Bruck v 51st Homes Realty Inc.
2019 NY Slip Op 32190(U)
July 18, 2019
Supreme Court, Kings County
Docket Number: 10542/2015
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 18th day of July 2019.

P R E S E N T:
HON. LARA J. GENOVESI,
J.S.C.

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SHAIDY BRUCK,

Index No.: 10542/2015

Plaintiff,

DECISION & ORDER

-against-

51ST HOMES REALTY INC.,

Defendant(s).

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

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion And Affidavits (Affirmations)	1
Opposing Affidavits (Affirmations)	2A, 2B
Reply Affidavits (Affirmations)	3

Introduction

Defendant, 51st Homes Realty Inc., moves by notice of motion, sequence number three, for an order pursuant to CPLR §§ 3212 and 3211[1] granting summary judgment,

[1] This Court notes that no arguments were set forth herein pursuant to CPLR § 3211.

dismissing the complaint and for such other relief as this Court may deem just and proper. Plaintiff, Shaindy Bruck, opposes the motion.

Background

On February 6, 2014, between 7:00 p.m. and 8:00 p.m. plaintiff alleges that she was injured when she slipped and fell on snow and ice on the sidewalk abutting 1556 51st Street (the premises), Brooklyn, New York. The premises, a two-family home, is owned by the defendant 51st Homes Realty Inc.

At plaintiff's examination before trial (EBT) on December 10, 2018, plaintiff testified that it last snowed three days prior to her slip and fall (*see* Notice of Motion, Exhibit F, EBT Transcript at p 24, ll 9-17). At the time of the accident, there was a smooth layer of ice outside of 1556 51st Street. It looked like the property was not shoveled, the snow melted and then covered the sidewalk with ice (*see id.* at p 34).

Joseph Heiman testified at an EBT on January 7, 2019, that he is the president of 51st Homes Realty Inc., not a salaried employee (*see* Notice of Motion, Exhibit G, EBT Transcript p 6, ll 13-25). Heiman is the only officer of the defendant corporation and the "sole stock holder" (*id.* at p 7, ll 8-13, 21-23). Heiman first testified that he is not the owner of the corporation (*see id.* at p 6, ll 21-23). However, when asked whether he "own[s] the corporation and does the corporation own the building located at 1556 51st Street", Heiman testified "Yes" (*id.* at p 7, ll 14-17). In his affidavit, Heiman stated that defendant is the owner of the premises.[2] The premises is the only property owned by the

[2] This Court notes that in support of this motion, Heiman provided an affidavit dated March 28, 2019, for which the notary is undated. This Court further notes that plaintiff did not raise this in opposition herein.

corporation (*see id.* at p 7, ll 24-25; p 8, l 1). Heiman testified that the corporation has owned the premises since 2008 (*see id.* at p 7, ll 18-20).[3]

Heiman further testified that he has lived in the premises since 2011. He and his family reside in the top two floors and a tenant resides on the main floor (*see id.* at p 8, ll 12-25). Heiman testified that he never shoveled snow due to his heart condition (*see id.* at p 17, ll 14-15). "Maybe [the tenant's children] voluntarily [shoveled] if they played in the street" (*id.* at p 18, ll 20-25). Heiman also bought shovels for his five children at a toy store, and he does not remember if they shoveled the sidewalk that abutted the premises (*see id.* at p 20, ll 2-10). Heiman never made any effort to clean or shovel snow and ice or have anyone clear the snow or ice on the sidewalk that abutted the premises (*see id.* at p 25, ll 3-9).

Procedural History

The summons and verified complaint were filed on August 25, 2015. A default judgment was granted on June 15, 2016, by the Hon. Kathy King. On February 3, 2017, Justice King denied defendant's order to show cause to vacate the default judgment. Justice King stated in the decision and order that "while defendant may have become aware of the [default] judgment in this matter as a result of an anonymous phone call on June 26, 2013, the designation of an erroneous mail drop number (#234) filed with the secretary of state, coupled with the 2009 deed evidencing the transfer of the property at

[3] This Court notes that in his affidavit, Heiman alleges that he is the sole member of 51st Homes Realty Inc. since 2009. The New York State Department of State, Division of Corporation records indicate that 51st Homes Realty, Inc., was incorporated on October 21, 2009 (Affirmation in Opposition, Exhibit A).

issue to defendant which shows defendant's address as 5308 13th Avenue, #234, Brooklyn, New York 11219, supports plaintiff's contentions that defendant, has been in fact, attempting to evade service of process" (Decision/Order J. King, February 3, 2017).

