Ronelli v Grandview Palace of N.Y.
2017 NY Slip Op 32899(U)
December 19, 2017
Supreme Court, Westchester County
Docket Number: 60123/2015
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROBERT RONELLI,

Plaintiff,

-against-

GRANDVIEW PALACE OF NEW YORK, a condominium, pursuant to a Declaration of Condominium executed October 18, 1996 and recorded on October 24, 1996 at the Sullivan County Clerk's Office in Liber 1905 of conveyances at Page 254, GRANDVIEW PALACE OF NEW YORK CONDOMINIUMS an unincorporated association by IVANNA JOHNSON, President, BOARD OF MANAGERS of GRANDVIEW PALACE OF NEW YORK CONDOMINIUM Acting on behalf of all unit owners of GRANDVIEW PALACE HOMEOWNERS ASSOCIATION and HIGH GROUND INDUSTRIAL, LLC,

Defendants.

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INDEX NO. 60123/2015

DECISION/ORDER

Motion Date: 10/18/17
Motion Seqs. 2, 3, 4

GRANDVIEW PALACE OF NEW YORK, a condominium, pursuant to a Declaration of Condominium executed October 18, 1996 and recorded on October 24, 1996 at the Sullivan County Clerk's Office in Liber 1905 of conveyances at Page 254, GRANDVIEW PALACE OF NEW YORK CONDOMINIUMS an unincorporated association by IVANNA JOHNSON, President, BOARD OF MANAGERS of GRANDVIEW PALACE OF NEW YORK CONDOMINIUM Acting on behalf of all unit owners of GRANDVIEW PALACE HOMEOWNERS ASSOCIATION, [1]

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[1] The parties have stipulated to discontinue the action against High Ground. Further, defendant/third party plaintiff shall herein be referred to as Grandview.

Third-Party Plaintiff,

-against-

MANNO ASSOCIATES, INC. d/b/a PMI,

Third-Party Defendant.
--X

ECKER, J.

The following papers numbered 1 through 74 were considered on the motion of GRANDVIEW ("Grandview"), made pursuant to CPLR 3212, for an order dismissing the complaint and cross claims [Mot. Seq. 2], as against ROBERT RONELLI ("plaintiff") and Third-Party Defendants MANNO ASSOCIATES, INC. d/b/a PMI ("Manno"); the cross-motion of ROBERT RONELLI ("plaintiff"), made pursuant to CPLR 3212), for an order granting partial summary judgment as to liability, as against Grandview [Mot. Seq. 3]; and the cross-motion of Manno, made pursuant to CPLR 3212, for an order dismissing the third-party complaint [Mot. Seq. 4]:

PAPERS	**NUMBERED**
Mot. Seq. 2	
Notice of Motion, Affirmation, Exhibits A-L	1 - 14
Affirmation in Opposition [Manno], Exhibits A-I	15 - 24
Affirmation in Opposition [Plaintiff], Exhibits 1-2	25 - 27
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Upon the foregoing papers, the court determines as follows:

Plaintiff, on August 2, 2012, at or about 2:00 p.m., while employed by Manno, slipped and fell while entering the unlocked guardhouse located outside the condominium complex owned and operated by Grandview. The Grandview condominium was the former Brown's Hotel located in Fallsburg, New York. There had been a large fire at the condominiums in April, 2012. Manno, at the insistence of Grandview's liability insurer, was engaged by Grandview to provide security

services in order to prevent theft of property, or injury to individuals, due to the dangerous conditions thereat, and the need to prevent authorized individuals from entering the premises. Plaintiff was assigned to the Grandview site by Manno; he had visited the site for two hours on a prior occasion. On the date of the accident, he was there to meet two security guards and give them their uniforms. Plaintiff then proceeded to the guardhouse. As he entered the well lighted office, and after taking two to three steps, he tripped and fell. He alleges his fall was caused by an uneven floor surface that he had not previously observed and that his foot was caught by the edge of a hole. He then got up and saw a rug with a depression. He delivered the uniforms to the security guards and left the site. Plaintiff alleges this fall caused his physical injuries.

