Ross v Powell Foods of 14041, LLC
2018 NY Slip Op 33435(U)
November 19, 2018
Supreme Court, Queens County
Docket Number: 705199/16
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

MICHAEL ROSS, as administrator of the estate of CARRIELEE STROTHER-ROSS, deceased,

Plaintiff,

-against-

POWELL FOODS OF 14041, LLC, BURGERKING 14041, and BURGERKING CORPORATION,

Defendants.

Index No.: 705199/16

Motion Date: 8/1/18

Motion Seq. Nos.: 5, 6, 7

The following papers numbered E34 to E68 were read on these motions by defendants for leave to renew, pursuant to CPLR 2221 (e), two prior motions denying defendants' requests for dismissal of the complaint against defendant, Burger King Corporation (Burger King) (Seq. 5), pursuant to CPLR 3211 (1); and for leave to subpoena a non-party (Seq. 6); and a motion for summary judgment seeking dismissal of the complaint against both defendants, pursuant to CPLR 3212.

	Papers Numbered
Notices of Motion - Affirmations - Exhibits	E34-E54
Answering Affirmations - Exhibits	E57-E65
Reply Affirmations	E66-E68

Upon the foregoing papers, it is ordered that defendants' motions are determined as follows:

This action was brought to recover damages for personal injuries and the wrongful death of Carrielee Strother-Ross on June 28, 2014, following a fall on an interior staircase at the Burger King restaurant located at Jamaica Avenue and 169th Street, Jamaica, New

York. Plaintiff commenced an action in negligence against defendant, Powell Foods of 14041, LLC (Powell Foods), "an affiliate company of Odyssey Foods, the owner of the subject Burger King franchise; and defendant, Burger King, the franchisee/landlord. In March 2017, defendants moved for dismissal of the complaint as against Burger King, pursuant to CPLR 3211 (a) (1). By decision dated April 12, 2017, said motion was denied. In December 2017, defendants moved for leave to subpoena and depose a non-party, which motion was "denied without prejudice and with leave to renew" on January 18, 2018 on procedural grounds. Defendants now move for leave to renew both said decisions, pursuant to CPLR 2221 (e). Defendants also move for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint. Plaintiff opposes the two dismissal motions.

A motion for leave to renew must be based upon "new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]; *see Schwartz v Schwartz*, 153 AD3d 953 [2d Dept. 2017]). Defendants' motion for leave to renew and for dismissal of the complaint, pursuant to CPLR 3211 (a) (1), "a defense founded upon documentary evidence," is denied. The court previously determined that the original motion was denied as "untimely." As such, said defense has been waived (see 3211 [a] [1]; *Skywest, Inc. v Ground Handling, Inc.*, 150 AD3d 922 [2d Dept 2017]; *Portilla v Law Offs. of Arcia & Flanagan*, 125 Ad3d 956 [2d Dept 2015]), and renewal is unavailable.

Had this motion been timely made, it would still have been unsuccessful. A motion to dismiss pursuant to CPLR 3211 (a) (1) requires "documentary evidence," *i.e.*, a paper that is unambiguous, authentic, and essentially undeniable (*see Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010], which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see County of Westchester v Unity Mechanical Corp.*, 2018 NY Slip Op. 06879 [2d Dept 2018]). "The deposition testimony relied upon by defendants in support of this ... motion does not constitute 'documentary evidence' within the meaning of 3211(a)(1)" (*JP Morgan Chase Bank, N.A. v Balliraj*, 113 AD3d 821, 821 [2d Dept 2014]; *see A.N., Etc. v Roman Catholic Diocese of Rockville Centre*, 2018 NY Slip Op. 06872 [2d Dept 2018]; *Attias v Costiera*, 120 AD3d 1281 [2d Dept 2014]).

Further, it would be an academic exercise for the court to consider treating this motion as one for summary judgment, as a separate motion for summary judgment has been made by defendants herein (Seq. 7). Consequently, defendants' motion (Seq. 5) to dismiss, pursuant to CPLR 3211 (a) (1), is denied.

With regard to the motion (Seq. 6) seeking leave to renew the prior motion to depose the non-party, the requirement that a motion for leave to renew be based on new facts "is a

flexible one," and while the moving party may not have technically met the requirements for renewal, the court has discretion, in the interests of justice, to consider such evidence (*JRP Holding, Inc. v Pratt*, 113 AD3d 823, 824 [2014]; *see Matter of Serviss v Incorporated Vil. Of Floral Park, 164 AD3d 52 [2d Dept 2018]; In re Defendini*, 142 AD3d 500 [2d Dept 2016]). The facts proffered by movant in support of this motion, although not "newly discovered," were not determined on the prior motion. Consequently, as no opposition to renewal, or the ultimate relief requested, has been forthcoming, leave to renew such prior motion, and leave to subpoena and depose Tamara Bloom, the Chief Medical Examiner of Nassau County, is granted, upon notice to defendants of any such deposition.

