De Los Santos v Ft Washington Refm. Church
2021 NY Slip Op 30734(U)
March 10, 2021
Supreme Court, New York County
Docket Number: 158377/2018
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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YOLANDA DE LOS SANTOS,

Plaintiff,

- v -

FT WASHINGTON REFORMED CHURCH, FORT WASHINGTON COLLEGIATE CHURCH,

Defendant.

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INDEX NO. 158377/2018

MOTION DATE 11/05/2020

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

FT WASHINGTON REFORMED CHURCH, FORT WASHINGTON COLLEGIATE CHURCH

Plaintiff,

-against-

CCNY CONSTRUCTION, INC.

Defendant.

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Third-Party
Index No. 595185/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 70

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this personal injury action, Plaintiff Yolanda De Los Santos ("Plaintiff") alleges that she was caused to slip and fall on water and ice accumulating outside a church due to the negligence of Defendant Ft. Washington Reformed Church and Fort Washington Collegiate Church (collectively "Defendant").

Background

Plaintiff alleges that she slipped and fell outside of the church owned by Defendant and located at 729 West 181st Street, New York, New York on January 25, 2016, while attempting to go inside to perform cleaning services. Plaintiff alleges that she was caused to fall due to Defendant's negligence in failing to timely clean up snow and ice on the premises that had accumulated in the days prior. Plaintiff commenced this action on August 23, 2018.

On February 20, 2020, Defendant filed a third-party summons and complaint against CCNY Construction, Inc. ("CCNY") (NYSCEF Doc No. 14), after learning of CCNY for the first time during a deposition of Mr. Lazaro Rodriguez, a custodian employed by Defendant. (NYSCEF Doc No. 41.) CCNY is a construction company that, on the date of Plaintiff's fall, is alleged to have performed construction and renovations at the church. Defendant alleges that CCNY was responsible for maintaining the premises in a reasonable manner and sets forth two claims against it, for common law indemnity and contribution.

Shortly thereafter, Plaintiff filed the note of issue in this case, certifying that all necessary discovery proceedings had been completed. (NYSCEF Doc No. 17.) In response, Defendant filed motion sequence 001, moving pursuant to 22 NYCRR 202.21[e] to vacate the note of issue on the grounds that discovery is incomplete. (NYSCEF Doc No. 19.) Motion sequence 001 is submitted without opposition.

In motion sequence 002, Defendant moves for summary judgment dismissing the complaint, arguing that Plaintiff's deposition entitles Defendant to invoke the "storm in progress" rule. (NYSCEF Doc No. 34.) Motion sequence 002 has been fully submitted and was argued remotely before the court on November 5, 2020.

Finally, in motion sequence 003, Defendant moves to amend the third-party complaint to add a cause of action for contractual indemnification against CCNY. (NYSCEF Doc No. 57.) Motion sequence 003 is submitted without opposition. The motions are consolidated for disposition.

Motion sequence 001

Defendant moves pursuant to 22 NYCRR 202.21[e] to vacate the note of issue on the grounds that discovery is incomplete. Defendant argues that when Plaintiff filed the note of issue on February 25, 2020, Defendant still had multiple discovery demands outstanding, including discovery related to the recently filed third-party complaint. (NYSCEF Doc No. 27.) Based on the submissions, it is clear that discovery is outstanding and as such, this case should not be on the trial calendar. (*Halsey v Stahl York Ave. Co., LLC*, 2015 WL 1094987 [Sup Ct, NY County 2015] ["It is well settled that the court may vacate a note of issue where, as here, it appears that a material fact in it, i.e. the representation that discovery is complete, is incorrect."].) Defendant's motion to vacate the note of issue is granted.

Motion sequence 003

In motion sequence 003, Defendant moves to amend the third-party complaint to add a cause of action for contractual indemnification against CCNY. (NYSCEF Doc No. 56.) This motion is also submitted without opposition. Leave to amend should be freely granted, especially where, as here, no prejudice is claimed (*see Foundos v 240 West 23rd Street Owners Corp.*, 2021 WL 834411 [Sup Ct, NY County 2021]). Accordingly, motion sequence 003, to amend the third-party complaint in the form annexed to the motion, is granted.

Motion sequence 002

In motion sequence 002, Defendant moves for summary judgment dismissing the complaint, arguing that Plaintiff, at her deposition repeatedly admitted that it was snowing at the time of the accident, thus allowing Defendant to invoke the "storm in progress" rule, suspending its duty to perform snow removal until a reasonable time after the storm has ended. In addition, Defendant cites the deposition testimony of Mr. Lazaro Rodriguez, a supervising custodian at the church, who also testified that it was snowing that day.

In opposition, Plaintiff submits an affidavit stating that her statements about the storm in progress were due to misunderstandings resulting from translation errors during her deposition, and that she was unable to comply with the 60-day time limit prescribed in CPLR 3116 for changing her deposition because of the coronavirus pandemic. Plaintiff also submits certified local climatological data from the Department of Commerce, indicating that there was no rain or snowfall on that day. (NYSCEF Doc No. 48.) Plaintiff notes, however, that this data was taken from a climate station in Central Park, "a few kilometers away from the accident location." (NYSCEF Doc No. 44 at ¶ 22-24.)

