Gomez v City of New York
2015 NY Slip Op 32347(U)
December 11, 2015
Supreme Court, New York County
Docket Number: 153888/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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YENY GOMEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, CENTRAL PARK CONSERVANCY, INC., NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and CENTRAL PARK BOATHOUSE LLC,

Defendants.

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Index No. 153888/14

Motion seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.

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By notice of motion, defendant Central Park Boathouse LLC (CPB) moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing the complaint. Plaintiff opposes.

I. UNDISPUTED FACTS

This action arises from a collision between a cyclist and pedestrian in Central Park, after which plaintiff, the cyclist, sustained injuries to her knee and head. In the early evening of July 26, 2013, plaintiff arrived in Central Park and rented a bicycle from CPB, whose employees neither instructed her on using the bicycle nor provided her with safety equipment. After cycling around the park for approximately an hour, plaintiff came upon a roadway that was heavily congested with other cyclists, cars, and pedestrians. Traffic cones and an electronic sign

redirected traffic. A jogger, whom plaintiff did not see beforehand, suddenly entered her path and collided with the front wheel and handlebars of her bicycle, launching plaintiff from the bicycle onto the pavement, resulting in her injuries. (NYSCEF 54, 62).

II. PROCEDURAL HISTORY

On September 12, 2013, plaintiff filed a notice of claim stating her intention to commence an action against defendant City of New York and other municipal entities (municipal defendants) sounding in negligence based on, *inter alia*, their failure to warn and/or safeguard against dangers on the roadway where the incident occurred. (NYSCEF 49).

On November 22, 2013, plaintiff appeared at a hearing pursuant to General Municipal Law § 50-h, where she testified, as pertinent here, that sometime before the accident, she noticed that the bicycle's handlebars were "shaky" and that its brakes were "a little off." (NYSCEF 54).

On April 22, 2014, plaintiff commenced this action against CPB and the municipal defendants, alleging, in relevant part, that CPB provided her with a defective bicycle, that it did not provide her with safety equipment or instruction, that it allowed her to ride the bicycle in a dangerous area, and that it permitted these dangers to persist. (NYSCEF 1).

By notice of motion dated December 3, 2014, the municipal defendants moved pursuant to CPLR 3211(a)(7) for an order dismissing the complaint for failure to state a cause of action. (Mot. seq. no. 001, NYSCEF 18). While CPB was not among the moving parties, plaintiff, in opposition, described the alleged defective condition of the bicycle, and provided an affidavit of an expert who opined that the condition of the bicycle was a proximate cause of her injuries. (NYSCEF 28-30).

By decision and order dated April 27, 2015, another justice of this court granted the

municipal defendants' motion and dismissed the complaint as against them, reasoning as follows:

> Reading the complaint in the most favorable light to plaintiff, the only conclusion the court can draw is that the actions of plaintiff and possibly the unidentified pedestrian were the sole proximate cause of the accident. The complaint does not allege any facts that implicate the City in causing the event. . . .
> . . . .
>
> Nothing in the complaint shows facts that the accident occurred other than because of the unanticipated act of the unidentified pedestrian.

(NYSCEF 33). The case was thereafter assigned to me.

III. CONTENTIONS

CPB contends that the prior justice's determination that plaintiff's and the pedestrian's actions were the sole proximate cause of plaintiff's injuries constitutes the law of the case, and thus claims that plaintiff has had a full and fair opportunity to litigate the issue of proximate cause, having addressed the alleged defect in the bicycle in her previous opposition papers, and that the prior justice ruled out any other causal factor contributing to her injuries. CPB also contends that plaintiff's 50-h testimony reflects that she was initially unaware of the alleged defect, and that once noticing it, she did not return the bicycle to CPB. (NYSCEF 47).

In opposition, plaintiff maintains that the issues of negligent maintenance of and/or defects in the bicycle were not before the court in its earlier decision, that the court considered only the sufficiency of the pleadings as against the municipal defendants only, and that, in any event, differing standards govern a motion to dismiss and one for summary judgment. (NYSCEF 62).

Plaintiff also observes that having offered no affidavit based on personal knowledge to refute her allegations of its negligence, CPB fails to establish, *prima facie*, that it is free from

negligence. Alternatively, she maintains that her allegations are consistent with her 50-h testimony and affidavits, wherein she states that the bicycle handlebars were wobbly and the brakes not functional, and that CPB offered her no instruction or safety devices, all of which proximately caused her injuries. (*Id.*).

