

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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WILLIAM BAHR,

Plaintiff,

-against-

Index No: 11589/06
Motion Date: 6/11/08
Motion Cal. No: 4 & 5
Motion Seq. No: 4 & 5

AIRWAY CLEANERS, INC., UNITED
AIRLINES, INC., UAL CORPORATION, INC., and
TERMINAL ONE, INC.,

Defendants.

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The following papers numbered 1 to 31 read on these motions by defendants Airway Cleaners, United Airlines Inc., and UAL Corporation, Inc., for an order, pursuant to CPLR § 3212, dismissing the complaint in its entirety and granting an award of sanctions, costs and attorneys' fees, pursuant to CPLR §8303-a and 22 N.Y.C.R.R.§130-1.1.

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Upon the foregoing papers, it is hereby ordered that the motions are disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff during the course of his employment as an airline pilot employed by defendant United Airlines, Inc. ("United"), to recover damages as the result of a trip and fall on an interior stairwell leading from the C Concourse Level to the Flight Operations Level in the United terminal at LaGuardia Airport on October 3, 2003. Plaintiff commenced this action against defendant Airway Cleaners ("Airway"), a maintenance company, United, his employer, defendant UAL Corporation, Inc. ("UAL"), a holding company and United's corporate parent, and Terminal One, Inc. ("Terminal One"), the alleged owner of the

building leased to United for use as its terminal.¹ Airway now moves for summary judgment dismissing the complaint and an award of sanctions, costs and attorneys' fees. Defendants United and UAL move for the same relief.

Summary Judgment Motions

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The initial question in a negligence action is whether the alleged tortfeasor owed a duty of care to the injured party [see, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002) ; Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004)], and the existence and scope of that duty are legal questions for the courts to determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist., 43 A.D.3d 1035 (2nd Dept. 2007); Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395 (2nd Dept. 2003). In premises liability cases, it is well recognized that to “establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (citations omitted).” “[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property (citations omitted).” “The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (citations omitted).” Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005); see, Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005). Here, it is determined by this Court that insofar that plaintiff failed to show that Airway had any responsibilities associated with the stairway upon which he fell, it owed no duty of care to plaintiff in the first instance to impose liability upon it for the happening of plaintiff's accident.

¹By order of this Court dated March 2, 2007, plaintiff was granted a default judgment against defendant Terminal One, Inc., for the causes of action set forth in the complaint, the amount thereof to be determined at an inquest to assess damages to be held at the time of the trial of this action. By stipulations dated October 25 and December 6, 2006, the default motion was withdrawn as against defendants United Airlines and Airways Cleaners, respectively.

In any event, “[t]he imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises.” Casale v. Brookdale Medical Associates, 43 A.D.3d 418 (2nd Dept. 2007). In the case at bar, Airway did not own, occupy, control, or put to a special use the subject stairwell, nor did it have any right or obligation to maintain that area, thus it established, as a matter of law, its entitlement to judgment in its favor. See, Ellers v. Horwitz Family Ltd. Partnership, 36 A.D.3d 849 (2nd Dept. 2007); Morgan v. Chong Kwan Jun, 30 A.D.3d 386 (2nd Dept. 2006); Franks v. G & H Real Estate Holding Corp., 16 A.D.3d 619 (2nd Dept. 2005); DePompo v. Waldbaums Supermarket, Inc., 291 A.D.2d 528 (2nd Dept. 2002); Welwood v. Association for Children With Down Syndrome, Inc., 248 A.D.2d 707 (2nd Dept. 1998). In opposition, plaintiff failed to come forward with any evidence that this defendant had, or was chargeable with, control or maintenance of the stairwell, or that it actually created the dangerous condition. Morgan v. Chong Kwan Jun, *supra*; Franks v. G & H Real Estate Holding Corp., *supra*; DePompo v. Waldbaums Supermarket, Inc., *supra*. And assuming arguendo, that the service agreement referenced by plaintiff and entered into between United and Airway Maintenance, a separate corporate entity not named in this action, somehow obligated Airway Cleaners as plaintiff suggests, the claims against Airway Cleaners would still fail.

