SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 150219/2011
TORRES, RAMON
vs.
BROOKS SHOPPING CENTER LLC
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/29/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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RAMON TORRES,

Plaintiff,

Index No.: 150219/11

-against-

DECISION

BROOKS SHOPPING CENTERS LLC,
THE MACERICH PARTNERSHIP, LP,
THE MACERICH COMPANY,
MIDWOOD MANAGEMENT COMPANY,
BATH & BODY WORKS, INC.,
BATH & BODY WORKS, LLC,
VALCO ASSOCIATES, INC. and
MACLEAN & ASSOCIATES, INC.,

Defendants.

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ANIL SINGH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendants Bath & Body Works, LLC (BBW) and Bath & Body Works, Inc. move, pursuant to CPLR 3211 (a) (5), (7) and (10), to dismiss the complaint asserted as against them and, pursuant to CPLR 8303-a, for reasonable costs and fees.

In motion sequence number 003, defendants Brooks Shopping Centers LLC (Brooks), The Macerich Partnership, LP, The Macerich Company (together, Macerich), and Midwood Management Company (Midwood)(collectively, 003 movants) move: (1) pursuant to CPLR 3211 (a) (7) and (10)and CPLR 1003, to dismiss the complaint

asserted as against them, and (2) for reasonable costs and fees, pursuant to CPLR 8303-a. Defendant Maclean & Associates, Inc. (Maclean) cross-moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint asserted as against it. Defendant Valco Associates, Inc. (Valco) cross-moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint asserted as against it.

BACKGROUND

Plaintiff alleges that, on September 17, 2008, he was employed by Advanced Relocation and Storage d/b/a Advanced Commercial Movers (Advanced), professional movers, to provide a lift truck and assistance in the unloading of materials from a tractor-trailer owned and operated by G & N Transport Company (GNT). Pursuant to an agreement between Advanced and Specialty Moving Systems (Specialty), plaintiff was to meet the GNT tractor-trailer with his fork lift truck at the Sears Parking Lot of the Cross County Shopping Center, located in Yonkers, New York.

Plaintiff initially filed suit in 2009 in the Supreme Court, Queens County, against Specialty, said action being removed to the federal district court by Specialty on diversity grounds. In this complaint, plaintiff alleged that he was inside the trailer portion of the tractor-trailer, owned and operated by GNT, in the Sears parking lot and that, while inside the trailer portion of the tractor-trailer, the tractor-trailer suddenly moved without

warning, causing plaintiff to come in contact with one of the tractor-trailer's interior walls, precipitating his falling into the roadway, thereby sustaining serious injuries. Motion 002, Ex. E.

The federal matter was eventually settled by the parties, who executed a stipulation of discontinuance with prejudice that was so-ordered by the court. Motion 002, Ex. G. As part of the settlement, plaintiff executed a general release with GNT, which stated, in pertinent part:

> "[the release] is specifically intended to release the RELEASEES and it is also specifically intended to release, whether presently known or unknown, all other tortfeasors liable or claimed to be liable jointly or separately or vicariously liable with the RELEASEES, and, whether presently known or unknown, any attorney related claims on settlement proceeds."

Reply, Motion 002, Ex. A.

In the instant amended complaint, filed in 2011, plaintiff alleges that he was engaged in unloading cargo from a truck owned by GNT on September 17, 2008, when he was injured while performing construction work. The complaint asserts that plaintiff was "actually engaged in and performing construction work at an elevated level ... ." Motion 002, Ex. F.

Motion sequence number 002

In September of 2008, BBW was having a store built at the Cross County Shopping Center, and contracted with Valco Associates, Inc. (Valco), an independent contractor, to construct

the store. BBW ordered fixtures and furnishings from a Canadian manufacturer and contracted with GNT to ship the goods to its store at the shopping center. The agreement called for the GNT truck to have a lift on it in order to lower the fixtures to the ground. However, the GNT truck did not have a lift, so Advanced was hired to take the fixtures off the GNT truck.

According to BBW, Advanced was to meet the GNT truck at the shopping center's parking lot, offload the fixtures from the GNT truck, and plaintiff was then to lower the fixtures from the Advanced truck to the ground of the parking lot, from where they would be taken by Valco to the BBW store.

In the amended complaint, plaintiff asserts causes of action based on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

BBW's first contention is that the complaint must be dismissed as asserted against Bath & Body Works, Inc. because it was improperly named in the complaint and is not a legal entity. Plaintiff has not opposed this portion of BBW's motion, and so the complaint is dismissed as asserted against Bath & Body Works, Inc.

BBW maintains that the present action must be dismissed pursuant to the doctrine of res judicata and collateral estoppel, because the matter could and should have been litigated against it in the prior action and is therefore now barred. BBW also

contends that the incident did not occur at a construction site, as alleged by plaintiff, and that the original complaint filed by plaintiff in 2009 alleges that his injuries arose out of negligence. Further, BBW states that it was under no duty to plaintiff who was employed by another entity that was an independent contractor.