Six months later, on August 17, 2017, the Hon. Devin Cohen vacated the default judgment. Issue was joined, discovery completed, and a note of issue was filed on February 26, 2019.

Contentions

Defendant contends that the premises is a two-family, owner occupied, residential only dwelling. Therefore, the defendant is exempt from liability under the New York City Administrative Code § 7-210 and owed no duty to the plaintiff to keep the sidewalk abutting the premises free of snow and ice.

Plaintiff contends that although the property is a two-family dwelling and Heiman, a shareholder, occupies the premises, a shareholder [or a corporations' president's] occupancy is not equivalent to the corporate entity occupying the premises. Further, the New York State Department of State, Division of Corporation records, dated May 20, 2019, indicate that the address for process is 5308 13th Avenue #234, Brooklyn, New York 11219, which differs from the premises address of 1556 51st Street (*see* Affirmation in Opposition, Exhibit A). Defendant states in an affirmation dated July 16, 2016, that the service of process address is an address previously owned by the defendant corporation (*see id.* at Exhibit B ¶ 5). This Court notes that this affirmation was annexed to defendant's motion to vacate the default judgment.

Discussion

Summary Judgment

"[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 absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

> Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions". To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form". Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts"… "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party". "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist". Accordingly, "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned". "[W]here credibility determinations are required, summary judgment must be denied" [internal citations omitted].

(*Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286 [2 Dept., 2019]).

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965

N.E.2d 240 [2012]). 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 (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). "A motion for 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'" (*Chimbo v. Bolivar*, 142 A.D.3d 944, 37 N.Y.S.3d 339 [2 Dept., 2016], quoting *Ruiz v. Griffin*, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2 Dept., 2010]).

New York City Administrative Code § 7-210

"In 2003, the New York City Council enacted section 7–210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalk conditions from the City to abutting property owners… However, this liability-shifting provision does not apply to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes [internal citations omitted]" (*Stubenhaus v. City of New York*, 170 A.D.3d 1064, 96 N.Y.S.3d 662 [2 Dept., 2019], citing Administrative Code § 7–210[b]). "The exemption was provided in recognition that it was inappropriate to expose small-property owners in residence, who have limited resources, to exclusive liability with

respect to sidewalk maintenance and repair [internal quotation marks omitted]" (*Brown v. City of New York*, 162 A.D.3d 733, 79 N.Y.S.3d 255 [2 Dept., 2018], quoting *Johnston v. Manley*, 150 A.D.3d at 1211, 52 N.Y.S.3d 891 [2 Dept., 2017]). "Legislative enactments in derogation of the common law which create liability where none previously existed must be strictly construed" (*Bisono v. Quinn*, 125 A.D.3d 704, 4 N.Y.S.3d 226 [2 Dept., 2015], citing *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d at 521, 860 N.Y.S.2d 429, 890 N.E.2d 191 [2008]). Additionally, "[a]bsent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use" (*Santelices v. City of New York*, 170 A.D.3d 914, 93 N.Y.S.3d 876 [2 Dept., 2019], quoting *Meyer v. City of New York*, 114 A.D.3d 734, 980 N.Y.S.2d 482 [2 Dept., 2014]).

In the instant case, it is undisputed that 51st Homes Realty Inc. owns the property in question and that it is a two-family residential property. It is further undisputed that no person shoveled the sidewalk to clear the snow on behalf of defendant and therefore, defendant did not cause and create the icy condition. At issue herein is whether the two-family property, which is owned by the defendant corporation and occupied by the owner of that corporation, can be considered "owner-occupied" and thereby is entitled to the exemption to tort liability under § 7-210 of the Administrative Code of the City of New York.

