

Benitez v City of New York

2017 NY Slip Op 31424(U)

June 29, 2017

Supreme Court, New York County

Docket Number: 151661/15

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 21

SIGFRIDO BENITEZ

INDEX NO. 151661/15

- v -

MOT. DATE

THE CITY OF NEW YORK et al.

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for dismiss (001) and sj (002)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s). _____

Replying Affidavits

ECFS Doc. No(s). _____

This is a personal injury action. In motion sequence number 001, defendant Ashraf Corporation ("Ashraf") moves pre-answer, pursuant to CPLR § 3211 (a) (1) and (a) (7), to dismiss the amended verified complaint and all cross claims, as against Ashraf. Defendants The Metropolitan Transportation Authority, The New York City Transit Authority Manhattan and Bronx Surface Transit Operating Authority and MTA Bus Company (collectively "Transit") and plaintiff oppose Ashraf's motion.

In motion sequence number 002, defendants Rockledge Scaffolding, and Rockledge Scaffolding Corp. (collectively "Rockledge") move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and any and all cross claims, as against them, and for an order imposing sanctions on plaintiff, for failure to withdraw his claims against Rockledge. Defendants Abner Properties Company, Newmark & Company Real Estate (s/h/a Newmark Knight Frank Global Properties, LLC), and The Rosen Group, Inc, (s/h/a The Rosen Group, LLC) cross-move for summary judgment dismissing plaintiff's claims and all cross claims alleged against them. Plaintiff opposes both Rockledge's motion and the cross-motion. Motion sequence number 001 and 002 are hereby consolidated for the court's consideration and disposition in this single decision/order.

The court will first consider the motion to dismiss. The following facts are alleged in the complaint. On December 13, 2013, plaintiff "was caused to slip, trip and forcibly strike his head on the sidewalk shed and scaffolding" located at the southeast corner of the intersection of West 14th Street and 7th Avenue and "violently precipitated to the ground, and suffer injury including but not limited to traumatic brain injury, injury to the left arm, hematoma, [and] swelling and strain." Ashraf allegedly filed permit applications and installed the subject sidewalk shed and scaffolding as well as designed, controlled, operated, managed and maintained same. Plaintiff specifically alleges that defendants improperly designed the sidewalk shed and scaffolding.

Dated: 6/29/17

HON. LYNN R. KOTLER, 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

At the outset, that branch of Ashraf's motion that seeks dismissal of the complaint based upon documentary evidence is untimely, inasmuch as the complaint was filed on October 22, 2015, and Ashraf's motion was not served until May 18, 2016 (CPLR § 3211 [e]; *Dany v. Meese*, 84 AD2d 670 [4th Dept 1981]). However, a motion to dismiss pursuant to CPLR 3211 (a) (7) can be made at any time during the pendency of an action (CPLR 3211 [a] [7], [e]; *Herman v Greenberg*, 221 AD2d 251, 251 [1st Dept 1995]).

Ashraf argues that plaintiff has failed to allege that its acts proximately caused his injuries, because it designed the shed, but not the scaffolding. Ashraf has provided the affidavit of Akm Ashraf Hoque, its principal and a professional engineer. Mr. Hoque states that the work based upon the plans it prepared for the sidewalk shed did not begin until almost two years after the accident. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). Affidavits, submitted in support of a motion pursuant to CPLR 3211 (a) (1), may be considered in deciding a motion to dismiss for failure to state a case (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]).

In order to state a negligence claim, plaintiff must allege that defendant owed plaintiff a duty, a breach of that duty, and that plaintiff's injuries and/or damages were proximately caused by defendant's breach (*Katz v. United Synagogue of Conservative Judaism*, 135 AD3d 458 [1st Dept 2016]). Ashraf's motion must be denied because plaintiff's complaint states a cause of action against it. Ashraf's arguments, that it could not possibly be liable for plaintiff's accident, go beyond the scope of a pre-answer motion to dismiss. These arguments would be more appropriately raised on a motion for summary judgment after issue has been joined. Accordingly, Ashraf's motion is denied in its entirety.

The court now turns to the motion and cross-motion for summary judgment. Rockledge argues that plaintiff's claims and cross-claims against it should be dismissed because there was no defective condition inherent in the construction or placement of the sidewalk shed, Rockledge does not owe plaintiff a duty since it was an independent contractor, and Rockledge did not have actual and/or constructive notice of the defective condition.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Rockledge has submitted an affidavit from Mike Wanko, the president of Gotham Claims Service, who examined the site of plaintiff's accident and took measurements and photographs. Mr. Wanko states that the vertical uprights supporting the shed are more than 48 inches from the curb "in the area of the bus stop." He also states that one bus sign is 21 inches from the curb, and another is 27 ½ inches from the curb; that the front vertical posts of the bus shelter are 35 ½ inches from the curb; and that there

are no vertical supports for the shed in front of the bus shelter. He concludes his affidavit by noting that “the sidewalk bridge was erected so that the bus shelter was framed out] and left unobstructed.”

However, plaintiff has submitted the affidavit of Rudolph J. Rinaldi, AIA, a former Commissioner of the New York City Department of Buildings, whose responsibilities included enforcement of the City’s building code. Mr. Rinaldi states, in his expert’s affidavit, that, as is obvious, a safe path to the sidewalk, in the area of the bus shelter, where there is an opening in the scaffolding, is of no immediate help to passengers exiting the bus from the rear, as plaintiff did. Mr. Rinaldi also points out that the only other opening in the sidewalk shed and the scaffolding accommodates the entrance to a Chase bank, and that, depending on the size, configuration, and stopping location of a bus, the rear door may or may not be opposite that opening. Mr. Rinaldi opines that the designers and builders of the shed should have requested that the bus stop be temporarily relocated either to the west side of the intersection of Seventh Avenue and 14th Street, or east, to a mid-block location beyond the construction site, between Sixth Avenue and Seventh Avenue. He notes that such a relocation was performed across the street from the accident location, in connection with a separate construction project on the Northwest corner of the intersection. In the alternative, he states that it is structurally possible to provide a setback of six feet or more for the supports of the sidewalk shed, and he opines that should have been done, given that exiting bus passengers are less stable than pedestrians walking on the street, and have less opportunity to observe the sidewalk shed prior to encountering it.

David Gentile, an employee of Gentile and Associates, whose duties include inspection of accident locations, states, in his affidavit, that whereas, on 14th Street, the sidewalk shed has only two openings between the sidewalk and the street, measuring, respectively, 24 feet and 12 feet 7 inches, on the Seventh Avenue side of the shed there are nine openings measuring, respectively from north to south, 15 feet 5 inches, 12 feet 5 inches, 12 feet 5 inches, 12 feet 5 inches, 12 feet 8 inches, 12 feet 9 inches, 8 feet, 5 feet 9 inches, and 15 feet. Also, while the distance between the shed and the curb was approximately 51 inches along the entire side of the shed on 14th Street, on the Seventh Avenue side, going from north to south, the setback of the shed differed in three sections, measuring, respectively, 5 feet 6 inches, 7 feet 6 inches, and 6 feet, all leaving more open space on the sidewalk than the setback on 14th Street. These measurements confirm Mr. Rinaldi’s opinion that it was structurally possible to have the shed supports set back more than 60 inches from the curb. Mr. Gentile also notes that, when he observed the scene of the accident, he saw buses discharging passengers, in areas where the doors aligned with sidewalk areas blocked by the sidewalk shed supports.

Thus, even assuming that Rockledge made out a *prima facie* case, the Rinaldi and Gentile affidavits raise issues of fact concerning the design and installation of the scaffolding, requiring a trial.

Rockledge relies on *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]) for the proposition that an independent contractor, like Rockledge, ordinarily owes no duty to a non-contracting third party. However, as Rockledge acknowledges, there is an exception where, in the performance of its duties, the contractor has “launched a force or instrument of harm” that proximately causes the plaintiff’s injuries. Here, there is an issue of fact as to whether Rockledge launched a force of harm.

Defendants Abner Properties Company, Newmark & Company Real Estate, and The Rosen Group, Inc. present no argument in support of their cross motion, other than expressly stating that it should be granted, in the event that the motions of Ashraf and Rockledge are granted. The motion of Rockledge, however, is denied. Moreover, to the extent that these defendants seek relief against plaintiff, a nonmoving party, their cross motion is improper (CPLR 2215; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 988 [2d Dept 2005]).

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Ashraf's motion to dismiss (motion sequence number 001) is denied; and it is further


ORDERED that Rockledge's motion for summary judgment, and Defendants Abner Properties Company, Newmark & Company Real Estate, and The Rosen Group cross-motion, are all denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

6/29/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.