Collado-Martinez v 527 Grand St. Corp.
2019 NY Slip Op 31986(U)
June 14, 2019
Supreme Court, Kings County
Docket Number: 504307/2016
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of June, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MIGUEL A. COLLADO-MARTINEZ,

Plaintiff,

- against -

527 GRAND STREET CORP. AND PEOPLE CHOICE PHARMACY, INC.

Defendants.

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Index No.: 504307/2016

DECISION AND ORDER

Motion Sequence #6, #7, #9

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 3/4, 5/6,
Opposing Affidavits (Affirmations).....	7, 8, 9,
Reply and Sur-Reply Affidavits (Affirmations).....	10, 11, 12,

After oral argument and a review of the submissions herein, the Court finds as follows:

This action has been commenced by the Plaintiff Miguel A. Collado-Martinez (hereinafter "the Plaintiff") to recover damages for personal injuries allegedly sustained by the Plaintiff on February 23, 2015. The Plaintiff was allegedly injured when he fell on the sidewalk adjacent to 527 Grand Street, New York, New York (hereinafter "the Subject Premises"). This sidewalk abuts the Subject Premises which is owned and managed by Defendants 527 Grand Street Corp. and People Choice Pharmacy, Inc., respectively (hereinafter "the Defendants").

The Defendants have moved (motion sequence #6) pursuant to CPLR 3212 for summary judgment on the ground that they did not have a duty to clear the snow and ice when there was a

"storm in progress." The Defendants also contend that they did not cause or create the condition or have actual or constructive notice of it. The Defendants contend that as a result they cannot be held liable. Defendant 527 Grand Street Corp. also seeks contractual indemnification as a result of its lease agreement with Defendant People Choice Pharmacy, Inc.[1] The Defendants also contend that the Plaintiff improperly made statutory claims in his Verified Bill of Particulars that are unsupported by the facts at issue, and should accordingly be dismissed.[2] The Defendants also move (motion sequence #7) by Order to Show Cause for an order providing for the following: (1) permitting examinations before trial of non-party witnesses to proceed despite the pending motion for summary judgment; (2) pursuant to CPLR 3124 directing Plaintiff to provide the Defendants with HIPAA compliant authorizations and to permit Defendants to interview Plaintiff's treating physician and physical therapist; (3) staying the trial pending a hearing on the Defendants' motion for summary judgment and directing a temporary restraining order in relation to this matter, pending the motion for summary judgment.[3]

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[1] The Defendants application for indemnification for Defendant 527 Grand Street Corp. is denied. First, the Court notes that this relief is not referenced in the notice of motion as required pursuant to CPLR 2214(a). The Court also notes that while the Defendants seemed to have made an application pursuant to CPLR 3212, regarding the issue of indemnification on behalf of Defendant 527 Grand Street Corp., Defendant 527 Grand Street Corp. and Defendant People Choice Pharmacy filed an answer together and are represented by the same law firm.

[2] As an initial matter, the Plaintiff does not oppose the Defendants' application for summary judgment in relation to those sections of the NYC Administrative Code other than §§7-210 and 16-123. Accordingly, the remainder of this Decision and Order will relate to the Plaintiff's claim based upon §§7-210 and 16-123 and the Defendants' motion is granted as it relates to those other sections referenced in the Verified Bill of Particulars, which were not opposed by the Plaintiff. *See Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 95, 30 N.E.3d 154, 157 [2015] (holding that where summary judgment is not otherwise opposed, dismissal is appropriate).

[3] The Defendants moved again (motion sequence #9) by Order to Show Cause for relief that was substantially similar to the relief sought as part of motion sequence #8.