Defendant replies that Plaintiff's mistranslation argument is disingenuous and a feigned issue of fact conjured solely for the purpose of defeating the motion for summary judgment. Defendant submits an affidavit from Ms. Ana Aquino, the translator who assisted Plaintiff during the January 23, 2020 deposition, stating that "it is not possible that [Plaintiff] misunderstood the attorney's questions or my translation, which was accurate." (NYSCEF Doc No. 54 at ¶ 9.) Regarding the climate records, Defendant states that, although the records indicate that there was no measurable snowfall on the date of the accident, those measurements were taken from the Central Park weather station, which is "a few kilometers away" from the site of the accident.

Defendant argues that, absent an expert affidavit explaining the climate records' relevance to snowfall at the site of the accident, the climate records fail to raise a triable issue of fact sufficient to defeat the motion for summary judgment.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

"[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended." (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007].) "The 'storm in progress' defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkway." (*Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345 [1st Dept 2002] [internal citations omitted].) "Where the evidence in the record is clear that the accident occurred while the storm was still in progress, Defendant may avail themselves of the rule as a matter of law. Indeed, evidence of a

storm in progress presents a prima facie case for dismissal." (*Powell*, 290 AD2d 345 at 345 [internal citations omitted].)

Here, Defendant's argument is that, during her January 23, 2020 deposition, Plaintiff testified on multiple occasions that it was snowing on the morning of January 25, 2016, the day of her accident. Specifically, Defendant points to the following testimony:

> Q. Was the snow coming down?
> A. Yes.
> ...
> Q. That morning, it was still snowing a little bit?
> A. A little bit, yes.
> ...
> Q. It was snowing on this particular day that we're talking about, January 25th, 2016, right?
> A. Yes.
> ...
> Q. Was the snowing coming down at that point [around 6:00 am when Plaintiff had woken up], too?
> A. Yes.
> ...
> Q. Other than waking up at 6 o'clock and seeing the snow and seeing snow during the walk to the church, is that safe to say that you saw snow falling down when you were on the bus and some other time?
> A. Yes, after I was on the bus, yes.
> Q. Do you know one way or the other if at any time the snow stopped between the time you woke up until the time you fell, between 6:00 and 8:30?
> A. Yes, it was stopping and coming again.
> Q. How do you know that?
> A. Because I looking out from the bus.
> Q. Do you know when it was stopping and snowing, specific times?
> A. No.
> Q. When you say that it was on and off --
> A. On my trip on the bus, I would see it.
> Q. By the time you got off the bus, the snow was still coming down?
> A little bit.
>
> (NYSCEF Doc No. 39 at 42, 47, 51, 54, 55.)

Defendant also cites the January 30, 2020 deposition testimony of Mr. Lazaro Rodriguez, a supervising custodian at the church. In response to the question "Do you recall if it was snowing

or what the weather was that day?", Mr. Rodriguez stated that "I remember it was an ugly day, it was very bad and it was snowing." (NYSCEF Doc No. 41 at 22.)

The court finds that issues of fact exist as to whether it was snowing at the time of plaintiff's accident and, as such, Defendant is not entitled to summary judgment based on the storm in progress rule. Defendant rests its entire argument on the deposition testimony of Plaintiff and Mr. Rodriguez. Although the court finds Plaintiff's affidavit alleging mistranslation unavailing, as "[a] party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]), it is possible that she was incorrect, as her deposition took place four years after the date of the alleged accident. (*Morales v Gross*, 137 NYS3d 704, 704 [1st Dept 2021], citing *Powell v MLG Hillside Assoc.*, 290 AD2d 345, 345 [1st Dept 2002] ["In any event, contrary to defendants' contention, the testimony of the parties alone did not establish that the snowstorm was still in progress at the time of the accident, and was therefore insufficient to avail them of the storm in progress defense"].)

Additionally, Plaintiff submits certified climatological data demonstrating that there was no snow or rain on the day of the accident, that there were only trace amounts of precipitation on the day prior, but that it snowed heavily on January 23, 2016. (NYSCEF Doc No. 48.) In response, Defendant fails to submit an expert's affidavit or contradicting climatological data, but only argues that this data, from a Central Park weather station, is in a different location than the site of the accident. (NYSCEF Doc No. 52 at 16-17.) This argument, however, fails to rebut the data set forth in the certified climate records submitted by plaintiff in opposition. (*See Kasem v Price-Rite Office and Home Furniture*, 21 AD3d 799 [1st Dept 2005] [reversing order granting summary judgment on the basis that plaintiff's certified climate data raised a triable issue of material fact,

although data was taken several miles away from the site of the accident].) Defendants fail "to submit any evidence to support [the] contention that the weather reports do not accurately reflect the weather conditions at the location where [Plaintiff] fell." (*Morris v City of New York*, 2010 WL 4053090 [Sup Ct, NY County 2010].) Based on the submissions, Defendant has failed to demonstrate that there are no material issues of fact in dispute, and thus, motion sequence 002 for summary judgment is denied. It is hereby

ORDERED that Defendant's motion sequence 001 to vacate the note of issue is granted, and the note of issue is hereby vacated and the action stricken from the trial calendar, and it is further

ORDERED that all further discovery in this matter shall be completed within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that Defendant's motion sequence 002 for summary judgment is denied; and it is further

ORDERED that Defendant's motion sequence 003 to amend the third-party complaint is granted, and the amended third-party complaint in the proposed form annexed to the moving papers (NYSCEF Doc No. 65) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that CCNY, the third-party defendant, shall serve an answer to the amended third-party complaint or otherwise respond thereto within 20 days from the date of said service.

03/10/21
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE