Kramer v Macerich Prop. Mgt. Co., LLC
2012 NY Slip Op 30805(U)
March 29, 2012
Supreme Court, Queens County
Docket Number: 6672/2010
Judge: Allan B. Weiss
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Weiss
Justice

IA Part 2

BRUCE KRAMER and KAREN KRAMER,

Plaintiffs,

-against-

MACERICH PROPERTY MANAGEMENT CO., LLC. MACERICH QUEENS LIMITED PARTNERSHIP, CONTROL FACILITY SERVICES, LLC and UNITED PARCEL SERVICE GENERAL SERVICES CO.,

Defendants.

x Index Number 6672 2010

Motion Date Jan. 25 2011

Motion Cal. Number 15

Motion Seq. No. 3

x

The following papers numbered 1 to 39 read on this motion by Macerich Property Management Company LLC, Macerich Queens Limited Partnership and Control Facility Services, LLC (hereinafter referred to collectively as the Macerich defendants) to dismiss the complaint pursuant to CPLR 3212; cross motion by United Parcel Service, Inc. (UPS), i/s/h/a United Parcel Service General Services, Company, to dismiss the complaint pursuant to CPLR3212, and, alternatively, to strike the answer of the Macerich defendants pursuant to CPLR 3126 and for summary judgment against the Macerich defendants on UPS' cross claims for indemnification due to co-defendants' spoliation of evidence; and cross motion by plaintiff to strike the answer of the Macerich defendants for spoliation of evidence.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 18
Notices of Cross Motions- Affidavits- Exhibits	19 - 29
Answering Affidavits - Exhibits	30 - 35
Reply Affidavits	36 - 39

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff Bruce Kramer and his wife, suing derivatively, seeks damages in this negligence action for personal injuries sustained by Bruce Kramer (herein "plaintiff"), in an accident at the Queens Center Mall loading dock, in Queens, New York. The complaint alleges that on July 16, 2007, plaintiff in the course of his employment with ABF Freight Systems, was on a loading platform preparing to make a delivery from his truck when he stepped onto a step stool/temporary staircase and fell to the ground. The complaint also alleges that UPS constructed the temporary staircase or placed the step stool in the loading dock. Macerich Queens Limited Partnership owns the Queens Center Mall. Through its management company, Macerich Property Management Company, MQLP engaged the services of Control Facility Services to provide maintenance throughout the building and that included the policing and maintenance of the loading bay at which plaintiff had his accident. The Macerich defendants move to dismiss the complaint on the ground that it provided a safe egress to and exit from its premises. UPS cross moves to dismiss the complaint, and, alternatively, to strike the answer of the Macerich defendants for spoliation of a surveillance video of plaintiff's accident, and for summary judgment on its cross claims for indemnification. Plaintiff also cross moves to strike the answer of the Macerich defendants for spoliation of evidence. The motion and cross motions are opposed by the respective parties.

Facts

Upon his examination before trial, plaintiff testified as follows: plaintiff intended to deliver a pallet of boxes to the Queens Center Mall and arrived there at approximately 12:20 p.m. He entered the Mall's 57th Street garage entrance, descended an incline to the Mall's basement delivery level, noticed that the loading areas were occupied with other vehicles and parked his vehicle. The plaintiff entered the Mall to notify security that he was making a delivery and was accompanied back down to the loading area by an employee of mall security. Plaintiff described the surroundings as consisting of a loading platform raised five feet above two parking spaced used by delivery trucks. On one side of this raised platform was an inclined ramp with guardrails leading from the parking area to the loading dock surface, on the opposite end there was a yellow and black step stool leading to the same. After plaintiff had returned to the loading dock with the mall security guard, he intended to park his truck in a vacated slip adjacent to the dock and noticed the set of stairs (the step stool). After plaintiff moved across the loading platform, he stepped down onto the step stool with his right foot; the step stool slipped out from underneath him thereby causing plaintiff to fall to the surface below.

Four months later when plaintiff returned to work, he learned from a co-worker (Donahue), that a security guard had shown Donahue a surveillance video that memorializes the accident.

UPS was deposed in the person of Jairo Reyes, a driver for UPS that personally witnessed plaintiff's fall. Reyes testified as follows: He has been making deliveries to the Queens Center Mall since 1997, and had his UPS vehicle parked in the space closest to the ramp on the day of plaintiff's accident. Reyes observed plaintiff walk across the surface of the loading dock, step down on the step stool and fall to the ground after the steps tipped over. Sometime afterwards, mall security came to plaintiff's assistance.