In opposition, the Plaintiff opposes the motions and argues that they should be denied. As to the Defendants' application for summary judgment, the Plaintiff contends that the Defendants have failed to meet their *prima facie* burden. Specifically, the Plaintiff contends that the Defendants have failed to provide evidence as to when the area in question was last cleaned or inspected relative to when the Plaintiff fell. The Plaintiff contends that the affidavit of Lilea Ng should not be considered given that she was not previously disclosed as a fact witness and also because the affidavit is self serving. The Plaintiff also contends that the "storm in progress" defense is not available given that whatever precipitation occurred ceased well before the alleged incident occurred. Additionally, the Plaintiff opposes the Defendants' discovery related applications and contends that the Defendants have not provided sufficient evidence that the Defendants have met their burden in seeking discovery, post note of issue.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Generally, in a slip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

What is more, "under the so-called "storm in progress" rule, a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm." *Dowden v. Long Island Rail Rd.*, 305 A.D.2d 631, 631, 759 N.Y.S.2d 544, 545 [2nd Dept, 2003]; *see Smith v. Leslie,* 270 A.D.2d 333, 334, 704 N.Y.S.2d 612 [2nd Dept, 2000]; *Taylor v. New York City Tr. Auth.,* 266 A.D.2d 384, 698 N.Y.S.2d 52 [2nd Dept, 1999]; *Mangieri v. Prime Hospitality Corp.,* 251 A.D.2d 632, 633, 676 N.Y.S.2d 207 [2nd Dept, 1998].

Turning to the merits of the Defendant's motion, the Court finds that the evidence provided in support of the motion demonstrates *prima facie* entitlement to summary judgment as a matter of law. In support of its motion, the Defendant relies on the deposition testimony of the Plaintiff, the deposition testimony of Liu Tristan, climatological data, and an affidavit by Lilea Ng. When asked during his deposition (Defendants Motion, Exhibit M, Page 48), whether it was snowing the morning of his accident, the Plaintiff testified "[n]o." When asked (Page 48) whether it had snowed the day before his accident, he testified "[y]es." When asked (Page 73) during his deposition what caused him to fall, the Plaintiff testified "[i]t was dry ice with snow on top." A certified copy of climatological data provided by the Defendants does show that there was a snow storm from February 21, 2015 through Feburary 22, 2015, the day before the alleged incident. During his deposition, Liu Tristan, who is, purportedly, the president of Defendant People Choice Pharmacy, when asked (Defendants Motion, Exhibit O, Page 23) whether it snowed in February of 2015, he testified that "I don't remember." When asked (Page 30) whether he knew if anyone removed snow or ice from the sidewalk adjacent to the store between January 1, 2015 through February 23, 2015 he testified that "I don't remember." However, in her affidavit, Lilea Ng, the manager for Defendant People Choice Pharmacy, states that on February 22, 2015, the day before the Plaintiff's alleged accident, she cleared the snow and ice from the sidewalk and inspected the sidewalk prior to leaving that night. In her affidavit she states (Defendants Motion Exhibit X Paragraph 11) that "I observed the sidewalk surrounding the pharmacy to be shoveled and salted." As a result, even assuming *arguendo*, that the Defendants had not met their *prima facie* burden regarding their reliance upon the "storm in progress" rule, the Court finds that the Defendants met their *prima facie* burden regarding their creation or notice of the condition at issue.

In opposition, the Plaintiff has raised an issue of fact that prevents this Court from granting summary judgment. In opposition to the Defendant's motion, the Plaintiff relies on the deposition of the Plaintiff, the deposition of Liu Tristan, an Affidavit from George Wright (a meteorologist) and climatological data. The Plaintiff described the condition that caused his fall as "dry ice with snow on top." In his affidavit, meteorologist George Wright stated (Affirmation in Opposition, Exhibit 3, Paragraph 10) that the storm at issue "ended between 7:45 a.m. and 8:00 a.m. on February 22, 2015." He also stated (Paragraph 13.a) that "'[t]he dry ice with snow on top' that was approximately 'half an inch' thick on the subject sidewalk was formed by the snow that fell on February 17, 2015 and the snow, sleet and freezing rain that occurred on February 21-22, 2015." This testimony, taken together, is sufficient to raise a material issue of fact. The evidence presented by the Plaintiff, which included his own deposition, the affidavit of his expert meteorologist and certified climatological data, "raised a triable issue of fact as to whether the injured plaintiff slipped and fell on old snow and ice that was the product of a prior storm, as opposed to precipitation from the storm in progress, and as to whether the defendant had constructive notice of the preexisting condition." *Burniston v. Ranric Enterprises Corp.*, 134 A.D.3d 973, 974, 21 N.Y.S.3d 694, 696 [2nd Dept, 2015]; *Hyun Kyung Oh v. Sky View Towers Holding, LLC*, 167 A.D.3d 725, 725, 89 N.Y.S.3d 703, 704 [2nd Dept, 2018].

