

Nunez v Plaza Residential Owner, LP

2013 NY Slip Op 33450(U)

December 18, 2013

Supreme Court, New York County

Docket Number: 102831/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Salvatore Scarpulla
Justice

PART 19

Index Number : 102831/2010
NUNEZ, BRAULIO R.
vs.
PLAZA RESIDENTIAL
SEQUENCE NUMBER : 001
STRIKE

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in
accordance with the accompanying decision/order.

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

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DEC 28 2013
JAS MOTION SUPPORT OFFICE
1155 SUPREME COURT-CIVIL

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DEC 23 2013
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NEW YORK

Dated: 12/18/13

Salvatore Scarpulla 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: CIVIL TERM: PART 19

-----X
BRAULIO R. NUNEZ,

Plaintiff,

-against-

PLAZA RESIDENTIAL OWNER, LP AND EL AD
US HOLDINGS, INC.,

Defendants.

-----X

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100831/10
Index No: ~~158272/2012~~
Submission Date: 10/9/13

DECISION AND ORDER

Papers considered in review of the motion to strike and for summary judgment:

Notice of Motion 1
Affidavit in Opp 2
Reply 3

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Plaza Residential Owner, LP ("Plaza") and El Ad US Holdings, Inc. ("El Ad") move to strike plaintiff Braulio R. Nunez's ("Nunez") amended/supplemental bill of particulars pursuant to CPLR §3043(b); and for summary judgment dismissing the complaint.

On November 23, 2007, Nunez allegedly slipped and fell in the 18th floor stairway of the Plaza Hotel, premises owned by Plaza. He was in the process of stepping down onto the first step from the landing when he fell down the remainder of the staircase to the

landing below. Nunez was employed by Plan Building Services as a maintenance worker at the hotel. Allegedly, there was construction being performed in the building at the time of his fall.

In or about January 2010, Nunez commenced this action seeking to recover damages for the injuries he sustained. On June 20, 2010, he served a verified bill of particulars, which alleged “[p]laintiff was caused to fall when he slipped tripped and fell on a foreign substance/debris/liquid/dust on the stairway.” On April 24, 2012, Nunez served an “amended/supplemental” bill of particulars alleging, for the first time, violations of Labor Law §§200, 240(1) and 241(6).

Plaza and El Ad now move to strike plaintiff Nunez’s amended/supplemental bill of particulars pursuant to CPLR §3043(b), and for summary judgment dismissing the complaint. They first argue that Nunez’s service of the 2012 “amended/supplemental” bill of particulars was inappropriate because it was done without leave of court and included new causes of action.

They next argue that they are entitled to summary judgment because of the court’s ruling in another action commenced by Nunez against CPS 1 Realty LP (“CPS”) and other defendants involving the same incident (“Action 1”), in which the court granted CPS’s motion for summary judgment dismissing the complaint insofar as asserted against it, without opposition. Plaza and El Ad claim that the court’s ruling in Action 1 is law of the case in this matter, and therefore, the claims asserted against them must be dismissed

as well. In the alternative, they argue that their motion for summary judgment should be granted because they did not create or have notice of any dangerous condition that caused Nunez's accident and Nunez can not identify the cause of his fall.

In opposition, Nunez argues that the relevant ruling in Action 1 can not be the basis for dismissal of this action because it did not involve the same defendants that are in this action. He further maintains that in a second deposition, not referenced by Plaza and El Ad in their motion, he clearly stated that the cause of his fall "got to be construction debris that was there, all that mess, and that black liquid was all on my pants...black liquid, wood chips, I saw tools, and just a total mess everywhere."

Nunez also argues that he was entitled to amend his bill of particulars without leave of court pursuant to CPLR §3042(b). Finally, he contends that he is entitled to partial summary judgment on his Labor Law §241(6) claim.

