SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X

PARSHOO BADLU,

Plaintiff(s),

Index No: 521061/20

-against-

DECISION AND ORDER

ANTHONY FARINA and CHASE LANDSCAPE CONSTRUCTION INC.,

Defendant(s),

X

ANTHONY FARINA,

Third-Party Plaintiff,

-against-

MANAGE TRANSIT CORPORATION,

Third-party Defendant. X

Recitation as required by CPLR 2219(a), of the papers considered in this motion and cross-motion for summary judgment.

Papers	NYSCEF Doc. Nos.
Order to Show Cause/Motion and Affidavits Annexed.	63-69
Cross-motion and affidavits annexed.....	74-88
Answering Affidavits.....	132-135
Reply Papers.....	157, 177

Upon the foregoing cited papers, the Decision/Order on these motion:

In this action to recover damages for personal injuries, defendant Chase Landscape Construction Inc., [Chase] moves [seq. no. 3] pursuant to CPLR 3212 for an order granting summary judgment in its favor dismissing the plaintiff's complaint and all cross-claims asserted against it, together with costs and disbursements including reasonable attorneys' fees. Defendant Anthony Farina [Farina] cross-moves [seq. no. 4] for summary judgment dismissing the plaintiff's complaint and all cross-claims and counter-claims asserted against him, or alternatively, denying Chase's motion for summary judgment.

This action arises out of an accident that occurred on November 9, 2017. Plaintiff, while in the course of his employment as a security guard for third-party defendant Manage Transit Corp. [Transit], allegedly sustained injuries when a portion of the premises' existing gate/fence that he was in the process of closing, fell, striking his hand and foot. The premises, a parking lot, was owned by Farina and leased to Transit, which had contracted with Chase for the installation of a new gate/fence to replace the existing one that was not functioning properly. Plaintiff's accident occurred one day after Chase's work on the new gate/fence commenced.

Chase's motion for summary judgment

Chase moves for summary judgment dismissing the complaint and all cross-claims arguing, essentially, that it did not owe a duty of care to the plaintiff, and that it did not cause or create the allegedly dangerous condition. " 'Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property' " (*Bartlett v. City of New York*, 169 AD3d 629, 630 [2d Dept 2019] quoting *Donatien v. Long Is. Coll. Hosp*., 153 AD3d 600, 600–601 [2d Dept 2017]). "A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Stiver v Good & Fair Carting & Moving, Inc*., 9 NY3d 253, 257 [2007], quoting *Espinal v Melville Snow Contrs*., 98 NY2d 136, 138 [2002]). "However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Hagan v. City of New York*, 166 AD3d 590, 592 [2d Dept 2018]; *see Espinal* at 140)

When a plaintiff alleges facts in his/her pleadings or bill of particulars which would establish the applicability of any of the Espinal exceptions, a defendant is required to affirmatively demonstrate that the exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law *(see Camelio v Shady Glen Owners'Corp*., 2023 NY Slip Op 04105 [2d Dept 2023]). Here, plaintiff pleaded in the complaint and bill of particulars that Chase created the alleged dangerous condition that caused the accident as a result of, among other things, in failing to property construct, erect,deconstruct and/or secure the gate to prevent it from falling. Therefore, Chase is required to establish, prima facie, that it did not create the dangerous or defective condition alleged (*id*.).

Chase's evidentiary submissions, including its contract with Transit for the installation of the new gate/fence, together with parties' deposition testimonies, establish prima facie that it neither launched an instrument of harm nor exacerbated the alleged dangerous condition that caused the accident (*see Calle v 16th Ave. Grocery, Inc*., 2023

NY Slip Op 04104 [2d Dept 2023]. Guy DeMarco, the individual who manages and operates Chase's business, testified that Transit contracted with Chase to install a new gate/fence at the entrance to the parking lot to replace the existing one that was not closing properly. DeMarco testified that it took four days to fabricate and install the new gate/fence. The work did not require anything to be done to the existing gate/fence, and that neither he nor Chase's other workers cut, altered, removed or damaged the existing gate/fence during the installation process. DeMarco further testified that the existing fence/gate remained in its original position during the installation process, was operational, and was not slated to be removed until the new fence/gate was fully installed. Plaintiff's testimony confirms that he was injured by the existing gate/fence and not the new one that Chase was in the process of installing.

In opposition, the plaintiff fails to raise a triable issue of fact as to whether Chase launched an instrument of harm (*see Qoku v 42nd Street Development Project, Inc*., 187 AD3d 808 [2d Dept 2020]). Plaintiff's deposition testimony that the accident occurred due to Chase having cut a portion of the existing gate/fence earlier in the day is based on speculation and hearsay that he learned during a telephone conversation with Transit's owner after the accident occurred. Plaintiff did not have any personal knowledge as to the cause of this accident, or as to any work that Chase may have done to the existing gate/fence. Although hearsay evidence may be submitted in opposition to a motion for summary judgment, it is insufficient, to bar summary judgment where, as here, it is the only evidence submitted in opposition (*see King v North Shore Long Island Jewish Hosp. at Plainview*, 127 AD3d 928 [2d Dept 2015]). Therefore, summary judgment is warranted in favor of Chase dismissing the complaint and any cross-claims asserted against it.

Farina's motion for summary judgment

Farina moves for summary judgment on the ground, among others, that he is an out-of-possession landlord who is not liable for plaintiff's injuries. Generally, an out-of-possession landlord is not liable for injuries that occur on its premises unless (1) the landlord had assumed a duty to maintain or repair the premises through contract or course of conduct, or (2) has reserved the right to enter to make repairs, and liability is based on a significant structural or design defect that violates a statutory safety provision (see *Vaughan v Truimphant Church of Jesus Christ*, 193 AD3d 1104, 1104 [2d Dept 2021]; *Sangiorgio v Ace Towing and Recovery*, 13 AD3d 433, 433-434 [2d Dept 2004]).

Here, Farina establishes his prima facie entitlement to judgment a matter of law by demonstrating that he relinquished control of the premises and did not assume any duty to maintain or repair the leased premises or its fences by contract or course of conduct, through a copy of the submitted lease as well as his own deposition testimony (*see Hope v Our Holy Redeemer R.C. Church*, 2023 NY Slip Op. 04197 [2d Dept 2023]).

Furthermore, although Farina reserved the right to enter the leased premises to make repairs, plaintiff fails to identify any specific statutory violation and fails to allege that his injury was caused by a significant structural or design defect (*see Lindquist v C & C Landscape Contractors, Inc*., 38 AD3d 616 [2d Dept 2007). Plaintiff's opposition fails to raise a triable issue of fact to Farina's prima facie showing. Therefore, summary judgment in favor of Farina dismissing the complaint and all cross-claims and/or counterclaims asserted against him.

In view of the foregoing, the respective motions for summary judgment are granted and the complaint and all asserted cross-claims/counter-claims are dismissed. The portion of Chase's motion for costs, disbursements, and reasonable attorney's fees is denied.

This constitutes the decision/order of the court.

Dated: September 20, 2023

Enter,

Hon. Karen B. Rothenberg, J.S.C.