Now before the court are summary judgment motions that may be summarized as follows: Mot. Seq. 2: Grandview takes the position that any injury to plaintiff is not its responsibility due to contractual indemnity; Motion Seq. 3: Plaintiff takes the position he is entitled to partial summary judgment because the condition that caused his injury was well-known to Grandview at the time of his fall; Mot. Seq. 3: Manno takes the position that there is no obligation on its part to indemnify Grandview for plaintiff's injury.

Mot. Seq. 2/Mot. Seq. 4: Grandview and Manno

Grandview and Manno negotiated the terms of an agreement that would define each party's rights and responsibilities. The original draft was prepared by Manno for consideration by Grandview. A document, bearing on page 1 a type-written date of August 2, 2012, was signed only by Peter A. Manno, as president of Manno, dated "8/2/12" [Grandview Ex. J]. This document had affixed to it on page 1 a post-it with the date stamp "Aug 13, 2012" and the hand-written note "For Your Records". This is labeled as Depo. Ex. C. In the same Ex. J. is a copy of the document in draft form with blocks of darkenings which Grandview asserts are not deletions but rather highlights of the changes to the agreement made by Grandview's attorney, John Theadore. This is labeled as Depo. Ex. D. In the same Ex. J is a copy of the document with the hand-written date "8/2/12" on page 1, and a post-it affixed to page 1 that is date stamped "August 13, 2012" and states "Please Return Signed Copy". This document is signed only by Peter A. Manno, as president. This is labeled Depo. Ex. E. Also included in Ex. J is a copy of the document referenced herein as Depo. Ex. C bearing only the signature of Manno.

Plaintiff, as was required of all visitors to the site, signed a "hold harmless" agreement at the behest of Grandview [Grandview Ex. H] dated July 31, 2012 [Grandview Ex. H] wherein he acknowledged the hazards present at the site and that he assumed all risks of injury, death or property damage sustained by him, and agreed to indemnify and hold harmless Grandview, the Town of Fallsburg, its agencies and departments, for economic or non-economic loss.

Manno, in its opposition to Grandview's motion, referred to the deposition testimony of David Mallory, who until August, 2012, was employed by Grandview, and who was aware of the conditions at the guardhouse. He testified that the floor was covered with linoleum/vinyl on top of two layers of plywood that had been "delaminated" or worn down by the scraping from the feet of an old metal desk chair with no rubber stops on the legs. Mallory testified that the Grandview Board of Managers was aware of this condition, and that any discussion of remedying this condition was

postponed as they had "bigger fish to fry". Mallory was not aware of a carpet on the floor but he had purchased a plexi-glass mat for placement under the chair, covering the "delaminated" area. The last repairs to the floor had been in 2009 when the plywood and linoleum were installed. He was aware of mats at the two entrances to the security booth.

The parties have referenced the deposition testimony of Anthony Ambrogio, president of the Board of Managers of Grandview. He was not aware of the condition of the floor in the guardhouse, and had been in it once, in the 1990's. He did not negotiate the agreement between Grandview and Manno, nor did he sign an agreement on behalf of Grandview. The parties have referenced the deposition testimony of David Hoehmann, president of non-party High Ground, the company hired to do the environmental remediation, demolition and clearance work at the site. He believed the doors to the guardhouse were locked when he visited the site prior to August 2nd, and his company had keys to the locks as standard procedure. The parties have referenced the deposition testimony of John Theadore, Grandview's attorney. He was not aware of the conditions in the guardhouse. Plaintiff and William Cherry, an employee of Manno, conducted a walk-through of the site on July 31, 2012, in anticipation that Grandview would engage Manno's services.

In support of its motion to dismiss [Mot. Seq. 2], Grandview asserts that it is not responsible for plaintiff's injuries because plaintiff assumed the risk of personal injury and the Indemnification and Hold Harmless Clause in the Grandview/Manor Agreement is enforceable. In support of its motion to dismiss the third-party complaint, Manno argues that Grandview cannot hold it liable by the application of Workers' Compensation Law ("WCL) § 11; by agreement; and by General Obligations Law (GOL) § 5-322.1. The court will address Grandview's and Manno's motion together.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], *quoting LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp., supra.* On a motion for summary judgment, the court's function is to determine if a factual issue exists, and 'the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and [a]n conflict in the testimony or evidence presented merely raise(s) an issue of fact.' [internal citations omitted]. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

Issue: Is there a contract?

