Banegas v RSL Bowling Corp.
2018 NY Slip Op 31606(U)
July 9, 2018
Supreme Court, New York County
Docket Number: 161535/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **IAS PART 2**

Justice

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INDEX NO. 161535/2015

DENNIS BANEGAS,

Plaintiff,

MOTION SEQ. NO. 002, 003

- v -

R S L BOWLING CORP., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CVS PHARMACY, INC., HOWARD BEACH FITNESS CENTER, INC., METROPCS NEW YORK, LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 107, 108, 110

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motions are granted.

In this personal injury action, defendants MetroPCS New York, LLC and Howard Beach Fitness Center, Inc. each move for summary judgment dismissing the complaint on the ground that they were not negligent and owned no duty to plaintiff. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are granted.

Factual and Procedural Background

After Hurricane Sandy, defendant RSL Bowling Corp. (RSL), owner of a building located at 157-05 Crossbay Boulevard, Howard Beach, New York ("the Building"), hired plaintiff's employer, non-party C-Tec Electronic Corp. ("C-Tec"), to pump water out of the sub cellar service

room in the basement of the Building, and to perform certain electrical work. At 11 a.m. on November 10, 2012, plaintiff, an electrician, was working in the Building's basement when he received an electric shock after the power lines which led into the basement were energized.

Plaintiff commenced this personal injury action on November 9, 2015 against RSL; Consolidated Edison Company of New York, Inc. ("Con Ed"), the electrical service provider; CVS Pharmacy of New York, Inc. ("CVS"), a commercial tenant of the 1st floor of the Building; Howard Beach Fitness Center, Inc., a commercial tenant of the 2nd floor of the Building ("Howard Beach Fitness") doing business as Gold's Gym; and MetroPCS New York, LLC, (MetroPCS), a commercial tenant of a portion of the roof for use as a cellular antenna site. In his complaint, plaintiff asserts the following causes of action against all defendants: common law negligence, Labor Law § 200 (Labor Law common law negligence), and Labor Law § 241(6) (failure to provide proper protection in violation of the Industrial Code).

Issue was joined by MetroPCS on February 12, 2016, by Con Ed on February 19, 2016, by RSL on March 21, 2016, by CVS on November 15, 2016, and by Howard Beach Fitness on December 5, 2016.

MetroPCS now moves for summary judgment (motion sequence 003) dismissing the complaint and all cross claims against it on the ground that it is not liable for plaintiff's injuries from the electrical shock. MetroPCS notes that, on December 19, 2007, it entered into a lease agreement with RSL to lease a portion of the rooftop for the installation, and use, of cellular telephone antennas and equipment. MetroPCS did not lease any other part of the building. MetroPCS argues that it did not hire C-Tec to do work at its leased location on the rooftop, nor did it direct or supervise plaintiff's work. Further, MetroPCS claims that it had no power or authority to reinstate electricity to the Building, and did not direct Con Ed to turn on the power on the day

of plaintiff's accident.

In support of its motion, MetroPCS submits, among other things, a copy of C-Tec's invoice to RSL for the work performed on the day of the accident. The invoice, dated November 21, 2012, shows that C-Tec's work involved gaining access to the basement, pumping out the storm water, disconnecting and removing all fuses, and de-energizing all disconnects. C-Tec also located all the short circuits on all the electrical conductors, and installed a new fuse disconnect for Gold's Gym (Howard Beach Fitness) and CVS. MetroPCS notes that, according to the invoice, C-Tec performed no work on MetroPCS's equipment.

In opposition, Con Ed argues that MetroPCS's motion should be denied as premature, since the motion papers do not address the location of the electrical equipment installed in the building that enabled MetroPCS to use the cellular antennas on the roof. Con Ed argues that depositions of the plaintiff and a MetroPCS employee are necessary to identify the equipment which caused plaintiff's accident.

In reply to Con Ed's opposition, MetroPCS argues that it cannot be held liable pursuant to Labor Law § 200 and Labor Law § 241(6) because it was not the owner of the Building where plaintiff was injured. Further, MetroPCS did not direct or control any work being performed by plaintiff. MetroPCS also argues that, at the time it made its motion, significant paper discovery had been completed and there is no evidence that MetroPCS had any duty to plaintiff or any control over the electricity.

The plaintiff also opposes MetroPCS's motion by merely submitting his attorney's affirmation. In his affirmation, plaintiff's attorney argues that the motion is premature because none of the defendants have been deposed. Plaintiff's attorney argues that, at a future MetroPCS deposition, plaintiff has the right to discover how MetroPCS's system was wired into the

Building's electrical system, and the location of the connection of MetroPCS's equipment to the Building's electrical system. Plaintiff's attorney also argues that plaintiff was electrocuted because someone reinstated the electrical flow to the building, and MetroPCS has not established, as a matter of law, that it did not reinstate the electrical flow to the basement of the Building. Plaintiff argues that MetroPCS could be found to be responsible for reinstating the flow of electricity to the Building.

