

Hanson v 836 Broadway Assoc.

2018 NY Slip Op 32942(U)

November 13, 2018

Supreme Court, New York County

Docket Number: 161649/2014

Judge: Robert D. Kalish

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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. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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CYNTHIA HANSON,

Plaintiff,

- v -

836 BROADWAY ASSOCIATES, 836 BROADWAY REALTY
CORP., HYDE PARK ANTIQUES, LTD. and SLADE INDUSTRIES,
INC,

Defendants.

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INDEX NO. 161649/2014

MOTION DATE 11/13/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for DISMISS

Motion, pursuant to 3211 (a) (1) and (5), by Defendant Hyde Park to dismiss the complaint as against it on the grounds that: a) the complaint was filed after the statute of limitations; and b) that Defendant Hyde Park had no duty to prevent the alleged misleveling of the elevator that Plaintiff asserts caused her trip and fall injury. Plaintiff opposes the instant motion and cross-moves for an order by the court deeming the amended complaint to relate back to the original complaint pursuant to CPLR 203 (f).

In order for an otherwise untimely complaint to survive dismissal, pursuant to the relation back doctrine under CPLR 203 (f), a plaintiff must show:

- “(1) both claims arose out of 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 such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits[;] and
- (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.”

(Buran v Coupal, 87 NY2d 173, 178 [1995].)

On the instant motion, Plaintiff fails to establish that Hyde Park and 836 Broadway are vicariously liable for each other's actions, and as such this Court finds that Plaintiff fails to establish that there is a unity of interest between the two entities. (*Vanderburg v Brodman*, 231 AD2d 146, 147-48 [1st Dept 1997]; see also *Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1150-51 [3d Dept 2007] ["To be sure, this prong is more than a notice provision and requires a showing that the new and original defendants are vicariously liable for the acts of the other."]; *Higgins v City of New York*, 144 AD3d 511, 513 [1st Dept 2016] ["Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants."].)

At most Plaintiff has shown that Hyde Park and 836 Broadway Associates shares officers, employees, and resources. This is not enough to establish that the two entities are vicariously liable for each other's acts and united in interest. (*Berkeley v 89th Jamaica Realty Co., L.P.*, 138 AD3d 656, 659 [2d Dept 2016] [finding that new defendant and old defendant "shared resources, such as business space and officers, or that Hong Yu Corp. had an informal sublease agreement with Sung Yu Corp." did not establish that they were united in interest].)

Plaintiff claims that Hyde Park is 836 Broadway Associates' "de facto managing agent," and therefore liable for her injuries. However, in order to establish liability of the managing agent for non-feasance, it must be established that the managing agent is "in complete and exclusive control of the management and operation of the building." (*German v Bronx United in Leveraging Dollars, Inc.*, 258 AD2d 251, 252 [1st Dept 1999].) Here, Plaintiff only presents evidence that: (1) 836 Broadway Associate's manager Rachel Karr is also a principal of Hyde Park; (2) that Hyde Park's superintendent and porter carry out a variety of tasks that benefit the building generally, including cleaning and inspecting the subject elevator. This is not sufficient to establish that Hyde Park is "in complete and exclusive control of the management and operation of the building."

Moreover, even if Plaintiff did establish that Hyde Park was 836 Broadway Associate's "de facto managing agent," this would not be sufficient to establish that the two entities were unified in interest. (*Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007] ["RY, as the managing agent of the premises where the plaintiff allegedly was injured, and Linden Plaza, as the owner, have different defenses. Moreover, a judgment against one would not affect the other."].)

Lastly, during oral argument, Defendant 836 Broadway Associates conceded that the two Hyde Park employees that regularly inspected and cleaned the subject

elevator were acting on its behalf. As such, any concern that Defendant 836 Broadway will attempt to argue that notice cannot be imputed to it through these two Hyde Park employees is rendered academic.

Accordingly, this Court grants the instant motion to dismiss the complaint and any cross-claims as against Defendant Hyde Park.

CONCLUSION

ORDERED that the motion of Defendant Hyde Park to dismiss the complaint and any cross-claims against it is granted and the complaint and any cross-claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that Plaintiff Cynthia Hanson's cross-motion for an order by the Court deeming the amended complaint to relate back to the original complaint pursuant to CPLR 203 (f) is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 20 days of the filing of this order, counsel for the moving party shall serve a copy of this order with notice of entry and upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

The foregoing, together with the transcript of the oral argument of November 13, 2018, constitutes the decision and order of this Court.

11/13/2018
DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

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