Gershuny v International Bus. Machs. Corp.
2021 NY Slip Op 33292(U)
November 16, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 2018-51650
Judge: Michael G. Hayes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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EDWARD S. GERSHUNY,

Plaintiff,

DECISION and ORDER
Index No. 2018-51650

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.
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HAYES, M.G., Acting Supreme Court Justice

The Court read and considered the following documents upon these motions:

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Plaintiff moves for an order, pursuant to CPLR 3212(a) & (c), granting him summary judgment on the issue of liability. Plaintiff also seeks dismissal of the defendant's first, fifth and seventh affirmative defenses, pursuant to CPLR 3211(b)[1] and CPLR 3212.

Defendant moves for an order, pursuant to CPLR 3212, granting it summary judgment and dismissing the plaintiff's complaint.

Background

This is an action for personal injuries allegedly sustained by plaintiff following a workplace accident which occurred on June 4, 2015. The accident took place at the exit from a men's bathroom in the back corridor of the basement of the International Business Machines ("IBM") Central Services Building located at 294 Rt. 100, Somers, New York. Plaintiff was an independently contracted attorney performing outside counsel services for the defendant.

Plaintiff alleges that defendant's employee negligently and carelessly pushed a tall laptop shipping case into a door through which the plaintiff was exiting. The collision between the

[1] The Notice of Motion filed on August 3, 2021 mistakenly seeks relief under CPLR 3111(b). CPLR 3111, entitled "Production of things at the examination", contains no subsection (b) and is irrelevant to the discussion at hand. Accordingly, the Court will consider the motion under CPLR 3211(b), which specifically addresses a motion to dismiss a defense.

shipping case and the door, forced the door to strike plaintiff, knocking him to the ground. Plaintiff allegedly sustained a tear of the rotator cuff in the right shoulder which required surgical intervention.

Plaintiff's Motion for Summary Judgment

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Plaintiff states that IBM's employee, Robert Figueroa, admits that he was pushing a tall shipping case down the hallway, when he allowed it to drift to the left of the corridor and strike the bathroom door, which knocked plaintiff to the ground. Plaintiff maintains that he is free from comparative fault and defendant's affirmative defenses should be dismissed.

In support of his motion, plaintiff offers his own deposition testimony. Plaintiff states that he is currently self employed as a lawyer working primarily with contracts that are related in some manner to intellectual property (*see* Deposition of Gershuny at p 9 lines 12-20). Plaintiff testified that as he was leaving the bathroom, he opened the door outward into the corridor with his right hand, when suddenly the door came back with great force and knocked him down (*see* Deposition of Gershuny at p 34 lines 5-15). Prior to attempting to open the door and during the processing of opening the door, plaintiff testified that he did not hear any noise in the corridor (*see* Deposition of Gershuny at pp 37-38 lines 20-25, 2-3). Plaintiff states that he spoke briefly with two men, one who had been pushing a cart and the other who witnessed the accident (see Deposition of Gershuny at p 37 lines 11-16). Plaintiff testified that the man with the cart apologized for running the cart into the door and said something to the effect that he had drifted too far left (*see* Deposition of Gershuny at p 34 lines 5-15). Upon prior occasions of using the bathroom, plaintiff stated that he has never had a similar incident (*see* Deposition of Gershuny at p 50 lines 21-24).

In further support of his motion, plaintiff submits the deposition testimony of Robert Figueroa, a Senior Information Technology Specialist employed by IBM. Mr. Figueroa testified

that on June 4, 2015, he was involved in an incident wherein the plaintiff was coming out of a bathroom and the rolling case which he was pushing hit the bathroom door (see Deposition of Figueroa at p 30 lines 5-10). The accident occurred in the central services building in the rear service corridor (*see* Deposition of Figueroa at p 30 lines 15-23). Prior to the incident, Mr. Figueroa stated that he had been in the corridor "lots of times" as it was the access point from the storage area to the loading dock (*see* Deposition of Figueroa at p 39 lines 7-25). The corridor was approximately 10 to 12 feet wide (*see* Deposition of Figueroa at p 41 lines 20-23). The bathroom location was midway between the storage room and the loading dock (*see* Deposition of Figueroa at p 42 lines 5-7). On June 4, 2015, Mr. Figueroa entered the service corridor from the storage area to get to the loading dock (*see* Deposition of Figueroa at p 45 lines 5-12). The laptop shipping case Mr. Figueroa was transporting down the corridor was a hard case, 69 inches high, maybe 30 inches wide and approximately 24 inches deep (*see* Deposition of Figueroa at p 47 lines 12-16). Mr. Figueroa, at 5 feet 2 inches tall, could not see over the cases, so he was forced to look around the sides of the cases when transporting them (*see* Deposition of Figueroa at p 112 lines 8-20). The approximate weight of the shipping case on the day of the incident was somewhere between 100 to 500 pounds (*see* Deposition of Figueroa at pp 49-50 lines 22-25, 2-

