Simmons v MDA Contr. Inc.
2014 NY Slip Op 31075(U)
April 25, 2014
Sup Ct, New York County
Docket Number: 105356/11
Judge: Paul Wooten
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SCANNED ON 4/29/2014

[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice — PART 7

DEREK V. SIMMONS,

Plaintiff,

- against -

MDA CONTRACTING INC., KAUFMAN MANAGEMENT COMPANY, L.L.C., and KAUFMAN 8TH AVENUE ASSOCIATES OF NEW YORK a/k/a KAUFMAN 8TH AVENUE ASSOCIATES, L.P.,

Defendants.

INDEX NO. 105356/11

MOTION SEQ. NO. 002

FILED

APR 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

The following papers were read on this motion by defendant MDA Contracting Inc. to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4
Replying Affidavits (Reply Memo)	5, 6

Cross-Motion: ■ Yes ☐ No

This is an action for personal injuries allegedly sustained by Derek V. Simmons (plaintiff) on June 23, 2008, when in the course of moving a loaded dolly onto a freight elevator at 519 8th Avenue, New York, New York 10018 (the premises), the boxes that were stacked onto the dolly fell on him resulting in injuries. At the time of the accident plaintiff was an employee of Ryder Construction, whose offices are located on the sixteenth floor of the premises owned by Kaufman 8th Avenue Associates of New York a/k/a Kaufman 8th Avenue Associates, L.P. (Kaufman Associates) and managed by Kaufman Management Co., LLC (Kaufman Mgt.) (collectively, Kaufman defendants). Plaintiff alleges in his amended complaint that the defendants negligently supervised and/or negligently loaded the dolly and that the dolly was defective (Amended Complaint at ¶ 8, 9). Plaintiff also alleges that the Kaufman defendants

negligently supervised the freight elevator through their agent, Jorge Tagle (Tagle), an employee of Kaufman Mgt., who failed to properly level the elevator with the floor.

Now before the Court is a pre-answer motion by MDA Contracting Inc. (MDA), pursuant to CPLR 3211(a)(7), to dismiss plaintiff's Amended Complaint and all cross-claims asserted against it. Also before the Court is a pre-answer cross-motion by the Kaufman defendants for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the basis of the applicability of the doctrines of res judicata and collateral estoppel. Plaintiff is in opposition to both motions.

BACKGROUND

On the date of the accident, plaintiff agreed to assist William Freesnick, the Chief Financial Officer of MDA, in the removal of old blueprints by transporting 40 boxes, at the approximate height of 3 feet and weight of approximately 125 pounds each, from the 16th floor to the basement for recycling (Plaintiff Examination Before Trial [EBT], exhibit I at 57- 59). The dolly that was used by the plaintiff was owned and provided to him by MDA (*id.* at 60, 61). Plaintiff maintains that he had never done this type of work before and that he loaded the boxes onto a dolly in order to transport them downstairs via the freight elevator.

In his affidavit, Tagle states that the freight elevators in the building are operated with a manual control or lever that moves the elevator car up and down (Notice of Cross-Motion, exhibit E at ¶ 2). When someone rings the bell for the freight elevator, he takes the elevator up to that floor and slides the gate open from left to right (*id.* at 3). On June 23, 2008, Tagle states that someone on the 16th floor called for a freight elevator, whereupon he rode to the 16th floor and opened the gate and observed some people moving boxes on a dolly (*id.* at 6).

Plaintiff describes the dolly he was using as a four wheeled flatbed dolly 2 to 3 feet long and 3 feet wide, incapable of locking, and he claims there were no security devices, operating apparatus, and it was not inspected prior to its use (*id.* at 60, 61; Affirmation in Opposition at ¶

7). The boxes were not stacked in a specific manner or method, according to plaintiff, and were flatly laid onto the dolly (Plaintiff EBT exhibit I at 62). Plaintiff testified that upon approaching the freight elevator with the loaded dolly he noticed that the elevator cab was about a foot higher than the floor (*id.* at 92-93). Plaintiff testified that he walked to the front of the dolly and went to reach down with his right arm to lift the dolly into the freight elevator, when Tagle told plaintiff "don't do that. I'm going to lower it for you" (*id.* at 93). At the time Tagle spoke to plaintiff, he testified that he had not tried to lift the dolly yet (*id.*). Plaintiff maintains that when the elevator was lowered the right half of his body was inside the elevator and the left half was outside the elevator, with his right foot inside and left foot outside (Plaintiff EBT, Notice of Motion, exhibit I at 96). During the course of the elevator being lowered, plaintiff testified that he remained in the aforementioned position (*id.* at 95). After Tagle lowered the elevator it was now six inches lower than the floor (*id.* at 94, 98). When the elevator was lowered, the dolly then rolled into the elevator without any contributing effort by the plaintiff and consequentially the boxes located on the dolly slid forward off the dolly and onto the plaintiff, which he alleges caused injury to his arm (*id.* at 99, 103).

Subsequently, plaintiff brought a lawsuit regarding this June 23, 2008 incident in the United States District Court for the Eastern District of New York, based on diversity jurisdiction, against the Kaufman defendants (*Simmons I*), which was later transferred voluntarily by plaintiff to the Southern District of New York. The Kaufman defendants filed a Third-Party Complaint against Ryder Construction, Inc., Ryder Construction, LLC, and MDA. The Kaufman defendants as well as the third-party defendants, filed motions for summary judgment. The Kaufman defendants moved for summary judgment seeking to dismiss the complaint on the basis that it was mechanically and electrically impossible for plaintiff to have sustained injuries as claimed. By a Decision and Order dated November 29, 2010, U.S. District Court Justice Jed S. Rakoff granted the Kaufman defendants' motion for summary judgment on the basis that

plaintiff had failed to raise a triable issue of fact in opposition as his version of the accident was based on pure speculation, and dismissed the third-party action as moot (Notice of Motion, exhibit L).[1] Plaintiff appealed this decision to the Second Circuit (Notice of Cross-Motion, exhibit Q). In its decision dated February 2, 2012, the Second Circuit determined that there was a lack of diversity jurisdiction and ultimately ordered that the case be remanded back to the District Court for entry of dismissal, or for such other disposition as the court determines to be appropriate (*id.* at exhibit S). The parties do not attach any further order of the District Court.

Subsequently, on or about April 27, 2011, plaintiff instituted the herein action by the filing of a summons and complaint (*Simmons II*) based upon the same June 23, 2008 accident. Plaintiff moved to amend to add Kaufman Associates as a direct defendant which was granted without opposition, and plaintiff filed an amended summons and complaint on or about February 27, 2012. In support of their respective motions, MDA and the Kaufman defendants submit, *inter alia*, affidavits, deposition transcripts and other documentary and extrinsic evidence which was submitted in support of their summary judgment motions before Justice Rakoff.

STANDARDS OF LAW

Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994] and *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]; CPLR 3026). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners*

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[1] Plaintiff sought leave before the District Court to add MDA as a directed defendant, however that request was not addressed in Justice Rakoff's decision, nor was this issued raised by the plaintiff on appeal (Notice of Motion to Dismiss at ¶ 17).

Corp., 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Concerning a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

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]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). 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 Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *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" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

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 fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

Motion to Dismiss

MDA argues that the deposition testimony of the plaintiff in *Simmons I* confirmed he did not have difficulty in operating the dolly on the day of his accident and it was the movement of the elevator cab that caused his injuries (Plaintiff EBT, Notice of Cross-Motion, exhibit 1 at 62, 105). However, despite this previous testimony, plaintiff now asserts he was provided with a defective dolly and that the defendants "negligently loaded and/or negligently supervised the loading of a dolly with boxes" (Amended Complaint, Notice of Motion, exhibit A at ¶ 8, 9). MDA argues that the current claims are blatantly false and the directly conflicting testimony by plaintiff warrants dismissal as it disproves an essential allegation of the Amended Complaint that the dolly was defective. Furthermore, plaintiff's previous testimony that he alone loaded the dolly (Plaintiff EBT, Notice of Cross-Motion, exhibit 1 at 71-72, 139) contradicts his allegation in the Amended Complaint that MDA negligently loaded or supervised the loading of the dolly (Amended Complaint, Notice of Cross-Motion, exhibit A at ¶ 8). Furthermore, plaintiff's allegations regarding the operation and maintenance of the service elevator relate

solely to the Kaufman defendants.