In discussing the issue of whether a contractual obligation can be the predicate for tort liability to an injured third party, the Court of Appeals explained in Stiver v Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 257 (2007), that:

A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party” (Espinal v Melville Snow Contrs., 98 N.Y.2d 136 (2002); see also Church v Callanan Indus., 99 N.Y.2d 104, 111 (2002)[“(O)rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor”]. We have identified only three exceptions to this general rule, which we summarized in Espinal. These are (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launches a force or instrument of harm” [quoting Moch Co., Inc. v Rensselaer Water Co., 247 N.Y. 160, 168 (1928)]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citing Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 N.Y.2d 220, 226 (1990)] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [citing Palka v Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 589 (1994); Espinal, 98 N.Y.2d at 140; see also Church, 99 N.Y.2d at 112-113]. In this regard, “[a] contractor who creates or exacerbates a harmful condition may generally be said to have launched it” [McCord v Olympia & York Maiden Lane Co., 8 A.D.3d 634, 636 (2004), citing Espinal, 98 N.Y.2d at 142; accord Stiver v Good & Fair Carting & Moving,

9 N.Y.3d 253, 257 (2007); Salvati v Professional Sec. Bur., 40 A.D.3d 735 (2007), lv denied 9 N.Y.3d 806 (2007)].

Airway has established, despite the fact that it was not a party to the service agreement and under no contractual duty or obligation, that none of the exceptions to the general rule exist here. In opposition, plaintiff again has failed to raise an issue of fact as to whether an exception to said general rule exists. Lastly, despite plaintiff's contention to the contrary, the service agreement at issue appears to be one for general janitorial services; repair of an allegedly defective step in a stairwell cannot be read into that contract. Thus, summary judgment in Airway's favor is warranted. Moreover, under the same reasoning, UAL the parent company of plaintiff's employer, United, is entitled to summary judgment as it owed no duty to plaintiff for the injuries allegedly sustained. See, Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Casale v. Brookdale Medical Associates, 43 A.D.3d 418; Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005); Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005).

With respect to that branch of the motion by United seeking dismissal on the ground that plaintiff did not sustain a grave injury, section 11 of the Workers' Compensation Law provides that an employer's liability prescribed by the Workers' Compensation Law shall be exclusive and in place of any other liability whatsoever. See, Stabile v. Viener, 291 A.D.2d 395 (2nd Dept. 2002); Soto v. Alert No. 1 Alarm Systems, Inc., 272 A.D.2d 466 (2nd Dept. 2000); Goodarzi v. City of New York, 217 A.D.2d 683 (2nd Dept. 1995). The section further provides that an employer may be liable in a third-party action for contribution or indemnification only where the third-party plaintiff proves through competent medical evidence that the employee sustained a grave injury. See, Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363 (2005); Meis v. ELO Org., 97 N.Y.2d 714 (2002); see, also, Spiegler v. Gerken Bldg. Corp., 35 A.D.3d 715, 715 (2nd Dept. 2006); Angwin v. SRF Partnership, L.P., 285 A.D.2d 568 (2nd Dept. 2001). "The term 'grave injury' as contained in Workers' Compensation Law § 11 has been described as 'a statutorily-defined threshold for catastrophic injuries, and it includes only those injuries listed in the statute and determined to be permanent' (citations omitted). Furthermore, the statutory list of grave injuries is intended to be exhaustive, not illustrative." Dunn v. Smithtown Bancorp, 286 A.D.2d 701, 702 (2nd Dept. 2001); McCoy v. Queens Hydraulic Co., Inc., 286 A.D.2d 425 (2nd Dept. 2001). Section 11 expressly provides:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external

physical force resulting in permanent total disability.

Moreover, it is well settled that “statutory language should be ‘sensibly’ read ‘without resort to forced or unnatural interpretations’ (citation omitted). Further, in interpreting the statutory language, the ‘guiding principle is, of course, to implement the intent of the Legislature—in this case to narrow tort exposure for employers while also protecting the interest of injured workers—by considering both the language used and objects to be accomplished’ (citation omitted).” Castillo v. 711 Group, Inc., 41 A.D.3d 77, 79 (2nd Dept. 2007).

Under the Workers’ Compensation Law, “[the] proponent of a motion for summary judgment dismissing a [] complaint because the plaintiff did not sustain a grave injury, is required to make a prima facie showing of entitlement to judgment as a matter of law.” Fitzpatrick v. Chase Manhattan Bank, 285 A.D.2d 487, 488 (2nd Dept. 2001); see, Meis v. ELO Organization, LLC, 97 N.Y.2d 714 (2002); Castro v. United Container Mach. Group, 96 N.Y.2d 398 (2001); DePaola v. Albany Medical College, 40 A.D.3d 678 (2nd Dept. 2007). The burden then shifts to plaintiff to demonstrate the existence of a genuine issue of fact on the “grave injury” issue. See, Benedetto v. Carrera Realty Corp., 32 A.D.3d 874 (2nd Dept. 2006); Palacio v. Textron, Inc., 295 A.D.2d 415 (2nd Dept. 2002); Fitzpatrick v. Chase Manhattan Bank, 285 A.D.2d 487 (2nd Dept. 2001); Miroe v. Miroe, 270 A.D.2d 400 (2nd Dept. 2000). Here, the record before this Court demonstrates that there are no triable issues of fact with respect to whether plaintiff, whose injuries as specified in his bill of particulars are to his right ankle, sustained a grave injury within the meaning of the Workers’ Compensation law. See, generally, Ramos v. DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH, 37 A.D.3d 802 (2nd Dept. 2007); Marshall v. Arias, 12 A.D.3d 423 (2nd Dept. 2004); Aguirre v. Castle American Const., LLC, 307 A.D.2d 901 (2nd Dept. 2003).² Thus, summary disposition of the complaint on this ground is warranted.

