

Gambino v 77 Ave D Supermarket Corp.
2020 NY Slip Op 31784(U)
June 9, 2020
Supreme Court, New York County
Docket Number: 150631/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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JOSE GAMBINO,

Plaintiff,

- v -

77 AVE D SUPERMARKET CORP., C&C APARTMENT
MANAGEMENT LLC., AVENUE D OWNERS LLC., RITE
AID OF NEW YORK, INC., and MADISON SB, LLC.,

Defendants.

-----X

RITE AID OF NEW YORK, INC.,

Plaintiff,

-against-

VOLKS SERVICE CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for JUDGMENT - SUMMARY.

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 565726/2019

In this personal injury action commenced by plaintiff Jose Gambino, defendant Madison SB, LLC (“MSB”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. After a review of MSB’s arguments, the arguments in opposition to the motion, and consideration of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured on February 5, 2015 when he slipped and fell on ice “on the northeast side of East 6th Street, approximately 17 flagstones west of Avenue D and 2 flagstones south of the fence located in front of 79 Avenue D and 77 Avenue D in Manhattan. Doc. 1. On January 26, 2016, plaintiff commenced the captioned action against defendants 77 Ave. D Supermarket Corp. (“Supermarket”), C & C Apartment Management LLC (“C & C”), Avenue D Owners LLC (“Avenue D Owners”), Rite Aid of New York, Inc. (“Rite Aid”), and Madison SB, LLC (“MSB”), claiming that he was injured a result of their negligence. Doc. 1.

C & C joined issue by service of its answer filed April 1, 2016. Doc. 5. It also cross-claimed against the other defendants for, inter alia, contribution, contractual and common-law indemnification, and breach of contract to procure insurance. Doc. 5.

Supermarket joined issue by service of its answer filed April 12, 2016. Doc. 7. Supermarket cross-claimed against the other defendants for contribution and common-law and contractual indemnification. Doc. 7.

Avenue D Owners and Rite Aid joined issue by service of their answer filed April 13, 2016. Doc. 9. Said defendants asserted cross claims against the other

defendants for contribution and common-law and contractual indemnification.

Doc. 9.

MSB joined issue by its amended answer filed August 3, 2016. Doc. 13.

MSB asserted cross claims against the other defendants for contribution, common-law and contractual indemnification, and breach of contract to procure insurance.

Doc. 13.

On October 10, 2016, plaintiff served combined discovery demands on MSB. Doc. 66. The same day, plaintiff served a notice to admit on MSB. Doc. 68. The notice to admit asked, inter alia, whether MSB owned 77 Avenue D and whether it owned a lot next to 77 Avenue D which was enclosed by a chain link fence. Doc. 68. On October 27, 2016, MSB responded to plaintiff's notice to admit. Doc. 15. MSB admitted that it owned 77 Avenue D but denied that it owned the lot next door. Doc. 15.

At the preliminary conference on June 6, 2017, MSB was directed to appear for deposition on September 18, 2017. Doc. 22.

At the compliance conference on October 24, 2017, MSB was directed to appear for deposition on February 9, 2018. Doc. 23.

At the compliance conference on March 6, 2018, MSB was directed to appear for deposition on June 27, 2018. Doc. 27.

At the compliance conference held on October 9, 2018, MSB was directed to appear for deposition on February 7, 2019. Doc. 29.

At the compliance conference held on February 19, 2019, MSB was directed to appear for deposition on April 18, 2019. Doc. 30.

At the compliance conference held on May 28, 2019, MSB was directed to appear for deposition on June 13, 2019. Doc. 33.

On August 22, 2019, Rite Aid commenced a third-party action against Volks Service Corp. (“VSC”), which allegedly had a contract to clean ice and snow from the front of the Rite Aid store located at 87-89 Avenue D. Docs. 35, 39, 42. VSC joined issue by its third-party answer filed October 10, 2019. Doc. 45. VSC cross-claimed against all other defendants for contribution as well as common-law and contractual indemnification. Doc. 45.

At a compliance conference conducted on December 3, 2019, MSB was directed to appear for deposition on April 16, 2020. Doc. 50.