In opposition, plaintiff argues that just because in *Simmons I* he testified that he had no problem with the dolly, he is not precluded now from arguing that the dolly was inadequate and dangerous for the intended use of moving six 125 pound boxes. He maintains that he had serious difficulties with the dolly because it ended up tipping when its wheels, which were not locking, got caught into the space between the elevator and the building floor, and the unsecured boxes fell off the dolly when Tagle lowered the elevator cab as the dolly had no sides or safety straps. Plaintiff avers that these allegations create questions of fact and require denial of MDA's motion.

"Factual allegations presumed to be true on a motion pursuant to CPLR 3211[7] may properly be negated by affidavits and documentary evidence" (*Wilhelmina Models Inc. v Fliesha,* 19 AD 3d 267 [1st Dept 2005]; citing *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], affd 94 NY2d 659 [2000]).

> "On a motion to dismiss a pleading for insufficiency, where extrinsic evidence is introduced, the allegations are not deemed true. The inquiry is whether the pleader has a cause of action, not whether he has properly stated one. The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted" (*Blackgold Realty Corp. v Milne*, 119 AD2d 512, 513 [1st Dept 1986], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The Court finds that the extrinsic evidence presented by MDA negates the claim asserted herein by the plaintiff in his Amended Complaint that he was provided with a defective dolly and that MDA negligently loaded or supervised the loading of the dolly. In his EBT in *Simmons I* plaintiff testified that he did not have any problems using the dolly on the date of his accident, that he alone loaded the dolly, and no one gave him instructions as to how to load the boxes (Plaintiff EBT, Notice of Cross-Motion, exhibit 1 at 61, 139). These statements disprove essential allegations against MDA asserted in the Amended Complaint. Lastly, any allegations

regarding the maintenance and operation of the elevator relate to the Kaufman defendants and not to MDA. Accordingly, the portion of MDA's motion seeking dismissal of the complaint is granted.

Summary Judgment

In support of their motion, the Kaufman defendants argue that the herein action should be dismissed on the basis of res judicata and collateral estoppel, as the matter was decided on its merits by the District Court (Affirmation in Support of Cross-Motion, ¶ 64). However, in the alternative the Kaufman defendants proffer that they are entitled to summary judgment based on the admissible evidence submitted in support of their motion, which demonstrates that plaintiff's accident as described in his deposition was impossible as a matter of law.

In opposition, plaintiff maintains that the allegation that the elevator cab stopped higher than the floor and was not level creates an inference of negligence pursuant to the theory of *res ipsa loquitur*, against the Kaufman defendants. Plaintiff also points to the EBT transcript of defendants' expert witness, Thomas Davies (Davies), wherein he states that the subject elevator could be "hot-wired" very easily which would allow the elevator to be operated with the door open (Affirmation in Opposition, exhibit D). There is a question of fact, according to plaintiff as to whether the elevator was hot-wired at the time of the accident.

Regarding res judicata,

> "a formal judgment on the merits (consent or otherwise) of a court of competent jurisdiction is binding on the parties not only as to those matters actually litigated in the first suit, but also to those which might have been litigated but were not, being based on the principle that the public interest demands that a party not be heard a second time on a cause of action that he once had an opportunity to litigate" (*Prudential Lines Inc. v Firemen Ins. Co. of Newark NJ,* 91 AD2d 1, 3-4 [1st Dept 1982] [citations omitted]).

"The dismissal of the prior action by the [Second Circuit] for lack of subject matter jurisdiction

does not require that the present action be dismissed on the grounds of res judicata" as the prior determination is not binding (*Denehy v St. John's Queens Hosp.*, 114 AD2d 991, 991-92 [2d Dept 1985]). Res judicata does not operate to bar the instant action since there was no final determination on the merits in *Simmons I*. Although *Simmons I* was adjudicated on the merits in the District Court, the Court of Appeals found that diversity jurisdiction was lacking and remanded the case back to the District Court for an entry of dismissal (Affirmation in Support of Cross-Motion, exhibit S).