3). Mr. Figueroa indicated that his department had no policies and procedures in regard to loading these cases, nor policies as to how to move the cases and which route to traverse (*see* Deposition of Figueroa at pp 55-56 lines 10-25, 2-17).

Mr. Figueroa recalls pushing the case down the corridor, when all of the sudden he felt a bang indicating that he hit the door (*see* Deposition of Figueroa at p 57 lines 9-12). Mr. Figueroa indicates that he heard Mr. Gershuny cry out and realized that Mr. Gershuny was on the other side of the door (*see* Deposition of Figueroa at p 57 lines 12-15). Mr. Figueroa states that the case he was pushing must have drifted off a little bit to the left and caught the corner or edge of the bathroom door (*see* Deposition of Figueroa at p 58 lines 2-5). Mr. Figueroa states that he had previously experienced the drifting issues with the cases and that adjustments had to be made while transporting the cases (*see* Deposition of Figueroa at pp 58-59 lines 14-25, 2-6). Mr. Figueroa recalls discussing the drifting of these laptop shipping cases with his manager prior to the incident of June 4, 2015 (*see* Deposition of Figueroa at p 62 lines 2-12).

Plaintiff next introduces the deposition testimony of Keith Bradoc, Manager of Corporate Litigation for IBM. Mr. Bradoc verified the contents of the defendant's answer on or about October 11, 2018 and verified the defendant's response to

plaintiff's demand for a verified bill of particulars as to the affirmative defenses on April 8, 2019. Mr. Bradoc did not personally perform an investigation of the incident, rather he formed the basis of his knowledge upon information gathered from documents, i.e. the accident report, etc. (*see* Deposition of Bradoc at p 65 lines 5-17). Mr. Bradoc was asked if he blamed Mr. Gershuny for wearing improper shoes at the time of incident. He responded that he did not know what shoes Mr. Gershuny was wearing, but states that if his shoes weren't properly supporting him they could have contributed to the accident (*see* Deposition of Bradoc at p 67 lines 6-24). Mr. Bradoc also indicated that Mr. Gershuny should have opened the door very slowly, as the corridor was very busy (*see* Deposition of Bradoc at p 69 lines 4-12). Mr. Bradoc states that, other than his attorney, no one told him that Mr. Gershuny exited the bathroom the wrong way or too quickly (*see* Deposition of Bradoc at pp 69-70 lines 19-25, 2). It was Mr. Bradoc's general impression that one should be very judicious in their movements when entering into an open area where they cannot see where they are entering (*see* Deposition of Bradoc at p 70 lines 11-17). Upon further questioning, Mr. Bradoc confirmed that he had not had any conversations with any witnesses regarding the accident (*see* Deposition of Bradoc at p 71 lines 2-5). Mr. Bradoc was asked if he blamed Mr. Gershuny for being inattentive, his reply was "if there's something coming

down the hall and he's not aware of it and -- and it's something I think, if he was very cautious, he might have been able to avoid. Again, it's my belief. It's not my knowledge." (*see* Deposition of Bradoc at p 71 lines 6-13). Mr. Bradoc was asked about the claim that Mr. Gershuny failed to heed warnings, to which he replied that "the general warning is that when walking into a busy area from where you can't see outward, you should be cautious" (*see* Deposition of Bradoc at p 72 lines 3-8). Additional questions were asked of Mr. Bradoc concerning Mr. Gershuny's alleged failure to take precautionary or safety measures, failing to pay proper attention, failing to take control of his person, failing to anticipate the accident, failing to make sure the hallway was in a proper and safe condition before he exited, failing to keep a proper and safe lookout, and failing to carefully and properly open the bathroom (*see* Deposition of Bradoc at pp 73-80). Mr. Bradoc answered all questions in a similar vein, that it was his general impression that one should act with caution when exiting a door leading to a busy corridor. Mr. Bradoc cited no witness to the event who observed any of these alleged failures. Rather Mr. Bradoc testified that no one other than his attorney told him that Mr. Gershuny failed to exercise caution in exiting the bathroom.