As to the Defendants' remaining applications relating to continuing discovery post note of issue, the court grants the application to a limited extent. The Defendants rely on *Arons v. Jutkowitz* and seek Examinations Before Trial of Carmen Laguoa, Dr. Shailyn Almonte and Niurka Gonzalez. In *Arons v. Jutkowitz* the Court of Appeals held that it was proper to grant a Defendant's application to compel a Plaintiff to provide HIPAA compliant authorizations permitting defense counsel to speak with the plaintiffs' treating physicians. *See Arons v. Jutkowitz*, 9 N.Y.3d 393, 402, 880 N.E.2d 831, 833 [2007]; *see also Porcelli v. N. Westchester Hosp. Ctr.*, 65 A.D.3d 176, 183, 882 N.Y.S.2d

130, 135 [2nd Dept, 2009]. However, the Court in *Arons v. Jutkowitz* also noted that the interview was to be off the record and "it bears repeating that the treating physicians remain entirely free to decide whether or not to cooperate with defense counsel." *Id.* As a result, the Court partially grants the Defendants' application in relation to Dr. Shailyn Almonte and Niurka Gonzalez. Purportedly, Dr. Shailyn Almonte is the Plaintiff's treating physician and Niurka Gonzalez is his physical therapist. In both their motions, the Defendants seek leave of court to conduct Examinations Before Trial of Dr. Shailyn Almonte and Niurka Gonzalez. This aspect of the application is denied. The Defendants may conduct off the record interviews if Dr. Shailyn Almonte and Niurka Gonzalez agree do to so. Plaintiff is to provide HIPAA compliant authorizations relating to Dr. Shailyn Almonte and Niurka Gonzalez within thirty days of service of this decision.

However, the Court finds that the Defendants have not met their burden as to the application for an Examination Before Trial of Carmen Laguoa. Ms. Laguoa is purportedly the Plaintiff's former spouse and as a result, Uniform Rules for Trial Courts (22 NYCRR) § 202.21 applies. Both motions sequence 7 and 9 were made in 2019, well after the twenty day period referenced in 22 NYCRR § 202.21. § 202.21(d) provides in pertinent part that in order to obtain further disclosure a party must show "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice..." and in such event "... the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." The Plaintiff has failed to make this showing as to Ms. Laguoa and as a result, his application for additional disclosure is denied. *See Blinds To Go (U.S.), Inc. v. Times Plaza Dev., L.P.*, 111 A.D.3d 775, 775, 975 N.Y.S.2d 355 [2nd Dept, 2003]; *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 138, 707 N.Y.S.2d 137, 139 [2nd Dept, 2000].

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants motion (motion sequence 6) is denied.

The Defendants motions (motions sequence 7 and 9) are granted solely to the extent provided above as follows: Plaintiff shall provide Defendants with HIPAA complaint authorization relating to to Dr. Shailyn Almonte and Niurka Gonzalez within thirty days of service of a copy of this Decision and Order.

This constitutes the Decision and Order of the Court.

Movant to serve a copy of this Order upon the Plaintiff within ten days of the date hereof.

ENTER:

Carl J. Landicino
J.S.C.