Significantly, Reyes testified that he had observed the step stool in the same position since he began making deliveries to Queens Center Mall in 1997. In fact, prior to plaintiff's accident, Reyes had used the same step stool "numerous times" without incident or complaint and had observed "everybody" using it, including "other drivers, mall security, mall maintenance, the fire department". Reyes, a UPS driver since 1990 had no knowledge of any "connection" between the step stool and UPS or any knowledge as to who owned it or placed it there. In fact, the step stool had already been placed there when he began his deliveries in 1997.

Jeffrey Owen, property manager at Queens Center Mall, testified as follow: MQLP owns the property, and MPMC operates and manages the same property. MPMC employed approximately fifty-five people in security, leasing and property operations. MPMC contracted with Control for housekeeping, repair and maintenance services at the time of plaintiff's accident. As part of MPMC's management, they maintain surveillance cameras throughout the mall, including in the area where plaintiff fell. Such recordings are stored on a hard drive and periodically erased, however in the event of an incident such as plaintiff's fall, the recording of the same is segregated and preserved. Owen testified that the security employee responsible for surveillance would have been obligated to do the same for the accident at issue, admitted that at least some of plaintiff's accident was recorded and that the recording was viewed by a security supervisor and at some point disposed of. Owen further testified that safety at the Queens Center Mall, including in the loading area, falls under his responsibilities. He testified that Mall security visits the loading area on a daily basis and is obligated to report unsafe conditions. In fact, Owen testified, Control, which is also obligated to address unsafe conditions and remove debris, took possession of the step stool that allegedly caused plaintiff to fall and placed it in storage. Owen had no personal knowledge as to who (originally) placed the step stool at the location or for how long it had been there. He admits that the idea that UPS might have placed the step stool at the loading dock is merely based on assumption and that no one actually saw such an act.

Alex Arizmendi, project manager for Control, testified on behalf of Control, as follows: he supervises ninety-three employees at the Queens Center Mall that are responsible for janitorial and maintenance services, including the loading area where plaintiff fell. One of his employees is obligated to inspect the loading area at least once a day and clear it of debris. If an employee came across an unsafe condition, it would be reported to him. Even Arizmendi would patrol the area on a daily basis. Arizmendi could not say (did not know) who had placed the step stool in the loading area. Arizmendi confirms that the loading area's entrance includes a security booth manned by a MPMC employee. Arizmendi was first notified of plaintiff's accident during a conversation with Steve Turchin, Operations Manager for the Queens Center Mall, and an employee of MPMC. Two of Arizmendi's employees were ordered by Turchin to remove the stool. Arizmendi had never heard of any connection between the placement or use of the step stool and Reyes or UPS.

Arizmendi also submitted an affidavit in which he avers that "persons desiring to ascend to or descend from the loading dock can travel up a ramp that is permanently affixed to the property."

Finally, plaintiffs submitted the affidavit of an expert, Stanley Fein, who opined that the "step way constituted a serious and dangerous circumstance . . . not fit for use as an access or step way onto the top of the loading platform." Fein further notes that the step stool was light in weight and would "easily slip on the concrete and would not provide a firm base for someone to use to reach the loading dock platform." Additionally, according to Fein, the absence of a handrail on the open side of the step stool allowed for an accident exactly as that described by [plaintiff].

<u>Motion by the Macerich defendants</u>

The branch of the motion by the Macerich defendant which seeks summary judgment dismissing the complaint, insofar as asserted against them, is denied. Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (*Bennett v Weber Job Lot Corp.,* --- N.Y.S.2d ----, 2012 WL 833214; *see Ellers v Horwitz Family Ltd. Partnership,* 36 AD3d 849 [2007]; *Franks v G & H Real Estate Holding Corp.,* 16 AD3d 619 [2005]). A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk (*Basso v Miller,* 40 NY2d 233, 241 [1976]; *Zuk v Great Atl. & Pac. Tea Co ., Inc.,* 21 AD3d 275 [2005]). In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.,* 84

NY2d 967, 969 [1994]; *Alexander v New York City Tr.,* 34 AD3d 312, 313 [2006]; 2B Warren's Negligence, Landlord and Tenant, s 6.01 et seq.) To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History,* 67 N.Y.2d 836 [1986]; *Lemonda v Sutton,* 268 AD2d 383 [2000]).

