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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

SERGEI GOREGLIAD,

Plaintiff,

"against"

FRIENDS OF THE HIGH LINE, INC.,

Defendant.

INDEX# 152397/2012

DECISION and ORDER

Margaret A. Chan, J.:

Plaintiff sustained personal injuries on October 9, 2011 when he tripped and fell on a walkway in High Line Park located in the County, City, and State of New York. Defendant Friends of the High Line, Inc. (FHL) made the instant motion to dismiss pursuant to CPLR § 3211(a)(7). Plaintiff submitted opposition to which FHL replied.

Plaintiff was walking along the path in High Line Park when, in an effort to get around a crowd of people, he stepped off the path and got his left foot caught on a curb that he did not see (Mot, Exh D, p 19). He tried to catch himself from falling with his right foot, but it was wedged between slabs of concrete on the walkway (*id.*). He fell and sustained physical injuries. Plaintiff claimed FHL was negligent in its maintenance and installation of the "sidewalk" and for failure to warn of the hazardous condition that caused his fall (Mot, Exh A, ¶ 6).

FHL disclaimed any liability as it did not owe a duty of care to plaintiff. FHL explained that it is a not-for-profit corporation "formed in 1999 to promote and assist in the restoration, preservation, maintenance, programming, and operations of the High Line Park" (Mot, Exh E, p 1). On May 26, 2009, the New York City Department of Parks and Recreation (Parks Dept), an agency of the City of New York (the City), and FHL entered into a license agreement (Agreement) under which FHL was to provide programming to the public on horticulture, education, recreation, sport, food, products, and music (Mot, Exh E, p 7). Additionally, FHL was to perform maintenance, which included cosmetic cleaning, snow removal, landscaping, and making repairs to seating, walls, and pavements (Mot, Exh E, pp 4- 6). FHL was not permitted make a restoration, modification, renovation or improvement to High Line Park without the approval of the Parks Dept (*id.* at 12). The Agreement provides FHL indemnification by the City and the Parks Dept from "any and all liabilities, obligations, damages and expenses arising from maintenance obligations and activities conducted by FHL . . . including without limitation any and all liabilities, damages and expenses in connection with injuries

suffered by persons visiting or working on the Premises" (*id.*). Neither the City nor the Parks Dept is a defendant in this suit.

In a motion to dismiss the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see* CPLR § 3211(a)(7); *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory (*id.*). In matters where documentary evidence contradicts the alleged facts and legal conclusions, they are neither presumed to be true nor afforded every favorable inference (*see Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dep't 2001]; *Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept. 1991]). The issue for the court is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*see Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d at 150 *quoting Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]). Contract interpretation is a legal issue for the court (*805 Third Ave. Co. v M.W. Realty Associates,* 58 NY 2d 447, 451 [1983]; *Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191 [1st Dept 1995]). The court will determine the rights of the parties from the contract itself, not from conclusory allegations in the complaint (*see 805 Third Ave. Co. v M.W. Realty Associates,* 58 NY at 451; *Pacnet Network Ltd. v KDDI Corp.* 78 AD3d 478 [1st Dept 2010]; *O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.* 198 AD2d 154 [1st Dept 1993]; *Miglietta v Kennecott Copper Corp.*, 25 AD2d 57 [1st Dept 1966]).

FHL's motion to dismiss is premised on its contention that it is not the proper party to this suit as it bears no liability, having no duty owed to plaintiff. Its license agreement does not grant it a possessory interest nor confer to it "occupancy, ownership, control or special use of such premises" upon which "liability for a dangerous condition on property may only be predicated" (*Gibbs v Port Authority of New York*, 17 AD3d 252, 254 [1st Dept 2005) *citing American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155 [1st Dept 1994]) and *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied* 73 NY2d 783 [1988]). Plaintiff, however, argues that the Agreement between FHL and the Parks Dept imposed a duty of care owed to him. Specifically, the duty stemmed from the section "Construction Defects and Hazardous Conditions", which provides:

> FHL shall inspect the High Line regularly for hazardous conditions and shall immediately institute appropriate measures to protect the public from harm, including but not limited to the creation of warning signs and temporary barriers. To the maximum extent practicable, FHL shall promptly repair any portion or feature of the High Line that exhibits defects or hazardous conditions.