In reply, CPB maintains that proximate causation is a central issue in both motions, for which plaintiff has now had an opportunity to brief fully. It claims that the court considered and rejected plaintiff's evidence, which included her description of the bicycle's defective condition and supporting exhibits. (NYSCEF 66).

IV. ANALYSIS

A. Law of the case

When parties have had a full and fair opportunity to litigate, a legal determination resolved on the merits in a prior order in the same action constitutes the law of the case. (*People v Evans*, 94 NY2d 499, 502 [2000]; *South Point, Inc. v Redman*, 94 AD3d 1086 [2d Dept 2012]; *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). Thus, once a court judicially determines an issue, another court of coordinate jurisdiction should not revisit that determination. (*Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335 [1st Dept 2009], *lv denied* 12 NY3d 713). As the law of the case applies only when the same question is at issue in the same case (*Erickson v Cross Ready Mix, Inc*, 98 AD3d 717 [2d Dept 2012]), a court determining the preclusive effect of an earlier determination must consider the respective procedural postures of the litigants at each point of the action (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]).

As the scope of review on a motion to dismiss pursuant to CPLR 3211 differs from one

for summary judgment, a determination of the former does not preclude arguments made in support of the latter. (*191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 [1st Dept 2011]; *Riddick v City of New York*, 4 AD3d 242, 245 [1st Dept 2004]).

While plaintiff described the alleged defective condition of the bicycle in her previous opposition papers, absent any indication that the court considered those facts in determining the issue of proximate causation, or otherwise addressed CPB's liability, there is no identity of issues precluding plaintiff from now litigating the issue of whether CPB proximately caused her accident. (*See Buller v Giorno*, 57 AD3d 216, 216 [1st Dept 2008] [law of case inapplicable where current motion "involved the conduct and liability of parties other than those involved in (the court's) prior ruling"]; *see also Dauria v Castlepoint Ins. Co.*, 120 AD3d 1016, 1018 [1st Dept 2014], *appeal dismissed* 24 NY3d 1008 [law of case inapplicable as issue of liability of one defendant not identical to that of other]).

Moreover, the disposition of the previous motion turned on the sufficiency of the pleadings, while a disposition of this motion turns on the sufficiency of plaintiff's evidence, a distinction that precludes the application of the law of the case here. (*See Moses v Savedoff*, 96 AD3d 466, 468 [1st Dept 2012] [previous determination on CPLR 3211 motion did not preclude subsequent motion for summary judgment]; *Del Castillo v Bayley Seton Hosp.*, 232 AD2d 602, 604 [2d Dept 1996] [same]).

B. Summary judgment

To prevail on a motion for summary judgment dismissing a cause of action, the movant "bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action."

(*Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The elements of a cause of action for negligence are: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) and a nexus between the alleged breach and damages. (*Chapman v Silber*, 97 NY2d 9, 22 [2001]; *J.E. v Beth Israel Hosp.*, 295 AD2d 281, 283 [1st Dept 2002]). A defendant moving to summarily dismiss a negligence action bears the burden of establishing, *prima facie*, that it was not at fault in bringing about the accident. (*Etingof v Metro. Laundry Mach. Sales, Inc.*, AD3d , 2015 NY Slip Op 08803 [2d Dept 2015]).

Here, CPB offers no evidence, beyond its counsel's conclusory assertions, that refutes plaintiff's allegations that it negligently rented her a defective bicycle and that such negligence caused her injuries (*cf. Bonilla v 191 Realty Assocs., L.P.*, 125 AD3d 470, 470 [1st Dept 2015] [summary judgment denied where defendant did not refute evidence it had knowledge of condition causing plaintiff's injury]; *Pierre v Ramapo Cent. Sch. Dist.*, 124 AD3d 614, 615 [2d Dept 2015] [defendant failed to establish that plaintiff assumed risk, and thereby failed to negate essential element of negligence claim]), and to the extent it relies on plaintiff's 50-h testimony, it fails to negate all triable issues of fact as to its own fault (*see Sarafolean v Accomplice New York*, 74 AD3d 1310, 1311 [2d Dept 2010] [defendants' evidence, including plaintiff's testimony and its employee's affidavit, who attested that bicycle's brakes were working both before and after accident, insufficient to eliminate all triable issues of fact regarding defective condition of brakes]). As CPB fails to satisfy its burden, I need not address plaintiff's opposition.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Central Park Boathouse LLC's motion for an order granting it summary judgment dismissing the complaint is granted to the extent that plaintiff's allegations of violations of Labor Law §§ 200, 240, and 241 in the fifth cause of action are stricken, and the motion is otherwise denied.

ENTER:

Barbara Jaffe, JSC

DATED: December 11, 2015
New York, New York