In reply to the plaintiff's opposition, MetroPCS argues that, in opposition to its motion, plaintiff did not submit an affidavit of a person with personal knowledge of the facts of this case. Further, even assuming that the equipment being worked on by plaintiff belonged to MetroPCS, MetroPCS did not have the power or authority to reinstate the electricity to the Building. MetroPCS notes that, due to the flooding caused by Hurricane Sandy, the Building had no power and was unusable until the landlord repaired the salt water damage, and Con Ed restored power. Further, MetroPCS argues that, pursuant to Labor Law 241(6), it was the duty of RSL or C-Tec to provide plaintiff with a safe working environment, not MetroPCS. MetroPCS argues that plaintiff, an electrician, was hired to restore power to the Building, and that the only way he could have been harmed by the reinstatement of the electricity was if he failed to cut the power to the Building while he was repairing the damage to the circuits. Therefore, according to MetroPCS, plaintiff's own negligence was the substantial cause of his injury.

MetroPCS annexes to its reply copies of plaintiff's Facebook page posts on the day of the accident. One post is a photo of a circuit board and a caption stating, "this is where we were working at the time con Edison [sic] turn[ed] on power without notification" (see Sohnen affirmation dated January 31, 2018, exhibit A).

There is no other opposition to MetroPCS's motion.

Howard Beach Fitness also moves for summary judgment (motion sequence 002) dismissing the complaint and all cross claims against it on the ground that it owed no duty to plaintiff and, therefore, is not liable for his injuries. In support of its motion, Howard Beach Fitness notes that it leased the entire second floor of the Building with a ground floor lobby entrance, and was doing business under the name Gold's Gym. The first floor of the Building was occupied by CVS. Howard Beach Fitness argues that RSL was responsible for restoring power to the Building after Hurricane Sandy, and hired C-Tec to repair the storm damage. It notes that, at the time of the accident, the entire building was without electrical services for several weeks. Howard Beach Fitness argues that it did not hire C-Tec to perform electrical work at the building, nor did it direct or supervise plaintiff's electrical work. Howard Beach Fitness also argues that it did not, and could not, turn on the electrical flow to the Building; therefore, Howard Beach Fitness cannot be liable to the plaintiff under the first cause of action seeking damages on a theory of common law negligence. Likewise, it is not liable under the Labor Law, because the Labor Law imposes a duty on owners and general contractors to maintain a safe work site, and it is neither the owner of the Building nor a general contractor. Howard Beach Fitness acknowledges that, under the Labor Law, a lessee can be considered an owner if it has the right or authority to control the work site. However, it insists that it had no right or authority to control plaintiff's work.

Plaintiff opposes this motion, again only submitting his attorney's affirmation, arguing that it is premature, and that plaintiff has not had a chance to dispose a member of Howard Beach Fitness Club to ascertain who reinstated the electricity to the Building.

There is no other opposition to Howard Beach Fitness's motion.

In reply, Howard Beach Fitness argues that, in opposition to its motion, plaintiff failed to provide an affidavit of someone with personal knowledge of the facts of this case, and, in any

event, plaintiff did not dispute any of the factual allegations it made in its motion papers. Further, while plaintiff claims the motion is premature, Howard Beach Fitness notes that plaintiff has not identified any information in the exclusive control of Howard Beach Fitness that could raise an issue of fact precluding summary judgment in its favor.

Discussion

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact [CPLR 3212, subd. (b)]" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980][internal quotation marks omitted], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff asserts three causes of action against movants MetroPCS and Howard Beach Fitness: common law negligence, Labor Law § 200, and Labor Law § 241(6).

Plaintiff's first cause of action seeks to recover damages for MetroPCS's and Howard Beach Fitness's alleged negligence. The elements of a common-law negligence cause of action are: a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting there from (*see Prescott v Newsday, Inc.*, 150 AD2d 541, 542 [2nd Dept 1989]).

Plaintiff's second cause of action seeks damages under Labor Law § 200 (1), which is a

codification of a land owner's and general contractor's common-law duty to maintain a safe workplace (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Labor Law § 200 provides, in relevant part:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Plaintiff's third cause of action alleges that, pursuant to Labor Law § 241(6), defendants violated numerous Industrial Code Provisions. Labor Law § 241(6) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> * * *
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

With respect to plaintiff's second and third causes of action, his Labor Law claims, MetroPCS and Howard Beach Fitness have each demonstrated that, under the facts of this case, they are not proper Labor Law defendants. It is clear that both Labor Law §§ 200 and 241(6) each address the duty owed by an owner. However, neither MetroPCS nor Howard Beach Fitness was the owner, or the agent of the owner, of the Building. Rather, they were lessees. In *Ferluckaj v Goldman Sachs & Co.*, (12 NY3d 316, 320 [2009]), the Court of Appeals addressed this issue by

holding that, while the Labor Law places a duty on "contractors and owners and their agents," it does not address lessees. Nevertheless, when a lessee hires a contractor and has the right to control the work being done, it should be considered an "owner" within the meaning of the Labor Law (*id.*). Here, MetroPCS and Howard Beach Fitness cannot be considered owners for the purposes of finding liability under the Labor Law, because RSL hired C-Tec to perform work at the Building, and neither MetroPCS nor Howard Beach Fitness had the authority to control plaintiff's work (c*f. Morato-Rodriguez v Riva Const. Group, Inc.*, 115 AD3d 401 [1st Dept 2014][Unlike the tenant in *Ferluckaj,* the testimony of the lessee's vice president established that it selected the contractor for the work and substantially directed and controlled it]).

