SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 13**

ROBERT FIDLER,

Plaintiff(s),

-against-

INDEX # 600535/14
Mot. Seq. 3
Mot. Date 12.19.16
Submit Date 3.9.17

GORDON-HERRICK CORP., GORDON-BROADWAY CORP., COMPASS HOLDINGS, INC., COMPASS GROUP USA, INC., and COFFEE DISTRIBUTING CORP. and F. PINHEIRO-CONTRACTOR CORP.,

Defendant(s).

XXX

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The following papers were read on this motion: E-File DocsNumbered

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Defendant, F. Pinheiro Contractor Corp s/h/a F. Pinheiro-Contractor Corp. ("Pinheiro"), moves [Mot. Seq. 003], pursuant to CPLR 3212, for an order granting it summary judgment dismissal of the plaintiff's complaint as well as any and all cross-claims.

In this action, plaintiff, Robert Fidler, seeks to recover for injuries allegedly sustained when he was caused to trip and fall to the ground over a concrete ramp in the warehouse loading dock at the building in which he works, namely, 190 Broadway, Garden City, New York (hereinafter the Premises). The Premises consist of a warehouse, a loading dock and a parking lot. At the time of the accident, plaintiff was employed as the Vice-President of Equipment and Service for defendant Coffee Distributing Corp. (CDC) which had operated out of the Premises for approximately ten years (Fidler Tr., p. 44). Notably, the ramp upon which plaintiff fell was

installed by CDC prior to CDC being purchased by Compass Group USA, Inc. (Compass Group). According to the Vice-President of Operations for CDC, Bryan Bohn, CDC had hired defendant, F. Pinheiro Contractor Corp. to install the subject ramp (Motion, Ex. H, p. 27). The ramp was designed, constructed and installed by defendant Pinheiro, the architecture firm retained by the plaintiff's employer.

Pursuant to the plaintiff's bill of particulars, the plaintiff contends that the defendant Pinheiro was, among other things, negligent, careless and reckless in allowing the subject ramp to become broken, uneven, raised, cracked, dangerous, out of repair, and improperly maintained, in failing to exercise the proper ownership, management, maintenance, repair, design, construction, control and operation of the subject ramp, in failing to warn, barricade, rope off, reroute and properly light the subject ramp area, in failing to properly construct and/or design the ramp that conforms to the industry and OSHA standards, in failing to place barriers, handrails, safety guards around the perimeter of the ramp and in failing to paint and repaint the ramp in a color visible to pedestrians.

This court notes at the outset that by short form order dated July 13, 2016 (entered July 14, 2016), the motion of defendants, Gordon-Herricks Corp. (Herricks), Gordon-Broadway Corp. (Broadway), Compass Holdings, Inc. (CHI), Compass Group USA, Inc., Coffee Distributing Corp. [Mot. Seq. 002], for an order granting them summary judgment dismissal of the plaintiff's complaint as well as any cross claims asserted by defendant, F. Pinheiro-Contractor Corp, was granted in its entirety.

Based upon the papers submitted to this court for its consideration, including, among other things, the expert affidavit of Architect, David D. Cannon, AIA,[1] this court held that the movants had established their *prima facie* entitlement to judgment as a matter of law by demonstrating, among other things, that: (1) Compass Group USA, Inc. and Coffee Distributing Corp. were entitled to have the complaint summarily dismissed against them under the Workers' Compensation Law §11; (2) CHI was entitled to summary judgment because, having merged into Compass Group on May 31, 2007, it was not in legal existence on the date of Fidler's accident; (3) Herricks was entitled to summary judgment because it was an out of possession landlord of the Premises and its only obligation with respect to the demised Premises was to make structural repairs; (4) in any event, the claim against Herricks was subject to dismissal as the accident was not proximately caused by any structural defect or building code violation; (5) that even if

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[1]In his expert affidavit, David D. Cannon, AIA, an architect with over 30 years of experience in architectural design and document review, averred that based upon his review of the applicable local and regional building codes, an invoice for the construction of the subject ramp dated October 30, 2010, multiple photographs, a lease agreement, excerpts of the plaintiff's deposition transcript and an inspection of the subject ramp on August 25, 2015, it was his expert opinion that the ramp as it existed on the date of the accident did not violate any building or statutory code regulations and provisions and was not a structural component of the building because it was not a part of the foundation, walls or roof.

plaintiff had alleged a structural building code violation, the building code does not apply to ramps which, as in this case, is not designed as a required exit to a building; (6) that the claims against Broadway were subject to summary dismissal because said defendant (owner of 200 Broadway, i.e., the office building adjacent to the warehouse Premises) had no ownership interest or presence at the warehouse Premises on the date of the accident; (7) in any event, neither the lighting nor the absence of any guardrail was the proximate cause of the accident; and, (8) the plaintiff having been fully aware that the light at the subject loading dock was not functioning, and not using an alternative exit, chose to exit through an allegedly darkened loading dock, walking down an outdoor flight of stairs, and tripping over the subject ramp in his attempt to walk around it.

