Warshefskie v New York City Hous. Auth.

2013 NY Slip Op 30072(U)

January 17, 2013

Supreme Court, Richmond County

Docket Number: 101966/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK **Index No.:101966/07**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 006, 007**

PAUL WARSHEFSKIE,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

NEW YORK CITY HOUSING AUTHORITY,

Defendants

The following items were considered in the review of the following motion for summary judgment and cross-motion to amend the summons and complaint and leave to amend the bill of particulars.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Memorandum of Law In Support	2
Notice of Cross-Motion and Affidavits Annexed	3
Affirmation in Reply to Motion	4
Affirmation in Reply to Cross-Motion	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The defendant moves for summary judgment dismissing the plaintiff's complaint. The motion is granted in part. The plaintiff cross-moves to amend the summons and complaint and for leave to amend the bill of particulars. The cross-motion is denied.

Facts

This is an action to recover for the amputation of the plaintiff's right index finger while he was an on duty police officer on December 6, 2006. It is alleged that as the plaintiff pursued a suspect down a flight of stairs in the Berry Houses, located at 50 Dongan Hills Avenue, Staten Island, New York, he reached out to prevent an automatic fire door from closing. The plaintiff was successful in reaching the door before it closed shut. But he grabbed the top of the door.

The plaintiff alleges that the top of the door had a ridge with a jagged metal corner, instead of a flat sealed surface. The plaintiff claims that when he reached out to stop the automatic door from closing, his index finger sunk into the ridge. The door swung shut automatically latching into the door frame which severed the plaintiff's fingertip that was gripping the ridge at the top of the door.

The plaintiff's complaint alleges two causes of action. The first cause of action is to recover under a theory of common law negligence; and the second cause of action is brought pursuant to the General Municipal Law § 205-e. The note of issue was filed on March 28, 2012. The defendant moves for summary judgment dismissing the plaintiff's complaint. The plaintiff cross moves to amend the summons and complaint and supplement his bill of particulars to include the applicable sections of the 1938 Building Code of the City of New York and the Housing and Maintenance Code.

Discussion

Cross-Motion to Amend the Summons and Complaint and Supplement the Bill of Particulars

A court may freely grant leave to amend a complaint, provided that the proposed amendment does not prejudice or surprise the defendant, that it is not patently devoid of merit, and that is not palpably insufficient.[1] However a factor to be considered in determining whether a motion to amend a pleading should be granted is whether the moving party has unduly delayed in asserting the proposed claim or defense. In particular, a court should be hesitant to grant to grant a motion made when the action has long been ready for trial.[2] And in cases where amendments are sought at the eve of trial discretion should be exercised sparingly.[3]

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[1] *Kinzer v. Bederman*, 59 AD3d 496 [2d Dep't, 2009].

[2] *Excelsior Insurance Company v. Antretter Contracting Corporation*, 262 AD2d 124 [1st Dep't. 1999].

[3] *Comsewogue Union Free Sch. Dist. v. Allied-Trent Roofing Sys.,* 15 AD3d 523 [2d Dep't. 2005].

In this case the note of issue was filed on March 28, 2012. Furthermore, the plaintiff originally sought to amend his complaint and bill of particulars in March 2011. In a decision and order dated August 3, 2011 this court permitted the plaintiff to amend his complaint and supplement his bill of particulars to include a cause of action to based upon a violation of law in allowing unlawful activity in the building. But upon reargument this amendment was denied. It also must be noted that the initial motion to amend the summons and complaint, and supplement the bill of particulars did not include a branch to add a violation of Sections C26-286 of the *1938* Building Code of the City of New York and Section 27-2005 of the Housing Maintenance Code, as opposed to the 1968 code section which plaintiff originally plead.

Given the totality of the circumstances it would be an abuse of discretion to consider the amendments to the summons and complaint and the supplementation of the bill of particulars to include these alternate theories of liability. Consequently, the cross-motion is denied.

Motion for Summary Judgment

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[4] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[5] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[6] On a motion for summary

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[4] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[5] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[6] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.[7] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[8]

The plaintiff's bill of particulars states that the closing mechanism was defective in that it closed the door with excessive force. In addition, the plaintiff asserted that the door was kept in a defective condition which rendered the door dilapidated with jagged and sharp edges. The defendant's expert, Mark I. Marpet, PhD, a professional engineer, opined that since the building was built in 1950 the 1938 Building Code applied, not the 1968 Building Code cited in the plaintiff's bill of particulars. The defendant's expert further avers that even if the 1968 Building Code applied there would not be a violation. The court finds that the defendant has met its prima facie burden going forward.

Even assuming that the court granted the plaintiff's cross-motion to amend the summons and complaint and supplement the bill of particulars to include the 1938 Building Code, the code makes no reference to the speed at which self closing doors should operate. In fact the text of the 1938 Building Code reads as follows:

> C26-286 (a) Self-Closing and automatic doors and windows . . . shall be equipped with such devices as may be required under the conditions of operating to close, and maintain in a closed condition, the doors and windows to which such devices are attached, except that easily released door holders may be used elsewhere than in basement passageways located in structures used exclusively for school purposes, provided that regular supervised fire drills are held. (b) Self-closing and automatic doors and windows and their operating devices shall at all times be maintained in working order. It shall be unlawful to so obstruct, hold, or block open any such door or window as to interfere with or prevent its operating as a self-closing or automatic fire or smoke cut off.

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[7] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

[8] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989].

Furthermore, neither the 1938 nor the 1968 Amendments to the Building make any reference to the construction of the door itself. The regulations do speak of the use and placement of bolts and locks, but they make no reference to how a door should be customized. The defendant's expert demonstrated that the 1968 Amendments to the 1938 Building Code were not applicable to this building as it was built in 1950. In addition, defendant's expert opines and this court accepts that both the 1938 and the 1968 Amendments to the Building Code concern general safety requirements. Even if the court granted the plaintiff's application to amend its complaint and bill of particulars, the defendant's expert concluded the 1938 Building Code was not violated.

In opposition, the plaintiff's expert, Richard J. Trieste, P.E., concludes that self closing mechanism was not properly calibrated. The plaintiff's expert's conclusion was based upon a visual inspection that the door "slammed shut" each time. However, the plaintiff's expert offers no evidence quantifying the force of the closing door.

In order to assert a cause of action under General Municipal Law § 205-e, a plaintiff must demonstrate that the defendant violated a ". . . statute, ordinance, rule, order or requirement." A court must dismiss a GML § 205-e claim where a plaintiff has not demonstrated a violation of any statute, ordinance, rule, order or requirement.[9] Here, the plaintiff has failed to raise an issue of fact with respect to any violation of a statute, ordinance, rule, order or requirement which would support a GML § 205-e claim. Consequently, that cause of action is dismissed.

However, the plaintiff's cause of action sounding in general negligence remains. The defendant's argument that the dismissal of a GML § 205-e claim barred recovery under a theory of ordinary negligence is incorrect. The plaintiff's cause of action alleging negligence against the defendant may continue through the application of General Obligations Law § 11-106 that states:

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[9] *Williams v. City of New York*, 256 AD2d 332, [2d Dep't. 1998].

> In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.

Unlike the cases cited by the moving defendants, the plaintiff is not asserting his claim against his municipal employer, the New York City Police Department, nor is he asserting his claims against a police co-worker.[10] Consequently, the defendant had a duty to maintain its premises in a reasonably safe condition.[11] To state a prima facie case for premises liability the plaintiff must show that a defect or dangerous condition existed on the property, and that the defendant either created the condition, or had actual or constructive notice of the condition.[12]

Here, the plaintiff's expert adequately demonstrates that an issue of fact exists concerning general negligence in the modification of the door to fit the door frame. In particular, the plaintiff's expert avers that the doors in question are manufactured with, ". . . flat sealed edges..." He further avers that the fact that the a recessed area existed at the top of the door, rather than at the bottom was improper. While the defendant's expert may state that the industry standard does not prohibit the recessed edge at the top the door in question, it is that question that must be determined by a jury. The defendant's argument that it did not have notice, either actual or constructive, of the recessed edge at the top of the door fails because their records indicate that

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[10] *See, Melendez v. City of New York*, 271 AD2d 416 [2d Dep't 2000); *see also, Carter v. City of New York*, 272 AD2d 498 [2d Dep't 2000].

[11] *Basso v. Miller*, 40 NY21d 233 [1976].

[12] *Walsh v. Super Value, Inc.*, 76 AD3d 371 [2d Dep't 2010].

the door was subject to a multitude of inspections. Therefore, summary judgment is denied as to the plaintiff's negligence claim.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for summary judgment is granted to the extent that the second cause of action pursuant to GML § 205-e is dismissed; and it is further

ORDERED, that the defendant's motion for summary judgment is denied as to the plaintiff's first cause of action for common law negligence; and it is further

ORDERED, that the plaintiff's cross-motion to amend the summons and complaint and supplement the bill of particulars is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Friday, January 25, 2013 at 11:00 a.m.** for a final pre-trial conference

ENTER,

DATED: January 17, 2013

Joseph J. Maltese
Justice of the Supreme Court