(Mot, Exh E, p.14).

This section, as plaintiff posits, imposes "a distinct and primary obligation to protect the public" and "an affirmative duty to inspect, warn and protect" the public. Thus, he is an intended third party beneficiary (Plft's Opp, p 6, ¶¶ 20-21)).

Plaintiff's argument is flawed. It is well settled that a "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]). The *Espinal* court explained how seventy years earlier Chief Judge Cardozo in *H. R. Moch Co. v. Rensselaer Water Co.*, (247 NY 160 [1928]), considered and ultimately dispelled the notion of extending tort liability for a municipal contractor to the general public because doing so would be an oppressive burden. "Having rejected the concept of open-ended tort liability, while recognizing that liability to third persons may sometimes be appropriate," the *Espinal* court established three exceptions to the general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal,* 98 NY2d at 139, 140 [internal citations and quotations omitted]).

Plaintiff contends that the first exception applies here. Under the facts of this case, there is no plausible view that plaintiff's claim is one where the FHL launched a force or instrument of harm as plaintiff so insists. This exception contemplates "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*Espinal,* 98 NY2d at 141-142; *see also, Haxhaj v City of New York,* 68 AD3d 612 [1st Dept 2009]). Considering plaintiff's claim - FHL's failure to provide a warning or barrier on the curb where he fell - the negligence alleged is the failure to do something; launching the force or instrument of harm requires an affirmative action (*see generally, Cornell v 360 West 51st Street Realty,* 51 Ad3d 469 [1st Dep't 2008][negligent removal of debris launched the harm]; *Grant v Caprice Management Corp.*, 43 AD3d 708 [1st Dep't 2007][negligent window installation with defective parts falls within this exception]; *Bienaime v Reyer*, 41 AD3d 400 [2d Dep't 2007][negligent repairs to a machine without its electrical diagrams launched the harm]).

This case is analogous to *Church v Callanan Industries* (99 NY2d 104 [2002]) where the plaintiff was injured when the driver of the car in which he was a passenger fell asleep at the wheel and drove off the embankment. At that time, that portion of the New York State Thruway was included in a highway improvement project. Plaintiff commenced an action against the construction engineering firm for the project, the contractor, and the subcontractor who installed a guiderail along that stretch of the thruway. Plaintiff claimed that both the contractor and subcontractor were negligent in failing to complete installation of the guiderail as

required by the contract between them, and the engineering firm for its negligent inspection and approval of the guiderail installation as no guiderail was installed at accident site. Analogizing *Moch* to its case, the Court of Appeals quoted *Moch* to define its view that the subcontractor's "breach of contract consists 'merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument of good'" (*id.* at 112 *quoting Moch,* 247 NY at 167-168). Thus, it found that "the failure to install additional length of guiderail did nothing more than neglect to make the highway at [the accident site] *safer* – as opposed to less safe – that it was before [the improvement project] began" and plaintiff failed to qualify his claim to the exception that would subject the contracting party to tort liability for third parties (*id.* at 112). Similarly in the case at hand, FHL, at worst, neglected to erect a sign or barrier at the accident site to make it safer as opposed to less safe. Similarly, this alleged failure did not launch the force or instrument of harm under the exceptions to liability pronounced in *Espinal* to find FHL owing a duty to plaintiff. Thus, FHL's motion to dismiss is granted.

Accordingly, it is hereby

ORDERED, defendant Friends of the High Line, Inc.'s motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the action is dismissed. The clerk of court is directed to enter judgment as written.

This constitutes the decision and order of the court.

Dated: August 6, 2015

Margaret A. Chan, *J.S.C.*