Plaintiff also introduces the deposition testimony of Gail Zarick, Esq., Intellectual Property Counsel for the storage

division of IBM. Ms. Zarick testified that she had used the women's room in the same corridor and never received instruction from IBM as to how to exit the bathroom properly (*see* Deposition of Zarick at p 35 lines 4-16). Ms. Zarick was not aware of a specific policy concerning the pushing of carts in the corridor prior to the incident (*see* Deposition of Zarick at p 72 lines 3-19).

Under the doctrine of *respondeat superior*, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment (*see Nevaeh T. v City of New York*, 132 AD3d 840 [2nd Dept 2015]). The deposition testimony of Mr. Figueroa establishes, *prima facie*, that he was acting within the scope of his employment and in furtherance of the defendant IBM's business when the incident occurred on June 4, 2015.

The admission by Mr. Figueroa that the 100-500 pound cart he was pushing down the corridor drifted to the left and struck the corner of the door which in turn stuck Mr. Gershuny is sufficient to establish plaintiff's *prima facie* burden on the issue of liability (*see Natoli v Trader Joe's East Inc.*, 2021 NY Slip Op 05821 [1st Dept 2021]; *Posada v Great Atl. & Pac. Tea Co.*, 70 AD3d 1019 [2nd Dept 2010]).

Additionally, the deposition testimony, specifically that of

Mr. Bradoc, warrants dismissal of the defendant's first, fifth and seventh affirmative defenses. The defenses asserting culpable conduct on plaintiff's behalf and assumption of the risk are unfounded and unsupported based upon the deposition testimonies submitted in support of the plaintiff's motion. Plaintiff testified that, after not hearing anything in the corridor, he exited the bathroom only to have the door strike him and knock him to the ground. Mr. Figueroa testified that the case he was pushing drifted off to the left and caught the corner or edge of the bathroom door. There is no offer of evidence that the conduct of the plaintiff was the competent producing cause of his injuries. Therefore, plaintiff has established that dismissal of the first, fifth and seventh affirmative defenses is warranted.

Defendant's Motion and Opposition

Defendant submits opposition to the plaintiff's motion for summary judgment and its own summary judgment motion.

The opposition papers attack the admissibility of the deposition transcripts as used to support plaintiff's motion. Defendant contends that if the deposition transcripts are to be used to support a motion for summary judgment, the transcripts must be signed by the respective witnesses or proof that the transcripts were forwarded to the witnesses must be provided.

In support of his motion, plaintiff has submitted his two deposition transcripts along with three deposition transcripts of the defendant's witnesses. None of the transcripts were signed and plaintiff's motion does not contain any indication that the transcripts were forwarded to the respective individuals for signature.

The unsigned but certified deposition transcripts of the plaintiff are admissible under CPLR 3116(a), since the transcripts were submitted by the party deponent himself and, therefore, were adopted as accurate by the deponent (*see David v Chong Sun Lee*, 106 AD3d 1044 [2nd Dept 2013]). Additionally, in reply to the defendant's opposition papers, the plaintiff has submitted evidence that on February 11, 2021, plaintiff's counsel mailed both transcripts to the plaintiff. Both were not returned, thus they are considered admissible pursuant to CPLR 3116(a). Mr Figueroa was deposed on October 9, 2020 and his original transcript was mailed to defense counsel on October 29, 2020. Mr. Figueroa did not return a signed copy until June 22, 2021. The unsigned copy is admissible as the deponent failed to return it within sixty days (*see* CPLR 3116[a]). Mr. Bradoc was deposed on October 9, 2020 and his original transcript was mailed to defense counsel on October 29, 2020. A signed copy was never returned. Accordingly, the unsigned deposition transcript of Mr. Bradoc was also admissible sixty days after his failure to sign

and return the transcript. Ms. Zarick was deposed on December 4, 2020 and her original transcript was mailed by plaintiff's counsel to defense counsel on January 11, 2021. Defense counsel returned a fully executed transcript with corrections on March 3, 2021. Plaintiff's counsel alleges that the unsigned transcript was submitted in error. However, the error was harmless and the issue rendered moot because no changes were made to any part of the deposition transcript cited by plaintiff in their moving papers.

The submissions by the plaintiff establish that the deposition transcripts were properly used as though they had been signed (*see* CPLR 3116[a]; *David v Chong Sun Lee*, 106 AD3d 1044 [2nd Dept 2013]).

Defendant next maintains that plaintiff's motion must be denied as he has not come forward with any evidence showing defendant can be held liable under the doctrine of *respondeat superior*. Defendant maintains that plaintiff mistakenly contends that Mr. Figueroa's email and the contractor injury report are attributable to the defendant as admissions by the defendant. The Court relied on neither the email of Mr. Figueroa nor the contractor injury report in finding that the plaintiff has established his *prima facie* entitlement to judgment as a matter of law. Accordingly, the issue of admissibility of the email and contractor injury report is deemed moot.

Defendant maintains that the affirmative defenses must not be dismissed as plaintiff has not established that he was free from negligence. Defense counsel alleges that it was plaintiff's act of opening the door that was the cause of the accident. This statement is simply unsupported by the submitted evidence.

The Court will now turn its attention to the defendant's motion for summary judgment. In support of its motion, defendant alleges that it cannot be held liable for the plaintiff's injury as its employee was not negligent and evidence exists that plaintiff's own actions were the sole cause of the accident.

Defendant offers the affirmation of Gail H. Zarick, Esq., in support of its motion. Ms. Zarick states: "I took care when opening the women's bathroom door into the back hallway because I knew there was activity in the hallway. I never opened the women's bathroom door coming into contact with a person or object in the hallway. I am not aware of anyone opening the men's and/or women's bathroom doors coming into contact with a person or object in the hallway before Mr. Gershuny's incident." Ms. Zarick also indicated that when the cases/carts were pushed upon the linoleum tile floor in the corridor, they were noisy.

Defendant next offers the affidavit of Robert Figueroa. Mr. Figueroa states that he has never opened the men's bathroom door coming into contact with a person or object in the hallway. On June 4, 2015, Mr. Figueroa confirms that he was pushing a case

containing laptop computers from the storage area to the loading docks using the rear corridor. While doing so, the men's bathroom door opened and came in contact with the left side of the case he was transporting. Mr. Figueroa states "I was pushing the case in the middle of the hallway when it drifted a little bit to the left." However, Mr. Figueroa also asserts that at the time of contact, the case was still in the middle of the hallway. Mr. Figueroa also states that the cases are loud when transported over the linoleum floor.

In its memorandum of law, defendant asserts that the fact that Mr. Figueroa was pushing a case down a hallway does not make him negligent. Mr. Figueroa has pushed the case in the same manner numerous times. Defendant maintains that it was plaintiff's negligent act of opening the door into the hallway which caused the accident. Defendant opines that plaintiff opened a door he could not see through without regard for who or what was on the other side of the door. Since the case was already in the hallway, plaintiff's action of opening the door into the case was the cause of the accident, according to defendant.

The evidence submitted by the defendant in support of its motion for summary judgment is insufficient to establish its prima facie entitlement to judgment as a matter of law. The evidence does not eliminate any material issue of fact as to whether defendant's employee was negligent in the handling of the

laptop computer shipping case at the time of the incident (*see Richardson v County of Nassau*, 156 AD3d 924 [2nd Dept 2017]).

Based upon the foregoing, it is hereby

ORDERED, plaintiff's motion for partial summary judgment as to liability against the defendant is granted, it is further

ORDERED, defendant's first, fifth and seventh affirmative defenses are dismissed, it is further

ORDERED, that defendant's motion for summary judgment is denied, it is further

ORDERED, the parties are directed to appear for a Pre-Trial/Settlement Conference on January 12, 2022 at 11:00 a.m. Adjournments are only granted with leave of the Court.

This constitutes the decision and order of the court.

Dated: November 16, 2021
Poughkeepsie, New York

HON. MICHAEL G. HAYES, AJSC