

Sharples v Shurgett LLC

2016 NY Slip Op 30393(U)

January 22, 2016

Supreme Court, Queens County

Docket Number: 708064/14

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

Ronald A. Sharples, , Index No: 708064/14
Plaintiffs,

-- against -- Motion Date: 11/02/15

Shurgett LLC and Getty Seq. No: 2
Petroleum Marketing Inc.,
Defendant.

Shurgett LLC,
Third-Party Plaintiff,

-- against --

Rock & Sutphin Gas Corp.,
Third-Party Defendant.

FILED
JAN 27 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 9 were read on this motion by defendant Shurgett LLC for an Order pursuant to CPLR §3212 granting Summary Judgment to Defendant Shurgett LLC dismissing all claims asserted by Plaintiff.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion, Answering Affirmations, Reply Affirmations, and Other.

Upon the foregoing papers, the motion is disposed of as follows:

Plaintiff brings the within action for personal injuries sustained on June 27, 2014 in a trip and fall accident over an inverted "U" shaped bollard/pipe in close proximity to the register at a gas station located at 149-20 Rockaway Boulevard, Queens, NY. Defendant Shurgett LLC and Getty Petroleum Marketing, Inc. are the out of possession landowners of said premises. Co-defendant Getty has failed to appear in the action The premises were leased to third-party defendant Rock & Sutphin Gas. Corp.

pursuant to a twenty year triple net lease.

Pursuant to the lease agreement, the tenant R & S was responsible for all expenses including maintenance, improvements, replacements, all structures and equipment, sidewalks, gasoline pumps, taxes, utilities, insurances, licenses, permits fees and fines.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the courts function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

In the within motion Shurgett LLC claims, inter alia, that since they are an out of possession landlord with a triple net lease transferring responsibility to the tenant for maintenance they are not liable as a matter of law as long as the landlord did not retain control of the premises or is some other way contractually obligated to repair unsafe conditions.


Plaintiff claims that the motion is premature and needs the completion of discovery in order to properly defend it. More specifically plaintiff claims that the very nature of the discovery they need is in the sole possession of the defendant. Plaintiff further claims that since movant Shurgett LLC retained the right to enter the premises to make repairs or alterations in the lease they should be allowed to explore whether movant's conduct in this case constituted "retaining control sufficient to

defeat the motion. More specifically plaintiff seeks to obtain information regarding the installation of the subject bollard including when it was installed, who paid for the installation of the bollard and further to explore a course of conduct sufficient to raise triable issue of fact.

Accordingly the motion is denied without prejudice to renew upon the completion of discovery including depositions.

This constitutes the Order of the Court.

Dated: January 22, 2016


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Leonard Livote, A.J.S.C.

FILED
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