Stamatakos v City of New York
2013 NY Slip Op 33402(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 111477/07
Judge: Paul Wooten

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

IOANNIS STAMATAKOS,
Plaintiff,

INDEX NO. 111477/07

-against-

MOTION SEQ. NO. 004

THE CITY OF NEW YORK, ADAMS EUROPEAN CONTRACTING INC.
Defendants.

The following papers were read on this motion by the defendants for summary judgment and plaintiff's cross-motion to amend and for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

This is a negligence action brought by Ioannis Stamatakos (plaintiff), a construction supervisor for nonparty New York Stone, to recover damages for injuries allegedly sustained when he slipped and fell on an outside stairway at Public School 63, located at 121 East 3rd Avenue, New York on September 13, 2006. The public school, which is owned by the City of New York (the City), was under construction at the time of the accident. Plaintiff filed his Notice of Claim against the City on December 8, 2006 and commenced this action on or about August 22, 2007 against the City. Issue was joined on or about October 15, 2007 when the City interposed its answer. Pursuant to a transfer/consolidation Order dated December 30, 2009, the action plaintiff commenced in Kings County Supreme Court against the City and Adams European Contracting, Inc. (AEC), was transferred to New York County Supreme Court and consolidated with this action. Discovery in this matter is complete and the Note of Issue has

been filed.

Now before the Court is a motion by the defendants, brought on December 12, 2011, for summary judgment seeking dismissal of the complaint as asserted against them pursuant to CPLR §§ 3211 and 3212. Defendants move on the basis that they did not create the alleged raised green carpet condition, the defendants did not have prior notice of the alleged raised green carpet condition, and the defendants did not control the work regarding the installation of the green carpet.

On February 8, 2012, plaintiff filed an amended verified Bill of Particulars, alleging violations of Labor Law §§ 240 and 241(6) and New York State Industrial Code sections 23-1.7(f), 23-2.7(e)(1) and (e)(2), and 23-3.3(c). On March 22, 2012, plaintiff submitted his opposition to the herein summary judgment motion also cross-moved to amend the complaint to allege new causes of action, namely Labor Law §§ 241 and 241(6) and New York State Industrial Code sections 23-1.7(f), 23-2.7(e)(1) and (e)(2), and 23-3.3(c) and also for summary judgment pursuant to CPLR 3212. In support of his cross-motion plaintiff proffers that the testimony and evidence indicates that plaintiff was caused to fall by raised temporary carpeting and plaintiff was unable to stop his slip and fall due to the absence of a handrail. Plaintiff further asserts that the condition of the raised carpeting and absence of the handrail existed for period of approximately two weeks at a building site which was under construction at the time. It is on those grounds that plaintiff seeks to assert violations of the New York Labor Law (*see* plaintiff's cross-motion, exhibit B, plaintiff's aff'd, exhibit C, expert's aff'd and exhibit D, site photographs).

STANDARDS

Summary Judgment

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 (*see Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that a "defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and

apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith,* 50 AD3d at 500). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material face" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Amend

CPLR 3025(b) provides that "[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 . . . Leave shall be freely given upon such terms as may be just . . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given"]). The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted. . . " (*Ancrum*, 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

DISCUSSION

On February 8, 2012, plaintiff served his third Bill of Particulars, alleging new causes of action for liability in this case, specifically violations of Labor Law §§ 240 and 241(6) and New York State Industrial Code sections 23-1.7(f), 23-2.7(e)(1) and (e)(2), and 23-3.3(c). Plaintiff

now seeks an Order permitting him to amend the complaint to assert these new causes of action. For the following reasons this portion of plaintiff's cross-motion is granted.

Previously, plaintiff served two Bills of Particulars, dated January 22, 2008 and June 17, 2008, alleging that the defendants were negligent in the ownership, maintenance, and control of the subject steps (*see* Affirmation of Aaron R. Haimowitz, Esq. [Haimowitz Aff.] in Support of Defendants' Motion, exhibits F and G). Although there is a delay by plaintiff in asserting these claims, delay alone is insufficient to deny a motion to amend. Furthermore, "a party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment]'" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012], quoting *Otis El. Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 308 [1st Dept 1990]. "Prejudice to warrant denial of leave to amend requires 'some indication that the defendant[s] ha[ve] been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position'" (*McGhee*, 96 at 450, quoting *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). In opposition the defendants have not shown that this amendment would hinder their preparation of the case. This is especially true in light of the Court striking the Note of Issue in order to allow for the parties to conduct discovery on these new claims. Accordingly, this portion of plaintiff's cross-motion is granted.

In turning to the respective motions of both the defendants and plaintiff for summary judgment on the complaint, the Court finds that there are triable issues of fact warranting trial, which preclude awarding summary judgment (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). As such, defendant's motion and plaintiff's cross-motion for summary judgment are denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion seeking summary judgment and dismissal of the

complaint asserted against it is denied; and it is further,

ORDERED that the portion of plaintiff's cross-motion for leave to amend the complaint, pursuant to CPLR 3025(b), to add causes of actions for Labor Law §§ 241 and 241(6) and New York State Industrial Code sections 23-1.7(f), 23-2.7(e)(1) and (e)(2), and 23-3.3(c) is granted, and plaintiff is directed to serve an amended complaint consistent with this Order within 20 days from the date of Entry of this Order; and it is further,

ORDERED that the defendants shall serve an amended answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further,

ORDERED that the portion of plaintiff's cross-motion for summary judgment, pursuant to CPLR 3212, is denied; and it is further,

ORDERED the Note of Issue is hereby stricken and the parties have 90 days from the date of service of defendants' amended answer to complete discovery on plaintiff's new claims; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court within twenty days of the date of this order.

This constitutes the decision and order of the Court.

Dated: 12/17/13 **Entered:**

PAUL WOOTEN, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**