A defendant, who moves for summary judgment in a negligence case involving defective or dangerous condition present on property, has the initial burden of making a *prima facie* showing that it neither created the hazardous condition, nor had actual or constructive notice of it (*Lee v Port Chester Costco Wholesale,* 82 AD3d 842 [2011]; *Manning v Americold Logistics, LLC,* 33 AD3d 427 [2006]; *Mitchell v City of New York,* 29 AD3d 372 [2006]). Here, while there is evidence in the record that UPS may have actually built or installed the staircase/step stool, there is also evidence that the staircase/step stool was in the loading area as early as 1997 thus giving the Macerich defendants at least constructive notice of the allegedly dangerous condition.

Furthermore, "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Trincere v County of Suffolk,* 90 NY2d 976, 977 [1997], quoting *Guerrieri v Summa,* 193 AD2d 647, 647, [internal quotation marks omitted]; *see Aguayo v New York City Hous. Auth.,* 71 AD3d 926 [2010]; *Copley v Town of Riverhead,* 70 AD3d 623 [2010]). Accordingly, the branch of the motion by the Macerich defendants which seeks summary judgment in its favor is denied.

The branches of the motion which seek to dismiss counts two and four of the complaint are granted. Count two alleges a violation of labor law 240 (1), which is inapplicable to the facts at hand. "While the reach of section 240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Martinez v City of New York,* 93 NY2d 322 [1999] [citation and internal quotation marks omitted]; *see LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 970–971 [2009]; *Karaktin v Gordon Hillside Corp.,* 143 AD2d 637, 638 [1988]).

Moreover, the provisions of Labor Law § 241(6) [count four], also are inapplicable to the facts of this case. Specifically, the accident did not arise from construction, excavation, or demolition work (*see* Labor Law § 241 [6]; *Nagel v D & R Realty Corp.,* 99 NY2d 98 [2002]; *Enos v Werlatone, Inc.,* 68 AD3d 713 [2009]). "To support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of

the accident" (*Rivera v Santos,* 35 AD3d 700, 702 [2006]). "[T]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23–1.4(b)(13), which defines construction work expansively" (*Vernieri v Empire Realty Co.,* 219 AD2d 593, 595 [1995]). Nevertheless, although that regulation recites that construction work consists of "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" (12 NYCRR 23–1.4[b][13]), the act of delivering packages clearly does not fall within any of the enumerated categories.

The branch of the motion which is to dismiss the Labor Law § 200 and common-law negligence causes of action insofar as asserted against the Macerich defendants, is denied. Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343 [1998]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127–128 [2008]; *Ortega v Puccia,* 57 AD3d 54, 60–61 [2008]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia,* 57 AD3d at 61; *see Chowdhury v Rodriguez,* 57 AD3d at 128). Where, as here, a plaintiff's injuries arise not from the manner in which the work was being performed, but rather from an allegedly dangerous condition on the property, including a defect in part of its loading dock, such as the presence of an unsecured temporary staircase or stepping stool, with no handrails, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, when the owner created the complained-of condition, or when the owner failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*see Barillaro v Beechwood RB Shorehaven, LLC,* 69 AD3d 543 [2010]; *LaGiudice v Sleepy's Inc.,* 67 AD3d 969 [2009]; Bridges v Wyandanch Community Dev. Corp., 66 AD3d 938 [2009]; Chowdhury v Rodriguez, 57 AD3d at 130; *Kerins v Vassar Coll.,* 15 AD3d 623, 625–626 [2005]). Here, in support of its motion, the Macerich defendants submitted evidence focusing upon its alleged lack of supervision of, or control over, the plaintiff's work, to wit, plaintiff's decision to use the step stool instead of the ramp. As that element is only relevant to owners in cases where the injury arises from the manner in which the work is performed (*see Ortega v Puccia,* 57 AD3d at 60–63), the Macerich defendants failed to meet their prima facie burden on that branch of their motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it (*see Barillaro v Beechwood RB Shorehaven, LLC,* 69 AD3d 543 [2010]; *Aguilera v Pistilli Constr. & Dev. Corp.,* 63 AD3d 763 [2009]; *Mikhaylo v Chechelnitskiy,* 45 AD3d 821 [2007]).

The branch of the motion by the Macerich defendants, alternatively, for additional discovery from UPS in the form of another examination before trial of UPS is granted, as unopposed. The second examination before trial shall be limited to interrogation about the step stool at issue.

