Kull v Ahern Rentals, Inc.
2022 NY Slip Op 33464(U)
October 13, 2022
Supreme Court, New York County
Docket Number: Index No. 151916/2022
Judge: J. Machelle Sweeting

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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DOMENICO KULL,

Plaintiff,

- v -

AHERN RENTALS, INC, HERC RENTALS INC, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 151916/2022

MOTION DATE 07/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

In the underlying action, plaintiff alleges that on August 17, 2021, at 8:45 A.M., plaintiff was power washing the underside of the Williamsburg Bridge located at Pitt Street near its intersection with Delancey Street, in the County, City and State of New York. Plaintiff and his partner Sal Vicari ("Vicari") were standing on a boom lift (the "Lift") that had been rented from defendant Ahern Rentals, Inc. ("Ahern"). Suddenly, the Lift "jolted" and "swayed," causing the employees to lose their balance and causing Vicari to spray plaintiff with Vicari's power washer.

In the complaint, plaintiff alleges four causes of action. The second and fourth causes of action are specifically directed at Ahern.

Pending before the court is a motion filed by Ahern seeking an order:

(i) pursuant to Civil Practice Law and Rules ("CPLR") Section 3211 (a)(1), dismissing the second cause of action in the complaint, based on documentary evidence, and dismissing the complaint, pursuant to CPLR § 3211 (a)(7), for failure to state a cause of action; and

(ii) pursuant to CPLR § 3211(a)(7), dismissing the fourth cause of action in the complaint, for failure to state a cause of action.

Arguments Made by the Parties

Ahern argues that plaintiff's Notice of Claim and 50-h testimony do not support a claim of negligence against Ahern but instead show that plaintiff's injury was caused by his co-worker spraying him in the face with a pressure washer and that the co-worker's act, which was unforeseeable by Ahern, was the sole and proximate cause of plaintiff's injury.

As to the fourth cause of action, Ahern argues that plaintiff failed to allege that Ahern is an owner, contractor, or agent within the meaning of the Labor Law and that the word "owner" as defined by the Labor Law, refers to the party that owned the property on which the accident occurred.

In opposition, defendant Herc Rentals, Inc. ("Herc") argues that Ahern's motion should be denied, because Ahern did not deny that it owned the Lift and it did not offer any expert affidavits outlining that the Lift was in good working order on the date in question so as to explain why the Lift malfunctioned and swayed. In addition, Herc argues that Ahern failed to offer maintenance records with respect to the Lift, and failed to show that the Lift had all necessary and required warnings. Further, Herc argues that the mere fact that other persons may share some responsibility

for plaintiff's harm does not absolve Ahern from liability, because there may be more than one proximate cause of an injury. Finally, Herc argues that Ahern's motion does not address Herc's cross-claims for, *inter alia*, contribution and indemnity, and that such cross-claims would remain regardless of whether Ahern's motion was successful.

The City argues in opposition that Ahern has not satisfied either CPLR § 3211(a)(1) or CPLR § 3211(a)(7) inasmuch as Ahern did not deny ownership of the Lift. The City also argues that the motion should be denied, because the allegations in the complaint are sufficient to allege, *inter alia*, negligence as against Ahern.

In opposition, plaintiff argues that dismissal in Ahern's favor should be denied, because Ahern has not yet filed an Answer to this action; there has not been enough discovery in this case to properly assess whether Ahern was an agent of either plaintiff's employer/contractor, or an agent of defendant City; and if Ahern did in fact supervise, maintain and control the Lift on the date of plaintiff's accident, then Ahern would in fact be an implied agent under the Labor Law. Plaintiff further argues, with respect to the second cause of action, that plaintiff properly pled that Ahern had a duty; that there was a breach of that duty, and that plaintiff's injury was proximately caused by Ahern's breach, as evidenced by plaintiff's 50-h hearing at which he testified that the Lift was owned by Ahern and the Lift malfunctioned and swayed.

Conclusions of Law

The second cause of action in the complaint alleges that Ahern owned and leased the Lift and that Ahern failed to maintain the Lift in a reasonably safe and suitable condition. In support of its motion for dismissal, Ahern relies on the notice of claim and the transcript of plaintiff's 50-h hearing, which Ahern argues show that, *assuming arguendo* that the Lift actually swayed, such

swaying was not the proximate cause of plaintiff's injury. This court finds this argument to be unavailing.

As the First Department has held, there can be more than one proximate cause of an injury. *See, e.g.,* Demetro v Dormitory Auth. of State, 170 AD3d 437 (1st Dept 2019) ("The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury"); Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp., 299 AD2d 230 (1st Dept 2002) ("It is well settled that there can be more than one proximate cause of an accident and there is no requirement that a plaintiff exclude every other possible cause other than defendant's breach of duty"). Here, whether plaintiff's injury was caused by the swaying of the Lift or solely by the action of plaintiff's co-worker is an issue of fact that cannot be determined on this record. Accordingly, summary judgment to Ahern and dismissal of the second cause of action is denied.

With respect to the fourth cause of action, the complaint generally alleges as against all defendants, including Ahern, that, "The plaintiff was injured due to a violation of Labor Law Sections 200, 240, 241, Industrial Codes and Occupational Safety & Health Administration by the defendants herein [sic]." This cause of action also alleges that defendants failed "to furnish, erect, supply, provide and make available to him [plaintiff], safeguards, safe equipment or other devices so constructed, placed and operated as to afford him proper protection for the performance of his work;" that defendants allowed plaintiff "to be in a defectively constructed structure and location, as well as unsafe and dangerous construction site;" and that defendants failed "to provide the plaintiff with a safe place to work and proper protections and warnings."

While neither Herc nor the City opposed Ahern's arguments with respect to this cause of action, plaintiff asserts that there has not been enough discovery in this case to properly assess whether Ahern was an agent of either plaintiff's employer/contractor or an agent of defendant City.

"It is well settled that on a CPLR 3211(a)(7) motion the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory . . .. A motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law" (M & E 73-75, LLC v 57 Fusion LLC, 189 AD3d 1 [1st Dept 2020]).

Here, it is alleged that Ahern owned the Lift; that Ahern leased the Lift; that Ahern maintained, managed, repaired, controlled, inspected, and constructed the Lift; and that plaintiff's injuries occurred while standing on the Lift, which had "jolted" and swayed." Whether Ahern was a contractor, owner or agent of the contractor or owner of the property is an issue of fact that cannot be determined on this record and can be further explored during discovery.

Conclusion

Accordingly, it is hereby:

ORDERED that Ahern's motion seeking dismissal of the second and fourth causes of action is DENIED.

10/13/2022
DATE

J. MACHELLE SWEETING, 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