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

PRESENT: MANUEL J. MENDEZ Justice PART 13

ANTHONY BARKSDALE,
Plaintiff,

-against-

BP ELEVATOR CO., THE LENOX CONDOMINIUM, BOARD OF MANAGERS OF THE LENOX CONDOMINIUM, KYROUS REALTY GROUP, INC. AND CAR PARK SYSTEMS OF NEW YORK, INC.,
Defendants.

INDEX NO. 154754/2012
MOTION DATE 06/22/2016
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 8; 9
Replying Affidavits	10; 11

Cross-Motion: X Yes ☐ No

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

Upon a reading of the foregoing cited papers, it is ordered that Defendant Car Park Systems of New York, Inc.'s motion for summary judgment is granted, and Defendants The Lenox Condominium, Board of Managers of the Lenox Condominium and Kyrous Realty Group, Inc.'s cross-motion, is denied.

Plaintiff was employed as a parking attendant at a parking garage managed by Car Park Systems of New York, Inc. (herein "Car Park") located at 380 Lexington Avenue, New York, New York (herein "the garage") on April 27, 2012, when the car elevator gate allegedly fell on Plaintiff and injured his shoulder. Subsequently, Plaintiff filed a Workers' Compensation claim as a result of this injury, and received payments for approximately two years. (See Mot. Exhs. G at p. 142, H, and I). The Workers' Compensation case is still open, although the payments to Plaintiff stopped in April of 2014.

Plaintiff commenced this personal injury action by Third Amended Summons and Complaint on September 11, 2013, against BP Elevator Co. (herein "BP"), The Lenox Condominium (herein "Lenox"), Board of Managers of The Lenox Condominium (herein "Board of Managers"), Kyrous Realty Group, Inc. (herein "Kyrous"), and Car Park (collectively herein "the Defendants"). (Mot. Exh. A). All Defendants interposed an Answer (Cross-Mot. Exhs. G, H, and I), and the parties proceeded with discovery.

Plaintiff was an employee of Car Park (Mot. Exh. G at PP 8-9), the company that managed the garage located in the cellar of the Lenox (Mot. Exh. J at P 23). The Lenox is a condominium managed by the Board of Managers. BP had a contract with Car Park for maintenance and repair of the car elevator located within the interior of the garage. (Cross-Mot. Exh. O).

Car Park now moves for summary judgment dismissing the Complaint and all Cross-Claims against it based on the Workers' Compensation Law. Car Park contends that when Workers' Compensation benefits are provided to an injured employee this is the exclusive remedy available, barring all common-law actions against the employer. Plaintiff does not oppose Car Park's motion.

Defendants Lenox, Board of Managers, and Kyrous (herein "cross-movants") cross-move for summary judgment dismissing the Complaint and all Cross-Claims against them, or in the alternative, denying that part of Car Park's motion seeking dismissal of the cross-movants' cross-claims for breach of contract and/or breach of warranty.

Plaintiff opposes cross-movants' cross-motion as against him, stating it is improper because he is not a moving party. Plaintiff contends that bringing a summary judgment motion by cross-motion against a plaintiff, a non-moving party, is prejudicial because it affords only a short time for opposition. Plaintiff argues that this technical defect can only be overlooked if the non-movant is not prejudiced by the cross-motion and does not object.

"A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party." (Mango v. Long Island Jewish-Hillside Medical Center, 123 A.D.2d 843, 507 N.Y.S.2d 456 [2nd Dept. 1986], citing CPLR 2215). However, "such a technical defect may be disregarded where, as here, there is no prejudice, and the plaintiff had ample opportunity to be heard on the merits of the relief sought." (Volpe v. Canfield, 237 A.D.2d 282, 654 N.Y.S.2d 160 [2nd Dept. 1997], citing CPLR 2001).

Although correct, Plaintiff's argument fails here. Plaintiff provides no proof or instances of how he has been, or would be prejudiced by allowing the cross-motion to proceed. Plaintiff only provides a conclusory statement that he is prejudiced by not being afforded ample time to respond to the relief sought against him because it was brought as a cross-motion. Further, the cross-motion was filed on April 28, 2016, and the motion was adjourned twice in the submissions part of Room 130, May 5, 2016, and May 12, 2016. Oral argument on these motions were finally heard on June 22, 2016. The Plaintiff had ample time to submit his opposition, and/or make an application to the Court for an extension, but he failed to do so. Therefore, the cross-motion is allowed to proceed.

In their cross-motion, Cross-movants contend that under the By-Laws and Declaration of the Condominium, they are only responsible for maintenance of the common elements. (Cross-Mot. Exhs. M and N). The cross-movants were not responsible for maintaining the car elevator located within the garage unit because the garage unit is a separate commercial unit that is the responsibility of the occupant/unit owner. Therefore, cross-movants are not liable to the Plaintiff because maintenance of the garage was the sole responsibility of Car Park.

Cross-movants also argue that even if they were responsible for maintenance of the garage, they are still not liable to the Plaintiff because there was no actual or constructive notice of any car elevator issues. The building superintendent Tovia Gonzalez testified that the cross-movants did not supervise garage employees, did not maintain the garage, and did not receive reports from Car Park or BP as to elevator defects. (Cross-Mot. Exh. J at PP 6, 9-12, 13, and 17). When any car elevator problems

arose, Brian Holder, the manager for Car Park, testified he was to notify BP and not the cross-movants. (Cross- Mot. Exh. K at PP 27-28) Cross-movants further argue that the maintenance contract for the car elevator was only between Car Park and BP, and they were therefore not involved with the elevator maintenance in any way. (Cross-Mot Exhs. L at P 13, and O). Cross-movants contend that they are likewise not liable to BP and Car Park on their cross-claims because the cross-movants had no duty to maintain the unit, had no notice of the car elevator defect, and were not contractually obligated in any way to insure, defend or indemnify Car Park. Based on the foregoing, cross-movants contend summary judgment dismissing the Complaint and all cross-claims against them should be granted.

