Pomponio v Lenox Hill Hosp.
2020 NY Slip Op 32288(U)
July 13, 2020
Supreme Court, New York County
Docket Number: 153548/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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RICHARD POMPONIO,

Plaintiff,

- v -

LENOX HILL HOSPITAL,

Defendant.

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INDEX NO. 153548/2016

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant Lenox Hill Hospital (Lenox Hill) moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint with prejudice on the ground that there are no triable issues of fact. Plaintiff opposes and cross-moves to amend the bill of particulars to assert a violation of Industrial Code 23-1.7. After a review of the parties' contentions, as well as the relevant statutes and case law, the motion and cross motion are denied.

Factual and Procedural Background

On August 10, 2015, plaintiff allegedly lost his balance and fell when his foot came into contact with a drain located in the mechanical room on the roof of the Uris Building at Lenox Hill, located at 100 East 77th Street, New York, New York. At the time of the incident plaintiff, an employee of Lizardos Engineering, was performing a survey, including taking photos and measurements on the roof (plaintiff dep at 31, 41, defendant exhibit F). Plaintiff testified that

there were three flexible pieces of ductwork, approximately 24 inches tall, that spanned across the floor of the mechanical room, which was surfaced with loose gravel (*id.* at 41, 64). Plaintiff testified that he had to go across the room in order to obtain additional information from the equipment on the opposite side of the room, as well as to take photographs of the equipment (*id.*). Plaintiff testified:

> "and what I didn't' realize at the time was when I stepped over the ductwork there was a roof drain that was hidden by the ductwork on the other side when my foot went in it – when my foot landed, I wasn't expecting it to have a change in the elevation or a dip and my foot slipped on the loose gravel. And the effort to catch myself from falling, I kept on slide [sic] on the gravel and in that process of trying to catch myself, I twisted my knee and I went down hard on both my hands in the gravel"

(*id.* at 41-42).

When asked what he thought caused him to fall, plaintiff testified that it was "[n]ot realizing that there was a sloped surface on the other side of the duct. I was stepping down, I thought I was stepping on level ground and I wasn't" (*id.* at 71). When asked if it was the sloped pan around the drain or the drain itself, plaintiff testified that it was the sloped pan (*id.*).

Kurt Jahrsdoerfer, engineering director at Lenox Hill, managed maintenance and compliance within the facilities (Jahrsdoerfer dep at 8-9, 12, defendant exhibit G). Jahrsdoerfer testified that he was aware of the project, named Uris Chiller Plant Phase I, which involved the "demolition of existing chillers within the subbasement and replacing it with two new chillers, and a rebuild of the cooling towers on the Uris Building along with pumps and controllers" (*id.* at 14-15). The ducts about which plaintiff testified "were temporary exhaust ducts that were put in place to exhaust any fumes out of the subbasement during the demolition" (*id.* at 21). Jahrsdoerfer knew Carrier was responsible for hiring the subcontractor that installed the ducts, but did not know the name of the actual contractor hired (*id.* at 35).

Defendant retained Peter Chen, a licensed professional engineer, who reviewed the pleadings, plaintiff's bills of particulars, discovery exchanged, deposition transcripts and exhibits from said depositions (Chen affidavit, defendant exhibit 1).[1] On June 18, 2018, Chen conducted an in-person inspection of the rooftop where plaintiff's accident allegedly took place. Based on his review and inspection, Chen concluded "with a reasonable degree of scientific and biomechanical certainty that plaintiff's alleged incident was not caused by any 'defect' in the mechanical room located on the roof of the Uris Building at Lenox Hill Hospital, and thus no dangerous or defective condition existed that was the cause-in-fact or a proximate cause of the plaintiff's alleged fall" (Chen aff, ¶ 6, 9). Chen also concluded that the roof area and mechanical room were not part of a means of egress or route for escape; the mechanical room and subject drain were in good condition; and the roof drain strainer measured approximately 11 inches in diameter and was 2-3.5 inches in height above the crushed rock layer placed on top of the underlying roof surface (*id*. at ¶ 7). Based on the aforementioned conclusions, Chen determined that there were no pedestrian or walkway or accessibility requirements under the 1938 or 1968 Building Codes for construction, and that the roof was maintained in accordance with New York City Building Codes (*id*. at ¶ 8). Specifically, the 1968 NYC Building Code, Reference Standard 16, P110.9 Roof Drain Strainers:

> "(a) General use. - All roof areas, except those draining to hanging gutters, shall be equipped with roof drains having strainers extending at least 4 in. above the surface of the roof immediately adjacent to the roof drain. Strainers shall have an available inlet area above the roof level at least 1 ½ times the area of the conductor or leader to which the drain is connected."

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[1] Plaintiff argues that this Court should discredit Chen's affidavit because a page (page 2) was omitted from the affidavit originally submitted with defendant's moving papers. Upon learning of the omission, defendant, who asserts that the omission was a simple clerical error in the efiling transmission, resubmitted the complete affidavit as exhibit 1 in reply. Plaintiff has not demonstrated any prejudice to a substantial right by this one-page omission; therefore, the court will overlook defendant's administrative error and will consider the affidavit (*see* CPLR 2001; *Calhoun v Midrox Ins. Co.*, 165 AD3d 1450, 1451 n 1 [3d Dept 2018] citing *Medina v City of New York*, 134 AD3d 433, 433 [1st Dept 2015]).

The 2014 NYC Plumbing Code, Chapter 11, Storm Drainage, Section PC1105, Roof Drains, provides that:

> "1105.1 Strainers. Roof drains shall have strainers extending not less than 4 inches (102 mm) above the surface of the roof immediately adjacent to the roof drain. Strainers shall have an available inlet area, above roof level, of not less than one and one-half times the area of the conductor or leader to which the drain is connected."

Chen confirmed that the roof was maintained in accordance with the NYC Building Codes; the roof drain strainer functionally performed as designed and prevented plaintiff from actually stepping into the drain itself; and that the subject area does not violate any code, rule or regulation and is compliant with any applicable code, rule or regulation (Chen aff, ¶ 8). Plaintiff does not offer an opposing expert.

Legal Discussion

It is well established that the proponent of a summary judgment motion "must 'make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp.,* 26 NY3d at 49 [internal quotation marks and citation omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Vega v Restani Constr. Corp.,* 18 NY3d 499 [2012]; *Negri v Stop & Shop*, 65

NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*McCummings v New York City Tr. Auth.*, 81 NY2d 923 [1993]; *Rotuba Extruda v Ceppos*, 46 NY2d 223, 231 [1978]). However, "mere speculation. . . is inadequate" to defeat summary judgment (*Acevedo v York Intl. Corp.*, 31 AD3d 255, 257 [1st Dept 2006]).

In order to recover damages for a common-law negligence claim, the plaintiff must prove that the defendant created or had actual or constructive notice of the hazardous condition or that the condition constituted a hidden trap which was the proximate cause of plaintiff's injury (*Kolari v Whitestone Constr. Corp.*, 138 AD3d 1070, 1071 [2d Dept 2016] [internal quotation marks and citations omitted] ["a defendant may be liable in common-law negligence and under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the condition'" (citation omitted)]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Mere speculation is insufficient to sustain the cause of action (*Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [2006]).

"[W]hether a dangerous or defective condition exists . . . so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks and citation omitted]). Plaintiff testified that he slipped on the drain strainer that was hidden behind the temporary ducts that were laying across the roof. Although Chen concluded that the roof area, the mechanical room and the subject drain were in good condition, he did not opine as to

the presence of the two-foot tall ducts at the time of the accident, or whether the ducts were present at the time of his inspection, nearly three years after the accident, as plaintiff argues (*see Alston v Zabar's & Co., Inc.*, 92 AD3d 553, 553 [1st Dept 2012]; *Santiago v United Artists Communications*, 263 AD2d 407, 407-408 [1st Dept 1999]). Therefore, this Court finds that defendant has not met its initial burden of establishing that a dangerous condition did not exist at the time of the accident as a matter of law.

Moreover, there is a question as to whether defendant, as owner of the property, had constructive notice of the condition. "The owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the condition or had actual or constructive notice of it" (*Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]). While there is no dispute that defendant did not create the condition, plaintiff argues that it had constructive notice thereof. "An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem" (*id.*, citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, Jahrdoerfer testified that the ducts were installed by a contractor hired by Carrier. Jahrdoerfer, however, did not testify as to when defendant last inspected the roof before plaintiff's accident. Therefore, there remains a question of fact with respect to whether defendant had constructive notice of the alleged dangerous condition.

To the extent that plaintiff raises the doctrine of res ipsa loquitur as an alternate basis for finding defendants liable, this Court finds the doctrine is not applicable to the circumstances of this case, as plaintiff has not established that the accident was "caused by an instrumentality

within the defendant's exclusive control" (*Pintor,* 90 AD3d at 451, citing *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).

This Court has considered the remainder of plaintiff's arguments with respect to the summary judgment motion and finds them without merit. Taking the facts in the light most favorable to plaintiff, this Court denies the motion for summary judgment.

Turning to plaintiff's cross motion, "[w]hile it is firmly established that leave to amend a pleading shall be freely granted (*see*, CPLR 3025 [b]), a motion to amend is committed to the broad discretion of the Supreme Court, and its determination will not lightly be set aside" (*Carranza v Brooklyn Union Gas*, 233 AD2d 287, 287 [2d Dept 1996]; *see also Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]). A court may deny such a motion when "plaintiff fail[s] to set forth any excuse for his delay in seeking leave to amend the bill of particulars . . . subsequent to the note of issue being filed and subsequent to a prior amend[ed] … bill of particulars" (*Warshefskie v New York City Hous. Auth.*, 120 AD3d 1344, 1345-1346 [2d Dept 2014]; *see also Silber v Sullivan Props., L.P.,* 182 AD3d 512 [1st Dept 2020] [affirming denial of plaintiff's motion to amend the bill of particulars where plaintiff failed to submit an affidavit or other admissible evidence showing a reasonable excuse in so moving three months after note of issue, and three years after commencement of the action]; *Cintron v New York City Tr. Auth.*, 77 AD3d 410, 410 [1st Dept 2010] [holding delay in making motion to amend unreasonable "given that it was made four months following the filing of the note of issue and four years after the commencement of the action"]). Here, plaintiff filed his cross motion to amend the supplemental bill of particulars three months after the filing of the note of issue, three years after the commencement of the action, and has provided no reason for the delay, which this Court finds unreasonable (*see Silber,* 182 AD3d at 512; *Haddad v New York City Tr. Auth.*, 5 AD3d

255, 256 [1st Dept 2004]). "Furthermore, the code violations plaintiff[] [seeks] to add to the bill of particulars [do] not merely embellish [his] initial claims, but constitute[] substantive changes and additions to the theory of the case, which would require defendant[] to reorient [its] defense strategy to focus on these violations" (*Cintron*, 77 AD3d at 410-411). Thus, this Court denies plaintiff's cross motion to amend the bill of particulars.

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

ORDERED that the motion by Lenox Hill Hospital for summary judgment dismissal of the complaint by plaintiff, Richard Pomponio, Jr., is denied; and it is further

ORDERED that the cross motion by plaintiff to amend the bill of particulars is also denied; and it is further

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

7/13/2020
DATE

KATHRYN E. FREED, J.S.C.

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