In the alternative, BBW claims that, even if the court were to decide that the instant action is not barred by the application of the doctrine of res judicata, plaintiff's Labor Law § 240 (1) claim must be dismissed because his accident was not the type of occurrence which Labor Law § 240 (1) was designed to address, and BBW did not supervise or direct plaintiff's work, thereby negating his Labor Law § 200 cause of action.

Lastly, BBW argues that the complaint should be dismissed because plaintiff cannot bring in GNT or Specialty because of their dismissal with prejudice in the federal action. BBW points out that, in his sworn deposition in the federal action, plaintiff testified that his injuries resulted when the GNT truck suddenly moved without warning. Motion, Ex. H. Moreover, plaintiff could have brought BBW into the federal action, thus avoiding the instant litigation.

In opposition to BBW's motion (motion sequence number 002), plaintiff states that BBW's res judicata argument lacks merit because there was no settlement on the merits in the federal

action and the causes of action in the present action and the federal action are different. Plaintiff bases this argument on the fact that the motion failed to include any of the settlement documents; however, the court notes that those documents were provided in the reply, as noted above, and were only made available to BBW by the insurer after the initial motion was filed.

Plaintiff also maintains that his Labor Law causes of action are viable, and that the fact that the accident occurred in the parking lot near the construction site does not negate the fact that the occurrence is covered by the provisions of the Labor Law. In support of his contention that Labor Law § 241 (6) applies to the facts of the case, plaintiff alleges violations of sections 23-1.7, 23-1.15, 23-1.22 (c) and 23-9.8 of the Industrial Code. In making this assertion, the court concludes that plaintiff has abandoned any other provisions of the Industrial Code and OSHA previously noted by him as support for his Labor Law § 241 (6) claim. Further, plaintiff asserts that BBW has provided no evidence in admissible form that it did not supervise or control plaintiff's work, and plaintiff avers that BBW did have notice of a dangerous condition in the parking lot. The court notes that neither the complaint nor the opposition indicates what the alleged "dangerous condition" was.

In addition, plaintiff argues that BBW has not demonstrated

why Specialized is an indispensible party so as to warrant dismissal of the action.

Lastly, plaintiff contends that costs and fees should not be assessed against him because this action is not frivolous.

In reply, BBW states that the general release is proof that the federal action was settled on the merits, rendering plaintiff's arguments against dismissal based on the application of the doctrine of res judicata meritless. Further, BBW avers that, based on the fact that plaintiff subpoenaed records from BBW in the federal action is proof that plaintiff was aware of BBW's role at the time that the federal suit was ongoing, and any claim against BBW could have been asserted at that time. According to BBW, if it were in privity with Specialty or GNT, the instant suit is barred based on the federal action, and, if it were not in privity with Specialty or GNT, plaintiff has no cause of action as against it. It is BBW's position that it was in privity with both federal defendants based on its contract with GNT, who then contracted with Specialty to fulfill its agreement with BBW. Reply, Motion 002, Ex. D.

BBW argues that, in the federal action, plaintiff averred that Specialty and GNT were supervising, managing and controlling him at the time of the occurrence, thereby negating plaintiff's common-law negligence and Labor Law § 200 causes of action. Motion 002, Exs. F & H. In addition to the foregoing, BBW, in

sum and substance, reiterates its original arguments.

Motion sequence number 003

The arguments presented by the 003 movants are identical to the ones presented by BBW in motion sequence number 002, and need not be reiterated in detail. The amended complaint identifies Brooks as the manager of the shopping center and Macerich and Midwood as the owners of the shopping center.

In their cross motions, Maclean, the owner of the premises leased by BBW, and Valco, the contractor for the construction of BBW's store, incorporate by reference all of the arguments presented by the other moving defendants.

Plaintiff's opposition to these motions consists of the same opposition arguments provided in opposition to motion sequence number 002, and includes an argument that plaintiff's sworn deposition, taken in the federal suit, is inadmissible as evidence in the present action because the instant movants did not provide a copy to plaintiff for verification.

In reply, the 003 movants and Maclean basically repeat their initial arguments, and state that, pursuant to CPLR 3116 (a), plaintiff's earlier sworn deposition is admissible evidence in the current lawsuit and that they were under no obligation to provide plaintiff with a copy of that deposition for verification because they were not parties to the federal action.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> . . .
>
> (5) the cause of action may not be maintained because of ... res judicata ...; or
>
> . . .
>
> (7) the pleading fails to state a cause of action; ... ."
>
> . . .
>
> (10) the court should not proceed in the absence of a person who should be a party; ... ."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002).