In the alternative, the cross-movants argue if summary judgment is not granted in their favor, that portion of Car Park's motion for summary judgment on cross-movants' cross-claims for breach of contract and/or breach of warranty should not be granted. Cross-movants argue that because Car Park managed the garage unit it was therefore an occupant of the garage unit, and was contractually obligated to maintain it and any of its limited common elements (like the car elevator). If cross-movants are held liable to the Plaintiff based on Car Park's failure to maintain the car elevator, then Car Park is liable to the cross-movants for consequential damages in breaching its responsibility to maintain the garage unit under the By-Laws and Condominium Declaration. Cross-movants contend that although the Plaintiff is barred from asserting claims against Car Park under the Worker's Compensation Law, Section 11 of the Worker's Compensation Law does not foreclose cross-movants' action for breach of contract against Car Park.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Workers' Compensation Law §10 provides in part that, "[e]very employer subject to this chapter shall in accordance with this chapter...secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury..."

Workers' Compensation Law §11 provides in part that, "[t]he liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee...or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom... 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

Section 11 further states in part that, "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean...death, [and/or] permanent and total loss of use or amputation of an arm..."

Car Park was Plaintiff's employer. As is required by law, Car Park provided Workers' Compensation benefits to the Plaintiff for his on the job injury. In support of its motion, Car Park provides the deposition testimony of its general manager Anthony Pansini who testified that Plaintiff was employed by Car Park. Also provided was Plaintiff's deposition testimony who also testified that he was employed at Car Park, and his claim for Worker's Compensation benefits which he received for almost two years. Car Park also provided the Workers Compensation Questionnaire forms filled out by the Plaintiff that identified Car Park as his employer. Therefore, based on Plaintiff claiming and receiving Workers' Compensation benefits from Car Park, Plaintiff is barred from maintaining a personal injury action against Car Park. Workers' Compensation is the exclusive remedy for an injured employee. (See Workers' Compensation Law §11). Therefore, summary judgment dismissing the Complaint as against Car Park is proper.

Cross-movants, however, have not established their right to summary judgment, nor do they successfully oppose dismissal of their cross-claims as against Car Park.

Cross-movants argue that Car Park did not make a prima facie showing of its entitlement to summary judgment on the cross-claims because it never addressed whether or not it breached its duties as an occupant or unit owner in its motion. Cross-movants also contend that their cross-claims for breach of warranty/breach of contract against Car Park are not barred by section 11 of the Workers' Compensation Law, and therefore warrant denial of that portion of Car Park's motion for summary judgment on all cross-claims against it. It is the cross-movants contention that there are facts that would allow a juror to infer

that Car Park is liable to the cross-movants for breach of warranty/contract. However, cross-movants provide only the Declaration of the Condominium and its By-Laws that impose a general duty on unit occupants to maintain the interior and all limited common elements of a unit. In order for a third person to survive the exclusive remedy provided for under the Workers' Compensation Law as a complete bar to recovery, there has to be proof of the employer's express agreement to contribution and indemnification. In addition to an express contribution/indemnification contract provision, the injured employee must have sustained a grave injury. The cross-movants provide no lease, or any other proof, that Car Park entered into a written contract where it expressly agreed to contribution or indemnification of the cross-movants. For these reasons, the cross-movants fail to raise issues of material fact warranting denial of Car Park's motion to dismiss cross-movants' cross-claims.

For these same reasons, cross-movant's fail to make a prima facie showing of their entitlement to summary judgment as a matter of law. The only proof cross-movants point to is the parties' deposition testimony (as cited above), and Car Park's indication in its moving papers that it managed the garage. The cross-movants fail to provide sufficient proof that Car Park was solely responsible for the maintenance of the garage unit, such as proof of a lease or ownership of the unit by Car Park. The By-Laws and Declaration of the Condominium do not assert that Car Park is the party responsible for such maintenance. There is only a general assertion that unit owners or occupants are responsible for their individual units.

Accordingly, it is ORDERED, that Defendant Car Park Systems of New York, Inc.'s motion for summary judgment dismissing the Complaint and all cross-claims against it, is granted, and it is further

ORDERED, that the Complaint and all cross-claims asserted against Defendant Car Park Systems of New York, Inc. are severed and dismissed, and it is further,

ORDERED, that Defendants The Lenox Condominium, Board of Managers of the Lenox Condominium, and Kyrous Realty Group's cross-motion for summary judgment dismissing the Complaint and all cross-claims against them, is denied, and it is further,

ORDERED, that the caption in this action is amended as follows:

ANTHONY BARKSDALE,
Plaintiff,

-against-

BP ELEVATOR CO., THE LENOX CONDOMINIUM,
BOARD OF MANAGERS OF THE LENOX CONDOMINIUM,
and KYROUS REALTY GROUP, INC.
Defendants.

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and it is further,

ORDERED, that within 20 days from the date of entry of this Order, Defendant Car Park Systems of New York, Inc. serve a copy of this Order on all parties, the General Clerk's Office Trial Support Clerk (Room 119) and the County Clerk (Room 141B) who is directed to enter judgment dismissing Plaintiff's Complaint, and all cross-claims as against Defendant Car Park Systems of New York, Inc., and amend the caption and the court's records accordingly.

Enter:

Dated: August 24, 2016

MANUEL J. MENDEZ

J.S.C. MANUEL J. MENDEZ

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE