

Cabrera v Rebco Associates

2003 NY Slip Op 30154(U)

March 17, 2003

Supreme Court, New York County

Docket Number: 0116349/2001

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich
0116349/2001

PART 54

CABRERA, LOUIS R.
VS
REBCO ASSOCIATES

INDEX NO.

0116349/01

MOTION DATE

2/6/03

MOTION SEQ. NO.

1

MOTION CAL. NO.

SEQ 1

AMEND CAPTION/PARTIES

The following papers, numbered 1 to 4 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3, 4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is denied in accordance with
the annexed decisional order.*

SCANNED
MAR 24 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/17/03

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
LUIS R. CABRERA,

Plaintiff,

Index No.: 116349/01

-against-

**DECISION AND
ORDER**

REBCO ASSOCIATES, a Limited Partnership,
JACK RESNICK, Individually **and** as a General Partner
in REBCO ASSOCIATES,

Defendants

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for work-related injury. Plaintiff, a forty-three year old parking garage employee, was injured when he allegedly fell into a hole in a ramp at a parking garage located at 110 East 58th Street, in New York City. Plaintiff brought this action against defendants after a deed search indicated that they were the owners of the land on which the premises were built. After issue was joined, a preliminary conference was held on March 15, 2002. During ensuing discovery, plaintiff learned that the building housing the garage is owned by Tenber Associates, a Limited Partnership (“Tenber”).

Motions

Plaintiff now moves to amend his complaint to add as defendants Tenber and Jack Resnick & Sons, Inc. (“Resnick & Sons”), as a general partner in Tenber. Plaintiff submits its attorney’s affirmation and copies of the summons and complaint, answer, notice to admit, preliminary conference order and an agreement between Tenber and Central Parking System of New York, Inc. (“Central Parking”), plaintiff’s employer, for lease of the basement of the premises for use as a

parking garage.

Defendants cross-move for summary judgment dismissing the complaint, and submit their attorney's affirmation, a land lease agreement between defendant Rebco and Tenber, and deposition testimony of plaintiff and Rebco by Patrick Martin, its building manager and other documents. Plaintiff does not oppose defendant's summary judgment motion.

Conclusions of Law

“A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms **as** may be just...” CPLR 3025(b). Accordingly, “[l]eave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay.” McCaskey, Davies & Associates, Inc. v. New York City Health & Hosp. Corp., 59 N.Y.2d 755 (1983). Plaintiff states that he learned about Tenber “for the first time” during the examination before trial of defendant Rebco. Affirmation of S. Harris, ¶ 7. **As** defendants do not advance any argument **as** to why the addition of Tenber would prejudice them, leave to amend is granted. The Court declines plaintiffs request to add Jack Resnick & Sons, Inc., a Tenber general partner.

Defendants argue that summary judgment dismissing plaintiffs complaint should be granted **as** to defendant Jack Resnick because “he has been dead for over ten (10) years;” and **as** to Rebco because it is an out of possession landlord not subject to liability for plaintiffs injury. Affirmation of G. Holmes, ¶6. The Court agrees. “No cause of action for injury to person or property is lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the personal representative of the decedent.” EPTL 11-3.2.

As plaintiff does not dispute that Mr. Resnick was deceased at the commencement of this action, and has not named as a defendant any representative of Mr. Resnick's estate, summary judgment dismissal is granted **as** to Mr. Resnick.

Summary judgment is also granted **as** to Rebco. "Generally, an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair." Velazquez v. Tyler Graphics, 214 A.D.2d 489 (1st Dept. 1995). There is no evidence on the record that Rebco, which owns the land but not the building, had any notice of the defect or had consented to be responsible for maintenance or repair of the building. On the contrary, the lease agreement dated September 28, 1967, whereby Rebco leased the land underlying the building to Tenber, provided that Tenber would build and maintain the building throughout the term of the lease. *Holmes Aff. Ex. C*, p. 13. Thus, there is no question that Rebco owed no duty to plaintiff.

"Parties may be added or dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms **as** may be just." CPLR 1003. "Where, upon order of the court...a new party is joined in the action and the joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party." CPLR 305(a). Therefore, plaintiff must file and serve a supplemental summons and amended complaint on defendant Tenber. Accordingly, it is

ORDERED that defendant Jack Resnick's motion for summary judgment dismissing the complaint **as** to him individually and **as** a general partner in Rebco Associates is granted, and the Clerk is ordered to enter judgment in his favor; and it is further

ORDERED that defendant Rebcos Associates' motion for summary judgment dismissing the complaint is granted, and the Clerk is ordered to enter judgment in its favor; and it is further

ORDERED that plaintiffs motion to amend his complaint is granted, and the amended caption shall read:

-----X
LUIS R. CABRERA,

Plaintiff,

-against-

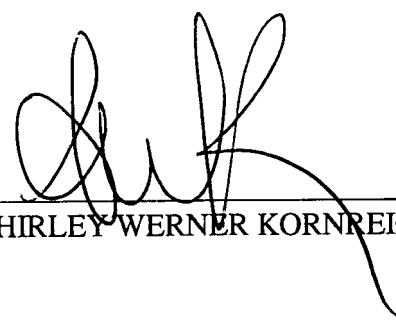
TENBER ASSOCIATES, a Limited Partnership,

Defendant.

..... X

The foregoing constitutes the decision and order of the Court.

Date: March 17, 2003
New York, New York



SHIRLEY WERNER KORNEICH