The Appellate Division, Second Department, stated in *Boorstein v. 1261 48th Street Condominium*, that "Administrative Code of the City of New York § 7–210(b) does not preclude a corporation from invoking the exemption from liability provisions contained therein" (96 A.D.3d 703, 946 N.Y.S.2d 200 [2 Dept., 2012]; *cf. Gordy v. City of New York*, 67 A.D.3d 523, 887 N.Y.S.2d 847 [1 Dept., 2009]). In *Boorstein*, the premises in question was a three-unit condominium. A condominium is a creature of statute; a legal arrangement that refers to joint and individual forms of ownership.

> The term "condominium" refers to a type of group ownership of multiunit property in which each member of the group has title to a specific part of the improvements to the real property, and an undivided interest with the whole group in the common areas and facilities.[1] Each condominium owner in a multiunit structure has title to the "family unit" in fee simple, while holding an undivided interest in stairways, halls, lobbies, doorways, and other common areas and facilities

(5 Am. Jur. Legal Forms 2d § 64:1).

In *Boorstein*, the defendants submitted affidavits from each of the three unit owners; while two of the units were sublet at the time of the accident, one unit was owner-occupied (*see Boorstein v. 1261 48th Street Condominium*, 30 Misc.3d 1241(A), 929 N.Y.S.2d 198 [Sup. Ct. 2011]). Just as it would be inappropriate to expose one, two, or three-family "small residence" owners to tort liability with respect to sidewalk maintenance and repair, the same can be said about condominium owners, who own a unit in the residence and otherwise satisfy the statutory exemption of § 7-210.

Unlike *Boorstein*, in the instant case, the property is owned by defendant 51st Homes Realty, Inc. The sole purpose of this corporation is the ownership of the property. "The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability but, manifestly, the privilege is not without its limits [internal citation omitted]" (*Walkovszky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6 [1966], citing *Bartle v. Home Owners Co-op.*, 309 N.Y. 103, 127 N.E.2d 832 [1955]).

> As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and consequently, will not impose liability upon shareholders for the acts of the corporation (Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 656, 389 N.Y.S.2d 327, 357 N.E.2d 983). Indeed, the avoidance of personal liability for obligations incurred by a business enterprise is one of the fundamental purposes of doing business in the corporate form (see Rapid Tr. Subway Constr. Co. v. City of New York, 259 N.Y. 472, 487-488, 182 N.E. 145).

(*Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 412 N.E.2d 934 [1980]).

As a separate legal entity, a corporation is responsible for its own debts. That means creditors of a corporation generally can seek payment only from the assets of the corporation - and not from the personal assets of shareholders, directors and officers. Owning property can be a risky proposition with potential for loss and liability, which may impact personal net worth. The formation of a holding company allows an individual to own real estate but protect one's assets. In effect, that means business owners can conduct business without risking their homes, cars, savings, or other personal property.

In this case, although the property is used for residential purposes, this Court is averse to determine that the property is "owner-occupied" simply because it is occupied by Heiman, the only officer of the defendant corporation. There are no indicia that defendant 51 Homes Realty, Inc. occupies the property. Heiman and the defendant corporation are not interchangeable for the purpose of § 7-210. Heiman, by choosing to hold title in a corporate name, is shielded from personal liability and afforded all the benefits derived from incorporation. To afford this real estate holding corporation the added protection of the § 7-210 exemption would be contrary to the legislative intent to protect small property owners with limited resources. Legislative enactments in derogation of common law must be strictly construed. Unlike the condominium owners in *Boorstein*, to construe the § 7-210 exemption to protect real estate holding companies, would be too broad an interpretation. Further, even assuming that the defendant corporation "occupies" the property, this Court would be hard pressed to say that it is exclusively for residential purposes.

Based on the foregoing, defendant failed to meet its burden and establish entitlement to summary judgment based on the exemption to New York City Administrative Code § 7-210. Since the defendant failed to meet its burden, this Court need not address the sufficiency of plaintiff's opposition papers (*see Rivera v. City of New York*, 173 A.D.3d 790, -- N.Y.S.3d – [2 Dept., 2019]).

Conclusion

Accordingly, the defendant motion for summary judgment is denied. Defendant failed to establish entitlement to the exemption to the New York City Administrative Code § 7-210. The premises, which is owned by defendant corporation, cannot be considered "owner-occupied". Anything not decided herein is denied.

The foregoing constitutes the decision and order of this Court.

E N T E R:

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Hon. Lara J. Genovesi
J.S.C.

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