-17) and any 3212 motion shall be made w/in 120 days of the NOI date (2-21-17)."

On February 14, 2017, plaintiff filed note of issue, which states in relevant part that all discovery was not complete and post-note of issue discovery was permitted pursuant to the 1/12/17 Order. This motion was filed June 14, 2017, and plaintiff's cross-motion was filed November 30, 2017. Plaintiff's counsel has provided an affirmation of good faith, wherein he details the efforts he made to obtain defendants' compliance with plaintiff's notice to produce Dossou. According to this affirmation, defendants failed to produce Dossou because he no longer works for defendants and had not for some time. Plaintiff's counsel admits that the defendants gave him an address for Dossou, but states that same is "bogus" and therefore seeks his date of birth and social security number. Plaintiff also served a notice to take the deposition of Dennis Fredrickson, who was a revenue control manager and supervised Begrin. On April 20th, 2017, plaintiff's counsel received a letter from defense counsel "objecting and refusing (for the first time) to produce" Fredrickson. Plaintiff maintains that Fredrickson's deposition is material because he installed the gate and trained Begrin on the installation and maintenance of such gates.

In opposition to the cross-motion, defense counsel contends that it should be denied because plaintiff engaged in "extensive delay" and did not make a good faith effort to resolve the discovery dispute. Defendants represent that after the April 2017 letter was sent, "the matter was then laid to rest."

The court finds that the cross-motion should be denied for the reasons that follow. First, plaintiff's counsel has not demonstrated that he actually made a good faith effort to resolve the underlying dispute prior to bringing the cross-motion (*Kelly v. New York City Transit Auth.*, 2018 WL 2614510 [1st Dept June 5, 2018]). Rather, as defendants point out, plaintiff waited several months after the motion for summary judgement was filed, and simply filed the cross-motion, claiming that discovery was outstanding. Further, the court agrees with defense counsel that the defendants are not obligated to provide anything other than a last known address for Dossou. In any event, plaintiff has not demonstrated

that a non-party deposition of Dossou is necessary. Simply because his name is listed on a work order generated after plaintiff's accident does not mean that he possesses any information that is material or necessary to plaintiff's claims in this action.

As for a further deposition of the defendants, plaintiff was waived his right to same. The 1/12/17 Order provided for one further deposition of defendant, and defendant produced Bergrin on February 21, 2017. Bergrin was knowledgeable about the gate and offered relevant testimony. Another deposition of the defendant was not expressly directed, or even contemplated, by Judge Kenney's 1/12/17 Order, and plaintiff has otherwise failed to demonstrate that she is entitled to post-note of issue discovery (*cf. Massa v. Lower Manhattan Development Corp.*, 142 AD3d 927 [1st Dept 2016]).

Finally, the court finds that plaintiff has failed to demonstrate how the defendants' response to her post-EBT demands were insufficient, beyond stating in conclusory fashion that defendants failed to provide the subject records. Therefore, the court finds that plaintiff has failed to demonstrate that she is entitled to any relief with respect to this argument.

Accordingly, the cross-motion is denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the motion and cross-motion are denied in their entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 6/29/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.