Torchia v Manhattan Plaza Inc.
2022 NY Slip Op 32628(U)
August 4, 2022
Supreme Court, New York County
Docket Number: Index No. 160177/2020
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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NANCY TORCHIA,

Plaintiff,

- v -

MANHATTAN PLAZA INC., RELATED MANAGEMENT COMPANY, L.P., and THE RELATED COMPANIES, L.P.,

Defendants.

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INDEX NO. 160177/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37

were read on this motion to/for DISMISS.

In this premises liability action, defendants Manhattan Plaza Inc., Related Management Company, L.P., and The Related Companies, L.P. move, pursuant to CPLR 3211(a)(1), 3211(a)(7), and 3212, for an order dismissing the complaint as against defendant The Related Companies, L.P. Plaintiff Nancy Torchia opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, defendants' motion is decided as follows.

Factual and Procedural Background

Plaintiff, a resident of the State of New York, commenced this negligence action against defendant Manhattan Plaza Inc. ("Manhattan Plaza") after she was allegedly injured when she tripped over a water hose on the sidewalk in front of 400 West 43rd Street in Manhattan ("the premises") (Doc No. 28 at 3-4). In her complaint, plaintiff alleged, among other things, that Manhattan Plaza owned and managed the premises (Doc No. 1 at 1-2). Following joinder of issue (Doc No. 3), plaintiff moved for leave to amend her complaint to add defendants Related

Management Company, L.P. ("Related Management") and The Related Companies, L.P. ("Related") as additional defendants (Doc No. 9). In her moving papers, she again alleged that Manhattan Plaza owned and managed the premises and also asserted that Related and Related Management were management companies which owned and managed the premises (Doc No. 10 at 1; Doc No. 15 at 3-6). By order entered November 11, 2021, this Court granted plaintiff leave to amend her complaint to name Related and Related Management as additional defendants (Doc No. 20).

Defendants now move, pursuant to CPLR 3211(a)(1), 3211(a)(7), and 3212, for an order dismissing the complaint as against Related (Doc No. 24). In support of its motion, defendants submit, among other things, plaintiff's amended complaint, defendants' answer to the amended complaint, plaintiff's bill of particulars, and an affidavit from David Katz, Related's Vice President (Doc Nos. 26-29). The Katz affidavit expressly provides that Related had no "direct legal interest, ownership interest or day-to-day involvement with the premises" as of the date on which plaintiff suffered her alleged injuries (Doc No. 29). Plaintiff opposes the motion, arguing that defendants' documentary evidence does not refute the premises liability claim, that it has properly alleged such claim against Related, and that summary judgment under CPLR 3212 is premature because there are outstanding depositions (Doc No. 34).

Legal Conclusions

Defendants' Request for Dismissal Under CPLR 3211(a)(1)

The documentary evidence submitted by Related fails to utterly refute plaintiff's claim. First, contrary to Related's contention, plaintiff's amended complaint clearly contains an allegation that Related — not just Manhattan Plaza — owned, operated, maintained, and controlled the premises (Doc No. 20 at 2-4). Second, affidavits "[are] not documentary evidence

within the meaning of CPLR 3211(a)(1)" (*Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2012] [internal quotation marks and citations omitted]; *see Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]). Thus, Katz's representation that Related was not involved with the premises in any way on the date of plaintiff's alleged accident is insufficient to refute plaintiff's claim (*see Tsimerman*, 40 AD3d at 242).

Third, and finally, although a verified answer may be considered as documentary evidence (*see Beagle v Parillo*, 116 AD2d 856, 857 [3d Dept 1986]), defendants' admission that Manhattan Plaza owned the premises does not utterly refute plaintiff's claim that Related is also liable for the premises (Doc No. 27 at 2). "As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011] [citations omitted]; *see Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2d Dept 2008]). Manhattan Plaza's admitted ownership of the premises does not eliminate the possibility that Related also has some relationship to the premises, whether through ownership, occupancy, control, or special use, that could render Related liable to plaintiff (*see Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235 [2d Dept 2019]). Therefore, defendants have not sufficiently refuted plaintiff's claim against Related (*see Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018]).

Defendants' Request for Dismissal Under CPLR 3211(a)(7)

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on [a] defendant's part to plaintiff, breach of the duty[,] and damages" (*Orlando v New York Homes By J & J Corp.*, 128 AD3d 784, 785 [2d Dept 2015] [internal quotation marks and citations omitted]; *see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d

579, 584-586 [1994]). A duty of care arises when a dangerous or defective condition exists on property owned, occupied, controlled, or used in a special way (*see Tilford*, 170 AD3d at 1235). Plaintiff alleges in her amended complaint that Related owed her a duty of care since it owned, managed, maintained, and controlled the premises (Doc No. 20 at 2-4). Plaintiff further alleges that Related and the other defendants breached that duty of care by failing to address the allegedly dangerous condition at the premises, and that she was injured when she fell due to that dangerous condition (Doc No. 20 at 5-8). Therefore, accepting all the facts alleged in the amended complaint as true, and according plaintiff the benefit of every possible inference, plaintiff has demonstrated that she has a cause of action sounding in negligence against Related (*see Velez v Captain Luna's Mar.*, 74 AD3d 1191, 1192 [2d Dept 2010]).

Defendants' Request for Summary Judgment Dismissing the Complaint

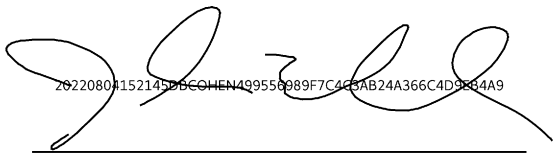
Contrary to plaintiff's contention, summary judgment is not premature at this stage since she has filed a note of issue and certificate of readiness in which she represented that all discovery has been completed (*see Burke v Yankee Stadium, LLC*, 146 AD3d 720, 721 [1st Dept 2017]; *Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013]). However, since defendants failed to submit a statement of undisputed facts, the branch of their motion seeking summary judgment dismissing the complaint as against Related is denied with leave to renew upon proper papers (*see* 22 NYCRR 202.8-g [e]).

The parties' remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint as against defendant Related pursuant to CPLR 3212 is denied with leave to renew

upon proper papers within 30 days after the entry of this order pursuant to 22 NYCRR 202.8-g, and the motion is otherwise denied.



8/4/2022
DATE

DAVID B. COHEN, J.S.C.

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