This court found that the plaintiff, on the other hand, failed to present any admissible evidence sufficient to raise a triable issue of fact. The court noted that, in opposition, the plaintiff, relying upon, his own affidavit as well as the affidavit of his expert, Robert Grunes, Ph. D, P.E., and his supplemental bill of particulars, had failed to demonstrate any merit to any of its three principal arguments including that the ramp constituted a dangerous condition because the defendants failed to properly maintain, secure and provide sufficient warnings, and the defendants created the condition that caused the plaintiff to fall by failing to have proper illumination in the area of the ramp and by blocking an egress from the building that compelled the plaintiff to walk towards the ramp.

This court noted that although the plaintiff's expert opined that the ramp was "structural" merely because it was designed to carry heavy loads, the plaintiff's reliance upon *Vasquez v. The Rector*, 40 AD3d 265 [1st Dept. 2007] contradicted the very definition of "structural" which ruled that a ramp was not structural because it did not affect the integrity of the building (*Id.* at 266). Thus, guided by the First Department's ruling in *Vasquez*, this court found that the ramp was *not* (as submitted by the defendants' expert Architect Cannon) a structural component of the building, i.e., that it was not a part of the foundation, walls or roof.

The court further found that the plaintiff failed to offer any substantive evidence that the ramp in question violated any structural building code regulations including 29 CFR 1910.21(a)(4) (platform), 29 CFR 1910.23[c][1] (guardrails) or 29 CFR 1910.144 (yellow paint markings). Importantly, this court ruled that, even if the plaintiff's claims of lack of lighting, railing and paint, were true, they nevertheless failed to establish that such failures were the proximate cause of plaintiff's injuries because the plaintiff's own testimony established that the plaintiff knew the ramp was there, knew that the light was not functioning, knew that the ramp lacked a railing and was not painted yellow, and in fact admitted to not looking down when navigating around it. This court ruled that the plaintiff's own testimony supported defendants' motion for summary judgment dismissal of the plaintiff's negligence claims.

Upon the instant motion, the defendant, Pinheiro seeks summary judgment dismissal of the plaintiff's claims. Defendant asserts three principal bases for its entitlement to summary judgment. One, there is no evidence that the defendant owed a duty to the plaintiff, that the

defendant breached a duty to the plaintiff or that a dangerous condition existed on the subject premises which proximately caused the plaintiff's accident. Two, based upon the law of the case doctrine, it has already been determined by this court that there is no evidence on this record that the subject ramp constituted a dangerous or defective condition or that said defendant was negligent in its design or construction of the ramp. Lastly, as previously held by this court, the evidence herein establishes that even if the ramp did cause the plaintiff to fall, it was clearly open and obvious and not inherently dangerous, and therefore Pinheiro cannot be found liable for the plaintiff's accident.

Plaintiff opposes the instant motion and advances the following five arguments. One, this court's prior decision dated July 13, 2016 did not in fact address the facts as they relate to this defendant, that is, on the prior motion, the parties did not argue plaintiff's claims that the ramp was negligently designed and installed on the premises by Pinheiro; rather, only issues concerning the duty and liability of the plaintiff's employer and the building owner with respect to the ramp were litigated and decided by this court. Two, the defendant failed to include the affidavit of any engineer, contractor or other expert attesting to the safety of the ramp. Three, as the architect and builder of the ramp, the defendant owed a duty of care to any person who is likely to be exposed to the danger, including the plaintiff. Four, as documented by the plaintiff's expert, Robert Grunes, Ph.D., P.E., the defendant was negligent in placing the ramp in such close proximity to a staircase and thereby blocking the exit discharge. Lastly, the improperly installed ramp, which the plaintiff was compelled to walk over in near darkness, was not an open and obvious condition.

In particular, the plaintiff's expert Dr. Grunes opines that "[a]s an engineering and construction matter, the placement of the ramp immediately next to the exit stairway was in violation of numerous regulations and accepted standards and constitutes an egregious design defect." And "the presence of a permanently installed ramp immediately adjacent [to] the exit discharge is a hazard to be guarded against. Furthermore, it was completely foreseeable that, drivers would park their vehicles around the exit stairway. Although the ramp alone constitutes an obstruction to the exit discharge, the truck that Defendant should have known would be parked in and around the area of the incident compounded the hazard to Plaintiff." Thus, plaintiff's expert concludes that "[t]he accident was a caused by the contractor F. Pinheiro Contractor Corp. in that it did not get a permit for the platform construction, it negligently constructed and installed the ramp by improperly placing the ramp in the exit discharge and thereby obstructed such exit discharge by not guarding the open sides as required, by not providing required warnings and by intentionally violating all applicable laws and standards." However, the plaintiff's expert does not offer any support for his speculation that defendant Pinheiro should have foreseen a low lighting situation or that the stairs would be blocked.

In addition, the plaintiff's assertion that its theories of liability against Pinheiro, warrant a different relief on its negligence claims than the one that this court arrived at in its prior decision and order, is unpersuasive.

The law is clear. The purpose of the doctrine of the "law of the case" is to avoid the re-injection of issues already determined within an action or proceeding (*see generally*, *Matter of McGrath v. Gold*, 36 NY2d 406 [1975]). "[U]nder New York's transactional analysis approach . . . once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [internal quotation omitted]). That is, the law provides that once an issue is judicially determined, that determination is law of the case and binding upon the parties to the litigation (*People v. Bilsky*, 95 NY2d 172 [2000]).

Here, the plaintiff does not contest that the causes of action asserted against Pinheiro arise out of the same transaction or series of transactions as those asserted against the other defendants. Thus, while there are arguably different theories of liability asserted against the defendant Pinheiro, the fact nevertheless remains that each of the *issues* raised by the plaintiff has already been dispositively addressed by this court in its prior decision.

It is clear that the plaintiff's claims against Pinheiro all sound in negligence. Thus, while the plaintiff's theories of liability against Pinheiro are indeed different from those asserted against the remaining (now dismissed) defendants, the fact remains that this court has already ruled on the "dangerousness" of the subject ramp finding, among other things, that the ramp, in any event, was the not the proximate cause of the plaintiff's injuries herein.

As noted above, this court has previously ruled that the ramp in question does not violate any structural building codes. In addition, this court found that the subject ramp was not required to have handrails by any statutory authority nor was the subject ramp required to be painted yellow by any statutory authority. Most significantly, this court ruled that lack of lighting, railing or paint on the subject ramp was not the proximate cause of the plaintiff's injuries as the plaintiff clearly knew each of these facts to be true prior to his fall. Moreover, this court noted that the plaintiff admitted that he did not look down at the subject ramp when navigating around it, despite being aware of its presence and therefore the plaintiff's failure to see the ramp was not the proximate cause of the plaintiff's injuries.

"[J]udicial determinations made during the course of litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination" (*Ruffino v. Green*, 72 AD3d 785 [2d Dept 2010] *citing Sterngrass v. Town Bd. Of Town of Clarkstown*, 43 AD3d 1037 [2d Dept 2007]).

The only specific claims made by the plaintiff against Pinheiro concerning the subject ramp relate to the fact that the same was built in violation of Building and Fire Codes and OSHA standards, in failing to illuminate the ramp, in failing to place barriers, handrails or safety guards around the perimeter of the ramp and in failing to paint the ramp in a color visible to pedestrians. The prior findings of this court – rulings that are subject to the law of the case doctrine – clearly establish that the plaintiff, who had a full and fair opportunity to litigate this (and other) issues in

the previous application to this court, wholly failed to establish any merit to its claim that the ramp constituted a dangerous and/or defective condition, much less that it was the proximate cause of his fall.

In the end, although adherence to the doctrine of the law of the case is not mandatory in all cases, only extraordinary circumstances will justify a departure from the doctrine (*Andrea v. Du Pont De Nemours & Co.*, 289 AD2d 1039 [4th Dept. 2001]; *People v. Guin*, 243 AD2d 649 [2d Dept. 1997]). These include a change in circumstances (*Solow v. Wellner*, 186 AD2d 21 [1st Dept. 1992]), where there is a need to correct clear error (*National Mtge. Consultants v. Elizaitis*, 23 AD3d 630 [2d Dept. 2005]), where there is a showing of new evidence (*Brownrigg v. New York City Hous. Auth.*, 29 AD3d 721 [2d Dept. 2006]; *Cromwell v. Le Sannom Bldg. Corp.*, 222 AD2d 307 [1st Dept. 1995]), where a statute conflicts with application of the doctrine such as by authorizing modification of a particular type of order by the court at any time (*Barker v. Barker*, 45 NYS2d 809 [Sup. Ct. Kings 1943]), with respect to a ruling which is not essential for disposition of the issue (*Animalfeeds Intl. v. Banco Espirito Santo E Comercial De Lisboa*, 101 Misc. 2d 379 [Sup. Ct. New York 1979]), and, where there has been a change in the law (*Lipovsky v. Lipovsky*, 271 AD2d 658 [2d Dept. 2000]).

None of these "extraordinary circumstances" is present in this case.

Accordingly, having previously ruled on the issue of whether the ramp constituted a dangerous and defective condition, and having previously ruled on whether the ramp was the proximate cause of the plaintiff's injuries, the court, as well as the parties, are bound by its prior determination. That decision is now law of the case.

Therefore, the instant motion by defendant, Pinheiro for an order granting it summary judgment dismissal of the plaintiff's complaint as well as any and all cross-claims is **granted**. The plaintiff's complaint is dismissed as against Pinheiro.

The parties' remaining contentions have been considered and do not warrant discussion.

This shall constitute the decision and order of this court.

Dated: Mineola, New York
April 21, 2017

ENTERED

APR 25 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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