With respect to plaintiff's first cause of action for common negligence, MetroPCS and Howard Beach Fitness have demonstrated that they owed no duty to plaintiff. It is well established that before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff (*see Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 342 [1928]; *see also Pulka v Edelman*, 40 NY2d 781, 782-783 [1976]). Here, MetroPCS and Howard Beach Fitness have each demonstrated that, as tenants of the Building, they had no authority or power to reinstate the electricity to the Building. Only Con Ed had that authority. Further, they have shown that RSL hired C-Tec to repair damage to the Building's electrical system after Hurricane Sandy. MetroPCS and Howard Beach Fitness did not hire C-Tec, did not direct, supervise or control plaintiff's activities, and were not present at the Building on the day of the accident.

Accordingly, MetroPCS and Howard Beach Fitness have each established prima facie entitlement to summary judgment as a matter of law on all three causes of action.

In opposition to both motions, plaintiff failed to raise an issue of fact precluding summary judgment because he merely submits his attorney's affirmation. Plaintiff did not submit an

affidavit of a person with personal knowledge of the facts of this case. It is well-settled that an attorney's affirmation alone is of no probative value (*see Ramnarine v Memorial Ctr. for Cancer and Allied Diseases*, 281 AD2d 218 [1st Dept 2001] [Attorney's affirmation is of no probative value in opposition to a motion for summary judgment unless accompanied by supporting documentary evidence]). Plaintiff did not submit an affidavit describing how the accident occurred, where he was in the basement at the time of the accident, and what equipment he was working on at the time of the accident, despite the fact that it appears from his social media posts, that plaintiff knew exactly what equipment he was operating at the time of the accident.

Plaintiff's argument that both motions are premature because he is entitled to depositions of MetroPCS and Howard Beach employees is unpersuasive. The granting of summary judgment is not premature merely because discovery has not been completed (see CPLR 212 [a]; *see also Mogul v Baptiste*, 161 AD3d 847 [2nd Dept 2018]). In order for a motion for summary judgment to be denied as premature, plaintiff herein must "provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party" (*see Mogul v Baptiste*, 161 AD3d at 848 quoting *Suero–Sosa v Cardona*, 112 AD3d 706, 708 [2nd Dept 2013][internal quotation marks omitted]).

With respect to MetroPCS's motion, plaintiff argues that MetroPCS could have been responsible for reinstating the electrical flow to the Building and, thus, further discovery is needed. However, there is no dispute that Con Ed had the sole power and authority to reinstate the electrical flow to the Building. Further, while deposing a member of MetroPCS might reveal how MetroPCS's cell system was wired into the electrical system, plaintiff has not identified which equipment he was working on at the time of the accident, and has not explained why those facts

are not available to him. Plaintiff does not need additional discovery to allege such a fact, which is within his personal knowledge. Moreover, it appears from his social media account that plaintiff does have knowledge about the equipment he was operating at the time of the accident. Nevertheless, he failed to submit an affidavit setting forth specific factual allegations about the accident.

Accordingly, MetroPCS has established prima facie entitlement to summary judgment dismissing the complaint, and plaintiff failed to raise an issue of fact precluding summary judgment in MetroPCS's favor.

Likewise, for reasons stated above, Con Ed failed to preclude summary judgment by arguing that it was entitled to a deposition of plaintiff to identify the equipment alleged to have caused his injuries.

With respect to Howard Beach Fitness's motion, plaintiff argues that he should have the right to discover whether Howard Beach Fitness turned on the electricity. However, as noted above, Con Ed does not dispute that it had the sole power and authority to reinstate the electrical flow to the building. Accordingly, Howard Beach Fitness established its prima face entitlement to summary judgment as a matter of law, and plaintiff has not raised an issue of fact to preclude summary judgment in Howard Beach Fitness's favor.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motions for summary judgment of defendants MetroPCS New York, LLC (motion sequence 003) and Howard Beach Fitness Center, Inc. (motion sequence 002), are granted and the complaint and all crossclaims against said defendants are dismissed; and it is further

ORDERED that said claims and cross claims against defendants MetroPCS New York, LLC and Howard Beach Fitness Center, Inc. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants MetroPCS New York, LLC and Howard Beach Fitness Center, Inc. dismissing the claims and cross claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that this constitutes the decision and order of the court.

7/9/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE