

Dressman v Atlantic Aviation
2013 NY Slip Op 33156(U)
December 6, 2013
Sup Ct, New York County
Docket Number: 103842/2010
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 103842/2010
DRESSMAN, RONALD
vs.
ATLANTIC AVIATION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 2, were read on this motion ~~to~~ for partial summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:
The court grants plaintiff's motion for partial summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212 (b) and (c).

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

FILED
DEC 11 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/6/13

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

- 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 46

-----x

RONALD DRESSMAN,

Index No. 103842/2010

Plaintiff

- against -

ATLANTIC AVIATION and US HELICOPTER,

Defendants

-----x

DECISION AND ORDER

FILED

DEC 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover damages for personal injuries he sustained June 5, 2009, at the 34th Street Heliport in New York County, which defendants operated. Plaintiff was standing on an elevated platform on the premises in the course of his employment, when the railing at the side of the platform broke, causing him to fall from the platform. Plaintiff moves for summary judgment on both defendants' liability. C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court grants plaintiff's motion against defendant US Helicopter, but denies his motion against defendant Atlantic Aviation.

II. APPLICABLE STANDARDS

Plaintiff, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d

733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiff satisfies this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of plaintiff's motion, the court construes the evidence in the light most favorable to defendants. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If plaintiff fails to meet his initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

Owners, occupiers, and operators of premises owe a duty to maintain the premises in a reasonably safe condition. Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006); DeMatteis v. Sears, Roebuck & Co., 11 A.D.3d 207, 208 (1st Dep't 2004); Galbreith v. Torres, 9 A.D.3d 304, 305 (1st Dep't 2004). To hold defendants liable for an unsafe condition on the premises that defendants operated, plaintiff must demonstrate that defendants created the condition or received actual or constructive notice of the condition. Alexander v. New York City Tr., 34 A.D.3d at

313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006).

III. PLAINTIFF'S EVIDENCE

Plaintiff testified at his deposition that he was standing on an elevated platform and closing a heavy sliding door on the platform with his left hand. To steady his position, he grasped the railing at the side of the platform with his right hand. When the railing broke under his grasp, he lost his balance and fell to the tarmac below.

Sandra Wells, a supervisor of US Helicopter, observed plaintiff's fall and testified at her deposition that the railing's collapse catapulted plaintiff over the steps that descended from the platform and onto the ground below. Wells also testified that before plaintiff's fall the railing had been broken and separated from the building structure to which the railing attached. Both Wells and Atlantic Aviation's general manager Patricia Wagner testified that US Helicopter was responsible for maintaining the premises.

This undisputed evidence demonstrates plaintiff's entitlement to a judgment on liability against US Helicopter. Plaintiff fails, however, to present any evidence that Atlantic Aviation caused any broken or unsafe condition of the railing or was charged with notice of the condition.

Plaintiff also demonstrates the absence of any factual question regarding his comparative fault. Sammis v.

Nassau/Suffolk Football League, 95 N.Y.2d 809, 810 (2000); Thoma v. Ronai, 82 N.Y.2d 736, 737 (1993); Maniscalco v. New York City Tr. Auth., 95 A.D.3d 510, 513 (1st Dep't 2012); Calcano v. Rodriguez, 91 A.D.3d 468 (1st Dep't 2012). See Gonzalez v. ARC Interior Constr., 83 A.D.3d 418, 419 (1st Dep't 2011); Strauss v. Billig, 78 A.D.3d 415, 416 (1st Dep't 2010); Tselebis v. Ryder Truck Rental, Inc., 72 A.D.3d 198, 200 (1st Dep't 2010). The record does not reveal that plaintiff was aware of any currently broken, weak, or other unsafe condition of the railing or any negligence on his part. His use of the railing for its intended purposes, to maintain his balance and guard against a fall, especially when the evidence discloses that the platform surface may have been slippery, was reasonable under the circumstances. E.g., Wesley v. City of New York, 76 A.D.3d 925, 926 (1st Dep't 2010).

In fact, plaintiff's failure to use the railing might have amounted to comparative negligence. See Williams v. 520 Madison Partnership, 38 A.D.3d 464, 466 n.2 (1st Dep't 2007). As Wagner acknowledged, "it would be natural to hold something with one hand" to brace oneself when closing the heavy door. Aff. of Jeffrey A. Rubin Ex. B, at 22. See Wesley v. City of New York, 76 A.D.3d at 926-27.

IV. DEFENDANTS' OPPOSITION

Defendants contend that plaintiff disregarded an open and obvious unsafe condition, which would not negate defendants' duty to maintain their premises in a reasonably safe condition,

Francis v. 107-145 W. 135th St. Assoc., Ltd. Partnership, 70 A.D.3d 599, 600 (1st Dep't 2010); Tuttle v. Ann LeConey, Inc., 258 A.D.2d 334, 335 (1st Dep't 1999), but which might raise factual questions regarding plaintiff's comparative negligence. Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d 89, 90 (1st Dep't 2011); Francis v. 107-145 W. 135th St. Assoc., Ltd. Partnership, 70 A.D.3d at 600; Tuttle v. Ann LeConey, Inc., 258 A.D.2d at 335. Although the railing was readily observable to plaintiff, no evidence indicates any observable broken, weak, or other unsafe condition of the railing. Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d at 92; Westbrook v. WR Activities-Cabrera Mkts., 5 A.D.3d 69, 72 (1st Dep't 2004). Plaintiff's awareness that the door was heavy and that the weather was rainy does not demonstrate his awareness of any reason not to use the railing for its intended purposes.

The fact that the door was heavy only indicates that more of plaintiff's body weight was applied pulling on the door rather than pushing against the railing. Insofar as defendants suggest that he might have avoided using the railing altogether had he lubricated the door or summoned two guards who were nearby to assist with closing the door, he bore no duty to do so. Moreover, even though the guards may have been nearby, plaintiff testified that only he was authorized to be in the area of the door.

V. CONCLUSION

In sum, nothing in the record supports any comparative negligence by plaintiff in causing his injury. Wesley v. City of New York, 76 A.D.3d at 926-27; Flores v. City of New York, 66 A.D.3d 599 (1st Dep't 2009); Neryaev v. Solon, 6 A.D.3d 510, 511 (2d Dep't 2004). Therefore the court grants plaintiff's motion for summary judgment on defendant US Helicopter's liability for his claims and on the absence of his comparative fault, but, for the reason delineated above, denies his motion on defendant Atlantic Aviation's liability. C.P.L.R. § 3212(b) and (e); Sammis v. Nassau/Suffolk Football League, 95 N.Y.2d at 810; Thoma v. Ronai, 82 N.Y.2d at 737; Maniscalco v. New York City Tr. Auth., 95 A.D.3d at 513; Calcano v. Rodriguez, 91 A.D.3d 468. See Gonzalez v. ARC Interior Constr., 83 A.D.3d at 419; Strauss v. Billig, 78 A.D.3d at 416; Tselebis v. Ryder Truck Rental, Inc., 72 A.D.3d at 200. This decision constitutes the court's order.

FILED

DATED: December 6, 2013

DEC 11 2013

NEW YORK *Lucy Billings*
 COUNTY CLERK'S OFFICE
 LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**