Discussion

Pursuant to CPLR §3043(b), "a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial." In addition, pursuant to CPLR §3042(b), "in any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue." However, a bill of particulars may not supply an essential allegation which is lacking in the pleading, that is, it may not cure a defect in the pleading

nor add or substitute a new theory or cause of action or defense. See *Jurado v Kalache*, 93 A.D.3d 759 (2nd Dept. 2012); *Melino v. Tougher Heating & Plumbing Co.*, 23 A.D.2d 616 (3rd Dept. 1965). Therefore, whether Nunez's 2012 bill of particulars is to be characterized as an "amended" or "supplemental" bill of particulars, Plaza and El Ad's motion to strike it is granted because it alleges new causes of action for violations of the Labor Law not alleged in the complaint.

However, the court denies Plaza and El Ad's motion for summary judgment dismissing the complaint. Contrary to their contention, the court's ruling in Action 1 granting summary judgment dismissing the complaint insofar as asserted against CPS does not warrant dismissal of the complaint in this action against these defendants. Plaza and El Ad maintain that the ruling in Action 1 is law of the case, however law of the case applies to various stages of the same litigation and not to different litigations. *McGrath v. Gold*, 36 N.Y.2d 406 (1975). Even assuming that Plaza and El Ad were actually seeking to rely on collateral estoppel or res judicata and not the law of the case doctrine, neither entitles Plaza and El Ad to summary judgment. Collateral estoppel applies when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *McGrath v. Gold*, 36 N.Y.2d 406 (1975). Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. *In re Hunter*, 4 N.Y.3d 260 (2005). Here, the

parties in this lawsuit are not the same parties in Action 1. Plaza and El Ad were not parties in Action 1. Plaza owns the portion of the premises relevant to this action; CPS owns a different portion of the premises, not relevant to this action. Therefore, the ruling in CPS's favor in Action 1 does not warrant dismissal of the complaint in this action against Plaza or El Ad.

Further, it is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury. *Siegel v City of New York*, 86 A.D.3d 452, 454 (1st Dept. 2011). Here, while Nunez originally testified that he did not know what he specifically tripped or slipped on, he later testified that the cause of his fall "got to be construction debris that was there, all that mess, and that black liquid was all on my pants...black liquid, wood chips, I saw tools, and just a total mess everywhere." He explained that when he reached the landing of the stairwell, it was a little dark, and he fell after stepping down onto the first step. He fell down ten or eleven steps to the next landing. Nunez testified that there was construction debris on the stairwell, and black liquid around the top of the stairwell. While he could not identify which precise item he tripped or slipped on, he testified "I don't know what I slipped, but I know it was that, that debris." His pants were "all full" of the black liquid after the fall. Nunez also testified that there was ongoing construction at the hotel at that time.

A plaintiff's evidence must be sufficient to permit a finding of causation based on logical inferences from the evidence. *Sieling v. New York Convention Ctr. Dev. Corp.*, 35 A.D.3d 227 (1st Dept. 2006); *Matalon v City of New York*, 2011 NY Slip Op 31359(U) (Sup. Ct. N.Y. Co., May 24, 2011). Although Nunez has not identified the precise item upon which he slipped or tripped, he submits sufficient evidence upon which a logical inference can be based. The court finds that the totality of the evidence is sufficient to raise questions of fact for the jury.¹

In accordance with the foregoing, it is hereby

ORDERED that defendants Plaza Residential Owner, LP and El Ad US Holdings, Inc.'s motion to strike plaintiff Angel Hernandez's April 24, 2012 bill of particulars is granted and it is hereby stricken; and it is further

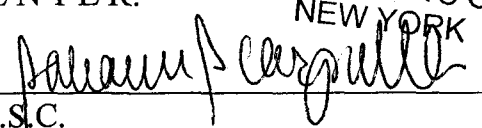
ORDERED that defendants Plaza Residential Owner, LP and El Ad US Holdings, Inc.'s motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 18, 2013

FILED

DEC 23 2013

ENTER: COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

¹ While Plaza and El Ad briefly mention that are entitled to summary judgment because they did not create or have notice of the allegedly dangerous condition that caused Nunez's fall, they do not argue this point in their papers, or submit any evidence to support it. They merely submit arguments on this point from CPS's motion papers in Action 1, which are not material because CPS was not the owner of the premises relevant to this action.