Defendants move for summary judgment (Seq. 7) dismissing plaintiff's complaint, pursuant to CPLR 3212, on the grounds that they have, prima facie, established that "the steps in question were not the proximate cause of plaintiff's accident." and that "defendants bear no liability for plaintiff's alleged injuries as a matter of law." Plaintiff opposes.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On one party's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the nonmoving party (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; *see Parietti-Fogarty v Fogarty*, 141 AD3d 512 [2016]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

"In a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous or defective condition nor had actual or constructive notice of its existence" (*Burke v Umpaca*, 163 AD3d 618, 618 [2d Dept 2018]). Such prima facie showing of entitlement to judgment as a matter of law can also be established by demonstrating that the plaintiff cannot identify the cause of his or her accident without engaging in speculation (*see Touloupis v Sears*, 155 AD3d 807 [2d Dept 2017]; *Vojvodic v City of New York*, 148 AD3d 1086 [2d Dept 2017]). Here, defendants contend that "plaintiff is unable to identify the cause of her accident" without resorting to speculation. While mere speculation as to the cause of the fall, when many possible contrary causes are present,

is fatal to a cause of action (*see Pasqualoni v Jacklou Corp.*, 2018 NY Slip Op. 06928 [2d Dept 2018]; *Burns v Lincen Street Realty, Inc.*, 2018 NY Slip Op. 06876 [2d Dept 2018]; *Eisenstein v Block 5298, Inc.*, 164 AD3d 1304 [2d Dept 2018]), in the case at bar, contrary to defendants' contention, they failed to demonstrate "prima facie entitlement to judgment as a matter of law on the ground that the (plaintiff) could not identify the cause of the injured plaintiff's fall" (*Pajovic v 94-06 34th Road Realty Co., LLC*, 152 AD3d 781 [2d Dept 2017]).

"[T]hat a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury" (*Buglione v Spagnoletti*, 123 AD3d 867, 867 [2d Dept 2014]; *see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743 [1986]). "Cases grounded on circumstantial evidence require a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred" (*Simion v Franklin Center for Rehabilitation & Nursing, Inc.*, 157 AD3d 738, 739 [2d Dept 2018] quoting *Bettineschi v Healy Elec. Contr., Inc.*, 73 AD3d 1109, 1110 [2d Dept 2010]). In such cases, plaintiff needn't positively exclude every different possible cause for the fall, but must only prove that it was more likely or more reasonable that the fall was caused by defendant's negligence than by some other agency (*see Gayle v City of New York*, 92 NY2d 936 [1998]; *Cross v Roberts*, 162 AD3d 852 [2d Dept 2018]).

Here, defendants' evidence in support of their motion includes the deposition testimony of the daughter of the deceased, who was with her mother at the Burger King, but did not see the actual fall; reference to at least one written statement by an employee of Burger King, and an "incident report" written by a manager at the scene, the content of which were described by Powell Foods' deposition witness, but neither of which documents were submitted with the motion papers; and a "CD of accident video" from the security camera at Burger King, clearly depicting the subject accident. Such evidence not only failed to eliminate triable issues of fact as to whether the stairs were a proximate cause of the accident, but bolstered plaintiff's claims by, among other things, showing the staircase as the site of the accident; contradicting defendants' employee's alleged assertion that the deceased was "running" up the stairs at the time of the fall; and marginalizing defendants' claim that the accident was "clearly ... caused due to (the deceased's) misstep." The video; the failure to include the statement and incident report; and the admission that the subject staircase was not renovated or changed since the accident, considered along with plaintiff's expert's findings from his inspection of the staircase, demonstrating alleged defects and violations thereat, all support the determination that defendants failed to meet their prima facie burden for summary judgment (*see Fennett v Alleyne*, 163 AD3d 754 [2d Dept 2018]; *Cross v Roberts*, 162 AD3d 852). As defendants have failed to substantiate their prima facie burden in the first instance, it is unnecessary to consider whether plaintiff's opposition papers are sufficient

to raise a triable issue of fact *(see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *D'Augustino v Bryan Auto Parts,* Inc., 152 AD3d 658 [2d Dept 2017]; *Uvaydov v Peart*, 99 AD3d 891 [2d Dept 2012]). Consequently, defendants' motion for summary judgment is denied.

Accordingly, the motions by defendants, made pursuant to CPLR 2221 (e), for leave to renew the court's prior decision, denying dismissal of the complaint against Burger King on the basis of CPLR 3211 (a) (1), (Seq. 5), and for summary judgment dismissing the complaint against both defendants (Seq. 7), are denied. The motion by defendants, made pursuant to CPLR 2221 (e), for leave to renew the court's prior decision, denying leave to depose a non-party witness (Seq. 6), is granted in all respects, without opposition.

Dated: November 19, 2018

J.S.C.

FILED
NOV 29 2018
COUNTY CLERK
QUEENS COUNTY