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan*

Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Motion sequence number 002, motion sequence number 003, and the cross motions are all granted, and the complaint is dismissed with prejudice.

"Res judicata precludes all claims which could have or should have been litigated in prior proceedings." *Mancini v Hardscrabble Commons Associates*, 31 AD3d 719, 720 (2d Dept 2006). "Pursuant to the doctrine of res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy [internal citation omitted]." *Coliseum Towers Associates v County of Nassau*, 217 AD2d 387, 389-390 (2d Dept 1996). The dismissal with prejudice, so-ordered by the federal court, constitutes a final determination with respect to all matters litigated, as well as to all matters that could have been litigated, but were not. *Lane v Birnbaum*, 258 AD2d 389 (1st Dept 1999).

In the case at bar, plaintiff does not dispute that all of the defendants named in the present action were known to him at

the time that he litigated his claim against GNT and Specialized, and both suits involve exactly the same occurrence. Therefore, any claims that plaintiff now wishes to assert against the defendants named in this action could have, and should have, been asserted in the previous lawsuit. Hence, the instant action is barred by the application of the doctrine of res judicata.

Even if the court determined that the present action was not barred by res judicata, the complaint would still be dismissed.

The general release signed by plaintiff effectively dismisses any claims based on common-law negligence.

Although the court agrees with plaintiff that a "construction site" consists of areas that may be a distance from the actual site, provided that work for such construction is being carried out at that location (*see D'Alto v 22-24 129th Street, LLC*, 76 AD3d 503 [2d Dept 2010]), plaintiff's Labor Law claims fail on substantive grounds.

In order to hold an owner or general contractor liable for injuries to a worker pursuant to Labor Law § 200, when the injuries were allegedly the result of the means and methods used by the contractor to do the job, the worker must evidence that the owner or general contractor exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993); *McFadden v Lee*, 62 AD3d 966 (2d Dept 2009). There is no such evidence in the record, and

plaintiff previously averred that his work was controlled by his nonparty employer. *Torres v Morse Diesel International, Inc.*, 14 AD3d 401 (1st Dept 2005). Even the "mere retention of contractual inspection privileges or a general right to supervise [, which does not exist in the instant matter,] does not amount to control sufficient to impose liability ... in the absence of proof of ... actual control." *Brown v New York City Economic Development Corp.*, 234 AD2d 33, 33 (1st Dept 1996).

Therefore, based on the foregoing, defendants are entitled to judgment since the accident arose from the means and methods of operation, and plaintiff was directed and controlled by his own employer. *Persichelli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136 (1965); *Robinson v County of Nassau*, 84 AD3d 919 (2d Dept 2011). The court notes that, whereas plaintiff's counsel, in his opposition papers, said that the accident occurred because of a dangerous condition, no such condition was alleged anywhere else, nor did counsel indicate what such condition was, and the court finds such statement unpersuasive.

A fall from a truck has been found insufficient to support a claim under Labor Law § 240 (1), since such occurrences are not deemed an elevation-related risk unless some other factor, not here present, is alleged. *Toefer v Long Island Rail Road*, 4 NY3d 399 (2005); *Cabezas v Consolidated Edison*, 296 AD2d 522 (2d Dept

2002). Moreover, plaintiff has failed to adduce any evidence that his fall resulted from the lack of a safety device. *Berg v Albany Ladder Company, Inc.*, 10 NY3d 902 (2008).

Finally, with respect to plaintiff's Labor Law claims, the court finds that the provisions of the Industrial Code specified by plaintiff – sections 23-1.7, 23-1.15, 23-1.22 and 23-9.8 – are inapplicable to the case at bar, where plaintiff alleged and testified that he was inside the truck when it suddenly moved, causing him to hit the side of the truck and fall out. Therefore, plaintiff cannot sustain a cause of action under Labor Law § 241 (6). *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998).

Having found that plaintiff has failed to state a cause of action against the named defendants, the court need not address the contention that the complaint should be dismissed for failing to join a necessary party, pursuant to CPLR 1003.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants Bath & Body Works, Inc. and Bath & Body Works LLC's motion to dismiss the complaint (motion sequence number 002) is granted and the complaint is dismissed as asserted against said defendants, with prejudice, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants Brooks Shopping Centers LLC, The Macerich Partnership, LP, The Macerich Company, and Midwood Management Company's motion to dismiss the complaint (motion sequence number 003) is granted and the complaint is dismissed as asserted against said defendants, with prejudice, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant Maclean & Associates, Inc.'s cross motion to dismiss the complaint as asserted against it is granted and the complaint is dismissed as asserted against said defendant, with prejudice, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant Valco Associates, Inc.'s cross motion to dismiss the complaint as asserted against it is granted and the complaint is dismissed as asserted against said defendant, with prejudice, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/29/12

ENTER:

Anil C. Singh