Lastly, the collective defendants on these motions seek awards of sanctions, costs and attorneys’ fees, pursuant to CPLR §8303-a and 22 N.Y.C.R.R. §130-1.1. Part 130.1 authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall

² Plaintiff, in his affirmation in opposition, belatedly agreed to discontinue the action insofar as asserted against his employer, defendant United Air Lines.

be payable as provided in section 130-1.3 of this Subpart. []

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The “intent of [Part 130.1] is to prevent the waste of judicial resources and to deter [vexatious] litigation and dilatory or malicious litigation tactics.” Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept. 1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006). The Rule further provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a “broad pattern of the [plaintiff’s] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation [].” Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept. 1999); see, Wecker v. D’Ambrosio, 6 A.D.3d 452 (2 Dept. 2004). “Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or

malicious litigation tactics (citation omitted).” Id. at 34 (1st Dept.1999).

Moreover, “CPLR 8303-a imposes a duty on a party and [his or] her attorney to act in good faith to investigate a claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis (citation omitted). The statute is intended to prevent waste of judicial resources and reduce expenses in opposing frivolous claims (citations omitted). An action is deemed frivolous when it is commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good-faith argument for an extension, modification or reversal of existing law (CPLR 8303-a[c][ii]).” Smullens v. MacVean, 183 A.D.2d 1105, 1106-1107 (3rd Dept.1992); see, Zysk v. Kaufman, Borgeest & Ryan, LLP, 53 A.D.3d 482 (2nd Dept. 2008); Jacobson v. Chase Manhattan Bank, N.A., 174 A.D.2d 709 (1991). Section 8303 of the CPLR, in pertinent part, provides:³

If in an action to recover damages for personal injury ... an action or claim is commenced ... or a counterclaim, defense or cross claim is commenced ... that is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

Here, although it has now been determined, upon this Court’s review of the relevant record, that plaintiff has asserted somewhat spurious claims against defendants, this Court finds that plaintiff has not purposely engaged in frivolous conduct within the meaning of the aforementioned statutes with respect to defendants UAL and Airway Cleaners, despite their contention to the contrary. However, as it is clear that plaintiff continued this action against his employer and did not sustain a grave injury, there is no factual or legal support for the causes of action against United, and such conduct is frivolous, and sanctions are appropriate.

Accordingly, the motions by defendants Airway Cleaners, United Airlines Inc., and UAL Corporation, Inc., for an order, pursuant to CPLR § 3212, dismissing the complaint in its entirety and granting an award of sanctions, costs and attorneys’ fees, pursuant to CPLR §8303-a and 22 N.Y.C.R.R.§130-1.1, are granted to the extent that the complaint hereby is dismissed as against them. Further, that branch of the motion by defendants United and UAL for sanctions, is granted to the extent that defendant United Airlines, Inc., is awarded costs and reasonable attorneys’ fees associated with the making of this motion in the amount of \$1,500.00, payable by counsel for plaintiff to the respective firm within twenty (20) days of service of a copy of this order with notice of entry, pursuant to section 8303-a of the CPLR. Further, in light of the instant decision dismissing this action as against the only answering defendants, the March 2, 2007 order of this Court which

³ Section 130-1.1 of the Rules of the Chief Administrator of the Courts authorizes the award of costs and the imposition of financial sanctions for frivolous conduct in civil actions; however, section 130-1.5 expressly provides that the rule does not apply to requests for costs or attorneys’ fees subject to the provisions of CPLR 8303-a.

granted plaintiff a default judgment against defendant Terminal One, Inc., and determined that an inquest to assess damages be held at the time of the trial of this action, is hereby amended, sua sponte, for an immediate assessment of damages.

Plaintiff shall place this action on the Inquest calendar of this Court by filing a note of issue and paying the requisite fees by October 24, 2008. A copy of the note of issue with proof of service of this order upon defendant Terminal One, Inc. shall be served upon the clerk of this Part at the time the note of issue is filed. The Inquest is hereby scheduled for November 12, 2008, at 11:00 a.m., in courtroom 63 of the Supreme Court, located at 88-11 Sutphin Blvd., Jamaica, New York.

Further, plaintiff's failure to proceed with this Inquest within ninety (90) days of the abovementioned scheduled date shall result in this action being marked inactive upon the expiration of the ninety day period.

Dated: September 8, 2008

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J.S.C.