MSB now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Doc. 54. In support of the motion, MSB submits an attorney affirmation; the deed to 79 Avenue D, which reflects that it is owed by Avenue D Owners; the pleadings; the bill of particulars; plaintiff’s deposition transcript; a photograph of the accident site; and the affidavit of Roopa Bhusri, a member of MSB. Docs. 54-64.

At his deposition, plaintiff testified that he fell right next to an empty parking lot located behind a chain link fence. The parking lot was used by Rite Aid to load and unload products. Doc. 62 at 53-62, 154-155.

In his affidavit, Bhusri states that, although MSB owns 77 Avenue D, which is at the corner of Avenue D and East 6th Street, it does not own, control, occupy, lease, clear ice and snow from, or use in any way the lot located next door. Doc. 64.

Plaintiff opposes the motion, arguing that it is premature because MSB has failed to respond to its discovery demands dated October 10, 2016 and to produce a witness for deposition. Docs. 65-67. Alternatively, asserts plaintiff, even if the motion were not premature, MSB failed to establish its prima facie entitlement to summary judgment. Doc. 65.

Rite Aid, Supermarket, Avenue D Owners, C & C and VSC also oppose the motion, adopting plaintiff's arguments. Docs. 72, 73, 75, 76, and 79, respectively.

In reply, MSB argues that the parties opposing the motion failed to produce any evidence establishing that further discovery would yield relevant information. Doc. 78.

LEGAL CONCLUSIONS:

It is well settled that in order to prevail on a motion for summary judgment, a movant "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." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the movant satisfies this burden, the burden then shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 NY2d at 324.

Here, MSB established its prima facie entitlement to summary judgment by submitting Bhusri's affidavit, plaintiff's deposition testimony, the notice to admit and MSB's response thereto, and the photograph of the accident site, on which plaintiff marked the precise location of his fall. The spot marked by plaintiff as the precise location of the accident was in front of the lot and not in front of MSB's building. Doc. 63. Specifically, MSB established that it did not own or control the area in which plaintiff allegedly fell. Although MSB's showing shifted the burden of proof to the parties opposing the motion, none of the latter submitted evidence sufficient to raise a triable issue of material fact.

This Court rejects the argument that summary judgment is premature because all discovery has not been completed. None of the parties opposing the motion provided an evidentiary basis for this Court to conclude that further discovery may lead to relevant evidence. *See* CPLR 3212(4); *Unisol Inc. v Kidron*, 180 AD3d 570 (1st Dept 2020) citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 (1st Dept 2000). Nor have any of the parties opposing the motion shown that MSB had exclusive knowledge of facts needed to oppose the motion. *See Unisol Inc. v Kidron*, 180 AD3d 570, *supra*, citing *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 (1st Dept 2006), *lv denied* 8 NY3d 804 (2007).

Although not raised by MSB, this Court notes that plaintiff's unreasonable delay in pursuing discovery further warrants that the motion be granted. *See Unisol Inc. v Kidron*, 180 AD3d 570, *supra* citing *Unisource, Inc. v Wolfe*, 169 AD2d 567 (1st Dept 1991). Despite the fact that this action was commenced in 2016, the same year in which plaintiff served its combined discovery demands on MSB, plaintiff never moved to compel MSB to provide responses to the said demands. Indeed, this is the first motion made in this action. Doc. 54.

Finally, plaintiff's unsubstantiated claim that the area where plaintiff fell was owned by more than one property owner, as well as his conclusory allegation that MSB's negligent maintenance of the area in front of its building caused or

contributed to the condition in front of the parking lot, do not alter this Court's opinion. *Unisol Inc. v Kidron*, 180 AD3d 570, *supra*.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendant Madison SB, LLC is granted and the complaint and all cross claims asserted against said defendant are dismissed; and it is further

ORDERED that all claims and cross claims against defendant Madison SB, LLC are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Madison SB, LLC dismissing the claims and cross claims asserted against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within 10 days of entry of this order, counsel for defendant Madison SB, LLC is to serve a copy of the same, with notice of entry, on all parties; and it is further

ORDERED that the remaining parties to this action shall appear for a compliance conference on July 28, 2020 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

6/9/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE