Bryan v Yu
2024 NY Slip Op 32207(U)
June 17, 2024
Supreme Court, Kings County
Docket Number: Index No. 526271/2020
Judge: Ingrid Joseph
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 17th day of June 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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Index No: 526271/2020

JUDY BRYAN,

Plaintiff(s)

-against-

CINDY YU, SAMMY YU, and PATRIOT MOBILITY INC.,

Defendant(s)

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ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support /Affidavits Annexed Exhibits Annexed/Reply..........	24-37; 73
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed...........	40-51; 54
Notice of Motion/Affirmation in Support /Affidavits Annexed Exhibits Annexed/Reply..........	56-53; 69-72
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed...........	64; 67

In this action, Patriot Mobility Inc. ("Patriot") moves (Motion Seq. 1) pursuant to CPLR 3211 or 3212 to dismiss Judy Bryan's ("Plaintiff) complaint and any and all cross-claims asserted against Patriot on the ground that Patriot did not owe a duty to Plaintiff nor was aware of any alleged defective condition that caused Plaintiff's alleged injuries. Plaintiff has opposed the motion. Additionally, Cindy Yu and Sammy Yu ("Yu Defendants") cross-move (Motion Seq. 2) for summary judgment dismissing Plaintiff's complaint and any cross-claims against them on the ground that there is no genuine issue of material fact concerning liability. Plaintiff and Patriot have opposed the motion.

This matter arises from an alleged accident that occurred on or about May 12, 2019, in front of the subject premises located at 106 Euclid Ave in Brooklyn, New York. Plaintiff, a home healthcare aid, alleges she was injured as a result of a wheelchair lift that malfunctioned while lifting her patient, non-party James Iacono ("Iacono"), resulting in the lift falling forward off its track and on top of Iacono, and a portion of the track striking the Plaintiff. The Yu defendants are the homeowners of the property and Defendant Patriot is a corporation that provides home accessibility equipment to disabled individuals.

In support of its motion, Patriot argues that Plaintiff's negligence claim against it must be dismissed because Patriot never owed a duty to her or the Yu Defendants. Patriot states neither Plaintiff nor the Yu Defendants were parties to an agreement that it had with the Department of Veteran Services regarding the instillation of the wheelchair lift, and that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. Patriot claims that it only contracted to

install the wheelchair lift on the Yu Defendants' property at the request of the Veteran's Administration and that the agreement does not contain any provisions requiring Patriot to perform any maintenance or repairs for the wheelchair lift. Additionally, Patriot states that it was never notified of any alleged defective conditions or complaints regarding the wheelchair lift prior to the subject accident. In support, Patriot submits an affidavit from mechanical engineer Leonard Parkin P.E., ("Parkin") who states that based on his analysis of the evidence and in his professional opinion, that the accident was not the result of any readily observable mechanical defect of the subject wheelchair lift and that it occurred suddenly and without warning. Patriot argues that the wheelchair lift failed because a plastic portion of the structure snapped as a result of a breakdown of the materials due to long term use. Patriot also submits an affidavit from Iacono who states that on the date of the accident, that while he was operating the wheelchair lift, it malfunctioned or broke causing the chair to flip over. Iacono claims that he landed on the bottom of the stairs with the lift on top of him and that Plaintiff was not sitting on the chair when it flipped over nor was she underneath or near him when he landed. Iacono asserts that as he was going up the lift, Plaintiff was standing on the steps and after the lift was removed from on top of him that Plaintiff was still standing on the steps and that she did not appear to be injured. Additionally, Patriot cites EBT testimony from Plaintiff, Edmund Ippolito ("Ippolito"), the owner of Patriot Mobility Inc., and the Yu Defendants, wherein the parties testified that they did not know each other prior to this lawsuit and were not aware of Patriot's instillation agreement, thus there is no basis for any claim that the Plaintiff and/or the Yu Defendants relied upon Patriot for its continued performance or any obligations regarding the subject wheelchair lift beyond its instillation.

In opposition, Plaintiff argues that Patriot has failed to meet its burden of proof in moving for summary judgment. The Yu Defendants incorporate by reference arguments raised by Plaintiff. Plaintiff asserts that Patriot failed to submit any inspection records as to when the subject wheelchair lift was last inspected prior to the accident and that Patriot has not established whether there was a maintenance agreement in place after initial instillation, thus raising triable issues of fact as to whether Patriot created or contributed to the defective condition. In support Plaintiff submits her EBT testimony, wherein she states that prior to the accident, that there were times where the wheelchair lift was not working and that Iacono had to call for repairs to be made.[1] Plaintiff also cites testimony from Cindy Yu, wherein she testified that Patriot installed the wheelchair lift and that he Department of Veteran Affairs told them that Patriot would "take care of it," but that she was unaware if Patriot ever came back to maintain or inspect the lift.[2] Additionally, Cindy Yu testified that occasionally Iacono would mention that the chair would not

[1] (Plaintiff Dep. Pg. 21 lines 4-7; 61 lines 7-25; 62 lines 21).
[2] (Defendant Cindy Yu Dep. Pg 20 lines 18-19; 24-25; 21 lines 2-19).

work, but that she was not aware of who would be called to make any necessary repairs.[3] Cindy Yu testified that neither she nor her family would ever touch or make any repairs to the subject lift.[4] Plaintiff cites Ippolito's EBT testimony, wherein he testified that on occasion Patriot may have come back to the accident location after initial instillation to replace batteries for the chair lift and that at times if a customer had an issue with equipment that they would call either himself, the Veteran's Association or both to address their concerns.[5] Additionally, Plaintiff submits photographs of the chairlift to demonstrate constructive notice in that the defective condition existed openly for a sufficient enough length of time for it to have been repaired.

In support of their cross-motion for summary judgment, the Yu Defendants argue that they did not create the alleged defective condition nor had any notice of its existence. The Yu Defendants cite Plaintiff's EBT testimony, wherein she testified that she never observed any problems with the wheelchair lift prior to the accident, and that she never made any complaints to the Yu Defendants about the wheelchair lift, nor did the Yu Defendants ever inform her of any defects.[6] Additionally, the Yu Defendants argue that they did not direct, supervise, or control the manner of work performed by Patriot and thus cannot be liable for its independent and/or negligent acts.

In opposition, Plaintiff argues that the Yu Defendants have failed to meet their burden of proof in moving for summary judgment because they have failed to submit any proof of inspection or maintenance records for the wheelchair lift. Additionally, Plaintiff asserts that the submitted photographs demonstrate that the defective condition existed for a sufficient length of time for it to have been repaired or at very least, for the Yu Defendants to have reported to the appropriate party that it needed to be repaired.

In partial opposition, Patriot reiterates that it never assumed any obligation for maintenance of the subject wheelchair lift because it never contracted with any of the parties nor did it assume responsibility over its maintenance by custom and practice, and thus does not owe them any duty. Additionally, Patriot states that the Yu Defendants failed to submit evidence to establish that it assumed their non-delegable duty to maintain a safe premises. Patriot does not dispute that no one was on notice of any defects regarding the lift.

It is well established that "the 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 the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago,* 107 AD3d 977 [2d Dept 2013]). Once

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[3] (Defendant Cindy Yu Dep. Pg 38 lines 6-25; 39 lines 2-5).
[4] (Defendant Cindy Yu Dep. Pg. 22 lines 20-23; 31 lines 2-6).
[5] (Ippolito Dep. Pg. 25 lines 21-25; 25 lines 2-6; 28 lines 20-25; 29 lines 7-13; 30 lines 12-25; 32 lines 3-14; 19-23; 40 lines 8-15; 41 lines 11-21).
[6] (Plaintiff Dep. Pg. 20 lines 14-25; 21 lines 2-3; 8-9; 58 lines 8-12; 63 lines 17-25; 64 lines 2-16).

a prima facie demonstration has been made, the burden 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. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

A finding of negligence must be based on the breach of a duty, wherein a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120 [2002]). The general rule is that a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Id.*). There are only three limited situations where a party's contractual obligation may be deemed to give rise to a duty of care toward noncontracting third-parties, so as to render such contracting party potentially liable in tort to the injured third-party (*Id.* at 140; *H.R. Moch Co. v Rensselear Water Co.,* 247 N.Y. 160 [1928]; *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.,* 76 N.Y.2d 220 [1990]; *Palka v Servicemaster Management Services Corp.,* 83 N.Y.2d 579 [1994]). The first situation is where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk, described as launching a force or instrument of harm (*Espinal* at 140). The second situation arises where a plaintiff has suffered an injury by reason of the plaintiff's reasonable reliance on the defendant's continued performance of its contractual obligations (*Id.*). The third arises when the contractor has entered into a contract that constitutes a "comprehensive and exclusive" property maintenance agreement that completely displaces the owner's duty to maintain the premises in a safe condition (*Id.*).

In a premises liability case, a defendant who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition that allegedly caused the accident nor had actual or constructive notice of its existence (*Castillo v Silvercrest*, 134 AD 3d 977 [2d Dept. 2015]); *Cosme v New York City Department of Education*, 221 AD3d 875 [2d Dept. 2023]; *Caban v Kem Realty, LLC*, 172 AD3d 1302 [2d Dept. 2019]; *Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693 [2d Dept. 2018]; *Kyte v Mid-Hudson Wendico, Inc*., 131 AD3d 452 [2d Dept. 2015]). To establish constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (*Cosme* at 859; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). To meet its initial burden on the

issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (*Id.*; *Tuck v Surrey Carlton Housing Development Fund Corp*., 208 AD3d 1383 [2d Dept. 2022]). Constructive notice will not be imputed where the defect is latent, i.e., where the defect is of such a nature that it would not be discoverable even upon a reasonable inspection" (*Lee v Bethel First Pentecostal Church of America, Inc*., 304 AD2d 798 [2d Dept. 2003]; *Ferris v. County of Suffolk*, 174 AD2d 70 [2d Dept. 1992]). The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect (*Monroe v. City of New York*, 67 AD2d 89 [2d Dept. 1979]; see *Pittel v. Town of Hempstead*, 154 AD2d 581 [2d Dept. 1989]).

Here, the court finds that Patriot has not established that it did not create the defective condition, nor lacked knowledge of its existence. With respect to the Agreement between Patriot and the Department of Veteran Services, the Service Agreement Provision states that "the Vendor does not offer Service Agreements. The Service Agreement Vendor will perform annual maintenance when scheduled by the customer at an additional cost of $225." However, parties have not submitted any evidence to establish if annual maintenance was ever scheduled regarding the subject wheelchair lift. Additionally, the submitted Agreement raises questions of fact as to what third party obligations, if any, the parties have regarding inspection, maintenance, or repairs of the equipment. Moreover, the conflicting testimonies of Cindy Yu and Ippolito raises triable issues of fact as to whether Patriot assumed any responsibility in providing any maintenance services for its equipment.

On the issue of notice, Patriot has failed to proffer admissible evidence as to if or when the wheelchair lift was last inspected or repaired prior to Plaintiff's accident. Additionally, Cindy Yu testified that at some point between 2014-2018, the wheelchair lift was replaced, to which parties have failed to address who replaced it or submit any records regarding its replacement.[7] Thus, movant has failed to establish its prima facie burden for entitlement to summary judgment as to liability, thus there is no need to consider opposing parties' opposition in rebuttal.

Accordingly, that branch of Defendant Patriot's motion for summary judgment to dismiss Plaintiff's complaint pursuant to CPLR 3212 is denied.

Upon a motion to dismiss pursuant to CPLR 3211 (a)(1), dismissal is warranted where documentary evidence refutes plaintiff's factual allegations and establishes a defense as a matter of law (*Leon* at 88; *Goshum v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Brio v Roth*, 121 A.D.3d 733 [2d Dept. 2014]).To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable," such as judicial records and documents reflecting out-of-court transactions

[7] (Cindy Yu Dep. Pg 37 lines 19-25; 38 lines 2-5).

such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010]; *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Xu v Van Zqienen,* 212 A.D.3d 872 [2d Dept. 2023]; *Phillips v Taco Bell Corp.,* 152 A.D.3d 806 [2d Dept. 2017]; *Fontanetta v John Doe 1,* 73 A.D.3d 78 [2d Dept. 2010]). Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Assn, Inc., v County of Rockland,* 227 A.D.2d 547 [2d Dept. 1996]; *Greene v Doral Conference Center Associates,* 18 A.D.3d 429 [2d Dept. 2005]); *Penato v. George*, 52 A.D.2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.,* 29 N.Y.3d 137 [2017]; *Duncan v Emeral Expositions LLC,* 186 A.D.3d 1321 [2d Dept. 2020]; *Dinerman v Jewish Bd. of Family & Children's Services Inc.,* 55 A.D.3d 530 [2d Dept. 2008]; *Nisari v. Ramjohn*, 85 A.D.3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence "conclusively refutes plaintiff's factual allegations (*Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]; *Kolchins v Evolution Mkts. Inc.,* 31 NY3d 100 [2018]; *Goshen v Mutual Life Ins. Co. of NY,* 98 NY2D 314 [2002]).

Here, the court finds, that the documentary evidence submitted does not utterly refute Plaintiff's allegations that Patriot had a duty to keep its equipment reasonably safe, with due care for the safety of its users and/or passersby at the premises, which it failed to do.

Accordingly, that branch of Defendant Patriot's motion to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(1) is denied.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc*., 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co*., 5 NY3d [2005]).

On a motion made pursuant to CPLR 3211(a)(7) to dismiss a complaint, the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc*., 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to

be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boeheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To plead a cause of action for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Solomon by Solomon v City of New York,* 66 N.Y2d 1026 [1985]). As a general rule, breach of contract does not give rise to tort liability unless a legal duty independent of the contract has been violated (*Teller v Bill Hayes, Ltd.,* 213 A.D.2d 141 [1995]; *Clark-Fitzpatrick Inc. v Long Island R. Co.,* 70 N.Y.2d 382 [1987]). Absent this legal duty independent of the contract, a claim for negligence is merely a restatement of the contractual obligations asserted in the cause of action for breach of contract (*Clark-Fitzpatrick Inc.* at 390). Where plaintiff essentially seeks enforcement of the bargain, the action should proceed under a contract theory (*Id.; Sommer v Federal Signal Corp.,* 79 N.Y.2d 540 [1992]).

Here, Plaintiff's claim for negligence stems in part from allegations that Patriot owed Plaintiff a duty to keep its equipment reasonably safe, with due care for the safety of its users and/or passersby at the premises and that Patriot breached this duty by causing, allowing and/or permitting the wheelchair lift to become improperly fastened, loose, and/or broken creating a defective condition which caused Plaintiff's accident. Thus, Plaintiff has adequately plead a cause of action for negligence.

Accordingly, that branch of Defendant Patriot's motion to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(7) is denied.

With respect to the Yu Defendants' motion for summary judgment, the court finds that has not established that it did not create the defective condition, nor lacked knowledge of its existence. Generally, an owner of land has a duty under the common law to maintain its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Kellman v 45 Tiemann Assoc.,* 87NY2d 871 [1995]; *Basso v Miller,* 40 NY2d 233, 241 [1976]). In most cases, a party who retains an independent contractor is not liable for an independent contractor's negligent acts (*Allstate Vehicle & Property Insurance Company v Glitz Construction Corp.*, 214 AD3d 691 [2d Dept. 2023]). Control of the method and means by which the

work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability (*Id.*; *Sanabria v Aguero-Borges*, 117 AD3d 1024 [2d Dept. 2014]; *Meehan v County of Suffolk*, 144 AD3d 640 [2d Dept. 2016]). Whether a worker is an independent contractor or an employee for the purposes of tort liability is usually a factual issue for the jury. However, where there is no conflict in the evidence, the question may properly be determined as a matter of law (*Lombardi v. Alpine Overhead Doors, Inc.*, 92 AD3d 921 [2d Dept. 2012]).

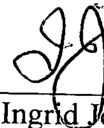
Here, the court finds that while the Yu Defendants did not install the wheelchair lift, it is undisputed that they are the property owners and they have failed to submit admissible evidence to establish that they did not have control and/or fully relinquished control of its repairs and maintenance to another party. While Yu Defendants argue that they did not have a duty to Plaintiff because this action does not regard a defect on their property that they failed to remedy but rather a defect on equipment installed on their property, the record before the court cannot determine at this time what parties agreed to and what responsibilities, if any, the parties have with respect as to the inspection, maintenance, or repairs of the equipment. Additionally, Cindy Yu testified that she was aware that the lift would not work on occasion prior to the accident, but does not state who would address equipment concerns or repairs.[8] Furthermore, while Cindy Yu testified that they did not keep any maintenance or inspection logs regarding the wheelchair lift, Sammy Yu testified that he and his sister Cindy Yu would inspect the property every so often.[9] Thus, movants have failed to establish their prima facie burden for entitlement to summary judgment because there are questions of fact as to what obligations, if any, the parties have regarding inspection, maintenance, or repairs of the equipment..

Accordingly, it is hereby,

ORDERED, that Defendant Patriot Mobility Inc.'s motion (Motion Seq. 1) for summary judgment to dismiss Plaintiff's complaint pursuant to CPLR 3212 or to dismiss pursuant to CPLR 3211 is denied, and it is further,

ORDERED, that Defendants Cindy Yu and Sammy Yu's motion (Motion Seq. 2) for summary judgment, is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[8] (Cindy Yu Dep. Pg 38 lines 16-21).
[9] (Cindy Yu Dep. Pg. 26 lines 4-14; Sammy Yu Dep. Pg. 29 lines 16-19; 30 lines 2-25).