Manno asserts that there is no contract because it was signed only by its principal and not by an authorized signatory of Grandview. It is clear that as of August 2, 2012, based upon the correspondence between the parties, i.e., email correspondence now part of the record, and the post-it date stamp of August 13, 2012 with the notation "for your records", that a contract had been

circulated and Manno had signed it. That being said, was there part performance on the part of Manno sufficient to justify a finding that the parties entered into a contract - a meeting of the minds - as of the date of the accident. It is not disputed that plaintiff was on the premises on that date for the business purpose of delivering uniforms to the two security guards, after having been there two days earlier on July 31, 2012, to walk the site with his co-worker Cherry, the same date plaintiff signed the indemnification agreement. The issue is whether these actions are sufficient to justify a finding of part performance. In other words, is there objective evidence establishing that the parties intended to be bound. See *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368 [2005], where the Court reversed the lower courts' granting of summary judgment to defendant and denied summary judgment dismissal of the third-party complaint.

Here, there is a factual dispute between these parties as to whether plaintiff was at the site on August 2, 2012 pursuant to an agreement already reached by the parties signed by Manno that awaited Grandview's written acceptance, or whether plaintiff was at the site in anticipation of what his duties would be once Grandview signed. The court finds that there are questions of fact involving not only the interaction between Manno and Theodore, on behalf of Grandview, from July 31st through August 13th, and beyond, since to date, the court has not been advised as to whether Grandview ever signed an agreement. Also, what was the purpose of plaintiff being at the site on August 2nd when he delivered uniforms to two security guards? Did they begin to provide security services that day, or at a later date, as Mallory testified that he was on the job until the middle of August. In the meanwhile, the document alleged to be the parties' contract is dated as of August 2, 2012, one typewritten, and one dated in what appears to be Peter A. Manno's handwriting, and as stated in each, to commence as of midnight August 2, 2012.

It is instructive to review the Court of Appeals findings in *Flores:*

> "In March, 2000, LES sent Procida a written contract including a provision for Procida to indemnify LES for injuries 'arising out of or resulting from performance at the Work' on the $3 million project. In accordance with the terms of the agreement, Procida purchased liability insurance and obtained payment and performance bonds. In a June 23, 2000 memorandum entitled 'Attachment 4-Scope Clarifications" and forwarded to LES, a Procida representative acknowledged the existence of an agreement, clarifying that under 'this contract' Procida assumed no responsibility for work performed by the previous general contractor. For reasons undisclosed in the record, **Procida did not sign the March 2000 contract or the June 2000 addendum, but it performed the work specified in the contract and was paid in conformity with the documents**." [Emphasis added].
>
> 4 NY3d, supra at 366 [2005].

Procida's employee was injured in September, 2000. He obtained workers' compensation benefits and brought suit against LES as owner of the work site. LES filed its third-party action against Procida asserting common law claims and contractual indemnification claims. Procida defended upon the ground that there was no written contract; hence, pursuant to WCL § 11, the "Graves" amendment, there must be an executed document to impose liability thereunder, which LES argued need not be a signed agreement, such that the parties' course of conduct was sufficient to demonstrate an enforceable agreement between them. The *Flores* Court, at page 370, ruled

> "(I)n many instances the issue of whether or when an indemnification agreement came into being in the absence of a signed document will present a question of fact to be resolved by the trier of fact. Based on the record presented in this case, however, LES is entitled to summary judgment on the contractual indemnification claim because Procida failed to come forward with evidence to present a triable issue of fact concerning the existence of an enforceable written contract."

The Court ruled in favor of LES, and the enforcement of the indemnification provision in the agreement, based upon the sufficiency of the facts in the record before it, not rebutted by Procida. Here, this court cannot make such a finding as a matter of law. There are too many questions to be answered before the inference can be drawn that there was an enforceable contract in the absence of a two-party signed document. There is no extended period of time, marked by specific acts by both sides, and payments for services rendered, as to constitute a definite course of conduct upon which this court may rely, as a matter of law, such as was found in *Flores*, supra. Hence, it is for the trier of fact, upon a further development of the facts, to make the determination as to whether the parties entered into an enforceable contract as of the afternoon of August 2, 2012. Plaintiff has filed a Note of Issue with Jury Demand [NYSCEF Doc. 38]. Thus, the task of making the determination of whether there is an enforceable contract must fall to the jury as the trier of fact. Accordingly, Grandview's motion for summary judgment as to the enforcement of the contract is denied.

Issue: Did Plaintiff Assume the Risk?

Grandview argues plaintiff assumed the risk by entering into the guardhouse. In this motion record there is no evidence that he entered there previously. The actual location of the hazardous conditions which his employer, Manno, was to be engaged (or was engaged) to protect was within a fenced off area behind a chain link fence, in front of which was the guardhouse. He opened the door, took two to three steps into a well-lighted enclosure, felt his heel catch on a hole, slipped and fell. The case cited by Grandview, *Turcotte v Fell*, 68 NY2d 432 [1986] involves a professional jockey who sued the owner of the horse he was riding and the racetrack after he was thrown from his mount, and is widely cited as a classic example of primary assumption of risk. Grandview premises its argument in reliance upon the Hold Harmless and Indemnification Agreement signed by plaintiff on July 31, 2012. The Agreement has language, *inter alia*, that the signer understands the entire property presents a significant risk to the health and safety of all those people who enter

onto it, that the Grandview Palace Condominium has been condemned and that the premises are extremely hazardous, that the signer fully understands there are hazards present, that he is assuming all risks of bodily injury..., that access is strictly limited to only the areas that pertain to his employer's interest in the loss site, that he will comply with all direction from the Board of Managers, and that he will not enter the marked asbestos zone.

The issue is whether it can be said, as a matter of law, that plaintiff's entry into the guardhouse constituted a voluntary act on his part to engage in a dangerous activity? That he tripped and fell does not answer the question, as people trip and fall every day in the most innocuous settings. It appears from the record that the guardhouse had been manned for 24/7 for many years, and since the fire in April, 2012. This court is not prepared to rule that plaintiff, upon entering the guardhouse, should have looked down to see what there was to see, or that the condition of the floor constituted a trap or other impediment to what one can expect when stepping on a floor for presumably the first time, as there is no evidence to the contrary. Nor is this court prepared to rule that the Hold Harmless and Indemnification Agreement was intended to cover the guardhouse as a location fitting the definition of premises that are "extremely hazardous". There are clearly issues of fact that militate against this court granting summary judgment as to assumption of risk. That task is better left to the trier of fact upon a full record. Thus, Grandview's motion for summary judgment is denied as to the issue of assumption of risk.

The court further rejects Grandview's argument that plaintiff speculated as to the cause of his fall. He very clearly states in his deposition that "I walked into the guardhouse and my right foot went into an uneven plot [2] of the floor, I caught my foot on my shoe on the edge of the hole and I twisted, then I went down." [Pltf's Cross-Motion, Ex. 7, p. 14, lines 16-19]. That to the court is sufficient to satisfy plaintiff's identification of the cause of his fall. As to what was the condition of the linoleum or the whereabouts of the rug, that is for the trier of fact to determine.

In its opposition to Grandview's motion for summary judgment, Manno argues that if the court finds there was an enforceable contract, then as a matter of law, the indemnification provided in the writing purporting to be the contract cannot be read to cover the facts of this accident. Given the court's finding that it is for the trier of fact to determine whether there is an enforceable contract, the court, in the exercise of discretion, defers to the justice presiding at the trial to make such rulings as are appropriate. This court should not bind a court of collateral jurisdiction with a ruling that may be moot, or if not moot, may not be justified under the facts as fully developed at trial.

Likewise, the court will not rule upon Manno's argument that GOL § 5-322.1 is applicable here, thereby barring Grandview's claim for contractual indemnification. As stated supra, to make a ruling in the absence of a finding that there is a binding contract is not something this court is able to do within the context of this record. In addition, there is an issue of fact as to whether the site of this accident, and specifically the guardhouse, falls within the ambit of "construction,

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[2] The court questions whether this is a typographical error meant to read "spot" or "part" but this does not affect the context of plaintiff's response.

alteration, repair or maintenance of a building or structure. In fact, Manno Ex. B is a photo of the guardhouse that shows the exterior of the structure to be intact. As to the condition of the floor, it is inconclusive from the interior photo included in Ex. B as to the condition of the floor. The photo submitted by plaintiff in the affirmation in opposition to Grandview's summary judgment motion is a better depiction of the condition of the floor in the guardhouse. As to whether that picture is what the floor looked like on August 2, 2012, or whether it was covered by carpet, that is for the trier of fact to determine. Thus far, there is no evidence in this record that the guardhouse, outside the fenced in area where the fire occurred, was under construction, alteration, repair or maintenance, at or about the time of the fire in April, 2012 or plaintiff's accident on August 2, 2012. It is beyond the purview of the court to rule as a matter of law that GOL § 5-322.1 is applicable in this action. That is yet another issue for the trier of fact to adjudicate, based as applied to the rule of law as charged by the justice presiding.

To summarize, neither Grandview or Manno is entitled to summary judgment as to the complaint, the cross-claims or the third party complaint.

Mot. Seq. 3: Plaintiff

Plaintiff seeks an order granting summary judgment pursuant to CPLR 3212(e) and (g), limited to a ruling by the court that as a matter of law, Grandview was on notice of the dangerous condition of the floor in the guardhouse where he slipped and fell. Subdivision (e) authorizes the court to grant partial summary judgment "as to one or more causes of action, or part thereof, in favor of one of more parties, to the extent warranted..." Subdivision (g) authorizes the court to grant partial summary judgment, in its discretion, to ascertain on the papers before it "what facts are not in dispute or are incontrovertible" and to make an order "specifying such facts and they shall be deemed established for all purposes in the action" (CPLR 3212[g]).

The court declines to make such a finding here, notwithstanding David Mallory's deposition testimony that the Board of Managers had determined there were "bigger fish to fry" than its concern about the condition of the floor in the guardhouse, as well as the actions he stated he took to alleviate the condition by the placement of the plexi-glass mat. It is important that the parties be afforded the opportunity to put the credence of his statements to the test of cross-examination, which is the function of the trier of fact to resolve, and not the court on a motion for summary judgment. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *A Dan Jiang v Jim-Liang Liu,* 97 AD3d 707 [2d Dept 2012]; *Brown v Kass*, 91 AD3d 894 [2d Dept 2012]. Hence, plaintiff is not entitled to partial summary judgment.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED the motion of GRANDVIEW PALACE OF NEW YORK, made pursuant to CPLR 3212, for an order dismissing the complaint and cross claims [Mot. Seq. 2], as against ROBERT RONELLI ("plaintiff") and Third-Party Defendants MANNO ASSOCIATES, INC. d/b/a PMI ("Manno") is denied; and it is further

ORDERED that the cross-motion of ROBERT RONELLI ("plaintiff"), made pursuant to CPLR 3212), for an order granting partial summary judgment as to liability, as against Grandview [Mot. Seq. 3] is denied; and it is further

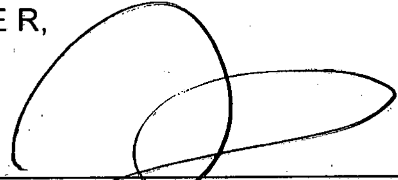
ORDERED that the cross-motion of Manno, made pursuant to CPLR 3212, for an order dismissing the third-party complaint [Mot. Seq. 4], is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on January 30, 2018, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
December 19, 2017

E N T E R,



HON. LAWRENCE H. ECKER, J.S.C.

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