"Simply stated, collateral estoppel means that, when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit" (*Prudential Oil Corp. v Phillips Petroleum Co.*, 69 AD2d 763 [1st Dept 1979] [citations omitted]). For the same rationale as stated above, the District Court's decision cannot be considered a final determination since it lacked subject matter jurisdiction to legally and properly adjudicate the issue. Therefore, the District Court's decision has no preclusive effect and collateral estoppel is inapplicable. As such, the Court finds that the portion of the Kaufman defendants' motion for summary judgment based upon res judicata and collateral estoppel is denied.

In turning to the alternative portion of the Kaufman defendants' motion, defendants argue that it was mechanically and physically impossible for claimant to have been injured as alleged, contending that due to a safety interlocking system, the elevator could not have been operated with the elevator door open and as a consequence no triable issue of fact can exist (Tagle Affidavit, exhibit E at ¶ 4). The Kaufman defendants also put forth the affidavit of their expert, Davies, who states that the subject freight elevator has vertical bi-parting doors and each has an electrical mechanical locking device called an interlock (Notice of Cross-Motion, exhibit H at ¶ 6, 7). If a freight elevator door is open, the interlock cuts voltage to the break and main hoist motor preventing the elevator from moving in any direction, and in order for the

elevator to move up or down both the gate and doors must be closed (*id.* at ¶ 8,9). Davies further opines that he inspected the interlock mechanism on the subject elevator and found that it was in proper working condition, and that the "plaintiff's account of the subject accident is simply impossible to have occurred as described" (*id.* at 12; Davies EBT, Plaintiff Opposition, exhibit D at p. 7). The Court finds that the Kaufman defendants have met their *prima facie* burden of establishing their entitlement to summary judgment through their submissions in support of their motion which establish that it was mechanically and physically impossible for plaintiff to have been injured as alleged.

In opposition, plaintiff avers that there is a triable issue of fact as the possibility of the elevator being "hot- wired" permitting the possibility for the injury to have occurred as claimed. In support of this proposition, plaintiff relies upon the EBT testimony of Davies. Plaintiff alleges that Davies testified that the elevator could have been operated with doors open, making it mechanically and physically possible for his injuries to be sustained in the manner claimed and creating a material issue of fact (Davies EBT, exhibit K, 11-12; Plaintiff Affirmation in Opposition ¶ 13). However, this allegation regarding the elevator door, without any other supporting evidence, is insufficient to raise a triable issue of fact that the elevator door was in fact hot-wired on the date of plaintiff's injury. Davies, in his EBT merely states that it is possible to hot wire the gate switch of the freight elevators (Opposition, exhibit D at pg. 11, 12). There is nothing before the Court that indicates or demonstrates, by way of expert testimony or otherwise, that the subject freight elevator was hot wired on the date of plaintiff's accident. As such, the portion of the Kaufman defendants' motion for summary judgment dismissing the Amended Complaint as asserted against them is granted.

To the extent that this Court is dismissing the plaintiff's complaint as against all defendants, all cross-claims are hereby dismissed as moot.

CONCLUSION

Upon the foregoing papers, it is,

ORDERED that defendant MDA Contracting Inc.'s motion to dismiss the Amended Complaint and all cross-claims asserted against it, pursuant to CPLR 3211(a)(7), is granted and the Amended Complaint and any cross-claims as asserted against MDA are dismissed; and it is further,

ORDERED that defendants Kaufman Management Company L.L.C and Kaufman 8th Avenue Associates of New York a/k/a Kaufman 8th Avenue Associates L.P cross-motion for summary judgment dismissing the Amended Complaint and all cross-claims, pursuant to CPLR 3212, is granted and the Amended Complaint and any cross-claims as asserted against said defendants are dismissed; and it is further,

ORDERED that counsel for MDA is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4-25-19

PAUL WOOTEN J.S.C.

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

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

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