"[T]he trial court has broad discretion in granting or denying disclosure" (*Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.,* 253 AD2d 8, 16 [1999]). Its determination will not be disturbed absent an improvident exercise of that discretion (*see Napoli v Crovello,* 49 AD3d 699 [2008]; *Nieves v City of New York,* 35 AD3d 557 [2006]). It is well settled that a party is entitled to full disclosure of all matter that is "material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). What is "material and necessary" is left to the sound discretion of the court and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell–Collier Publ. Co.,* 21 NY2d 403, 406 [1968]; *Young v. Tierney,* 271 AD2d 603 [2000]). Here, additional deposition of UPS is sought regarding the issue of how the step stool came to be in the loading dock area in the first instance.

Cross Motion by UPS

Inasmuch as UPS' cross motion for summary judgment was made more than 120 days after the note of issue was filed, it is untimely (*see* CPLR 3212 [a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Since no good cause was articulated by UPS for its late filing, its cross motion for summary judgment is properly denied as untimely (*id.*; *see Lofstad v S & R Fisheries, Inc.*, 45 AD3d 739, 743 [2007]; *Jones v Ricciardelli*, 40 AD3d 936 [2007]). Moreover, since the grounds upon which UPS premises its cross motion are not nearly identical to those upon which the Macerich defendants relied in connection with their motion (*see Bickelman v Herrill Bowling Corp.*, 49 AD3d 578, 580 [2008]; *cf. Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]), there is no basis upon which the court may impute good cause for UPS' delay in submitting its cross motion.

Cross Motion by plaintiffs

Plaintiffs cross move to strike defendants' answer on the ground that defendants failed to preserve the surveillance video tape of plaintiff's accident. When a party destroys essential physical evidence "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence,' the spoliator may be sanctioned by the striking of its pleadings" (*New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.,* 280 AD2d 652, 653 [2001], quoting *DiDomenico v C & S Aeromatik Supplies,* 252 AD2d 41, 53 [1998];

see Klein v Ford Motor Co., 303 AD2d 376, 377 [2003]; *Squitieri v City of New York,* 248 AD2d 201, 202 [1998]; *Kirkland v New York City Hous. Auth.,* 236 AD2d 170, 173 [1997]). New York courts possess "broad discretion" to impose sanctions for the spoliation of evidence (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *see Gotto v Eusebe-Carter*, 69 AD3d 566, 568 [2010]), and an imposition of sanctions will not be disturbed "[a]bsent a clear abuse of discretion" (*Miller v Weyerhaeuser Co.*, 3 AD3d 627, 628 [2004], *lv dismissed* 3 NY3d 701 [2004], *appeal dismissed* 5 NY3d 822 [2005]).

Courts should consider the prejudice caused by the spoliation "in determining what type of sanction, if any, is warranted as a matter of fundamental fairness" (*Scarano v Bribitzer*, 56 AD3d 750, 751 [2008]). Where "the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (Klein v Ford Motor Co., 304 AD2d 376, 377 [2003]; *see Riley v ISS Intl. Serv. Sys.,* 304 AD2d 637, 638 [2003]; *Chiu Ping Chung v Caravan Coach Co.,* 285 AD2d 621 [2001]).

Here, plaintiffs failed to establish that they are prejudiced by the disposal of the surveillance tape so as to warrant the sanction of preclusion (*see Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402, 403 [2009]; *Dearden v Tompkins County*, 6 AD3d 783, 785 [2004]; *Kerman v Martin Friedman, C.P.A., P.C.*, 21 AD3d 997, 999 [2005]). Plaintiffs did not come forward with any evidence that they sought to either preserve or inspect the surveillance video, that they are prejudiced by the destruction of the video, or that defendants acted in bad faith, willfully or contumaciously (*see Robertson v New York City Housing Authority,* 58 A.D.3d 535 [2009]; *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007]). Furthermore, the injured plaintiff is able to rely on his own description of the accident, there was a witness to the accident, and there are photographs of the stepping stool/temporary staircase available. Based on these circumstances, an adverse inference charge at trial pursuant to PJI 1:77.1 is appropriate.

<u>Conclusion</u>

The branches of the motion by the Macerich defendants which are to dismiss plaintiffs' labor law claims, to wit, counts two and four, are granted. The branch of the motion which is to dismiss count three, to wit, a cause of action under Labor Law §200, is denied. The branch of the motion by the Macerich defendants which is for summary judgment in their favor is denied. The branch of the motion which is to conduct a second deposition of UPS is granted, as unopposed.

The cross motion by UPS is denied as untimely.

The motion by plaintiffs for a spoliation sanction is granted to the extent that an adverse inference charge shall be given at trial regarding the destruction of the surveillance tape.

Dated: March 29, 2012

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J.S.C.