

McElroy v Bernstein

2009 NY Slip Op 30583(U)

March 16, 2009

Supreme Court, Queens County

Docket Number: 8699/2006

Judge: Patricia P. Satterfield

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Created Under the Last Will and Testament of Alan D. Bernstein a/k/a Alan Bernstein, for which defendants Gail Bernstein and Herbert Resnik are Co-Trustees.

The note of issue was filed on May 16, 2008, so that the 120-day period for moving for summary judgment expired on September 13, 2008. Defendants timely served their motion for summary judgment on September 13, 2008, and seek to dismiss the complaint on the grounds that they are an out of possession landlord, and that plaintiff cannot demonstrate the existence of both a statutory violation and a structural or design defect. Plaintiff served his cross motion on November 11, 2008 and seeks summary judgment in his favor on the grounds that defendants are not an out of possession landlord, and they created or maintained a dangerous or defective condition on the premises, in violation of certain statutory provisions. Plaintiff asserts that the service of the late cross motion is excusable, as the relief sought is nearly identical to that of defendants. In the alternative, plaintiff asserts that the court may search the record, pursuant to CPLR 3212(b), and grant summary judgment in his favor.

In Brill v City of New York, (2 NY3d 648, 652 [2004]), the Court of Appeals held that CPLR 3212(a) permitted a late summary judgment motion upon the showing of good cause, which "requires ... a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (see also Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725, 726, 727 [2004]). The Appellate Division, Second Department, in applying Brill to late cross motions has taken two different approaches. In Thompson v Leben Home for Adults (17 AD3d 347 [2005]), the court stated that "in the absence of such a 'good cause' showing, the court has no discretion to entertain even a meritorious, non-prejudicial [cross] motion for summary judgment."

However, the Appellate Division, Second Department has also stated that a cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion (see Grande v Peteroy, 39 AD3d 590 [2007]; Fahrenholz v Security Mut. Ins. Co., 32 AD3d 1326 [2006]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 [2005]; see Altschuler v Gramatan Mgt., Inc., 27 AD3d 304 [2006]). An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to

any party without the necessity of a cross motion (CPLR 3212[b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion (see Dunham v Hilco Constr. Co., Inc., 89 NY2d 425, 429-430 [1996]; Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280 [2006]; Baseball Off. of Commr. v Marsh & McLennan, Inc., 295 AD2d 73, 82 [2002]). Here, as plaintiff's cross motion seeks relief nearly identical to that of defendants' motion on the same causes of action, leave to serve the late cross motion is granted and said cross motion is deemed timely served.

The subject real property, located at 25-30 Borden Avenue, Long Island City, New York, consists of a building which is used as an indoor lumber yard. The building contained plywood storage mezzanine bins consisting of an old wooden structure located along the interior eastern wall of the building. Beneath the mezzanine bins is a wooden mezzanine platform or catwalk, approximately 4 feet wide, and 7½ feet above the concrete floor. The catwalk can only be accessed by a wrought iron staircase affixed to the extreme northeastern part of the building.

Plaintiff testified that he began working for LeNoble Lumber Company (LeNoble) at the subject location in June 1999, and became a manager the following year. He stated that at the time of the accident Mark Bernstein was his immediate supervisor.¹ Plaintiff stated that in 1999 or 2000, the upper storage bins were constructed and that he helped in their construction. The original uppermost plywood storage mezzanine bins were dismantled and their attachments to the roof structure were removed. He further stated that when he began working at LeNoble, there were handrails on the catwalk, but that they were constantly being damaged by the forklifts and were eventually removed. No handrails were in place on the catwalk on the date of the accident.

Plaintiff stated that on December 15, 2005, he began work at approximately 6:00 A.M. and was operating a forklift outside of the building, until approximately 10:00 A.M., when he received a telephone call from a customer who inquired as to whether a certain door size was in stock. He stated that he continued to work outside until approximately an hour later when he went to search for the requested door. Plaintiff stated that he first looked in the trailer which held different sized doors, and then entered the subject building, where other doors were stored in the "mistake

¹ This court in an order dated April 4, 2008, dismissed plaintiff's claim against Mark Bernstein, as a claim against a co-employee is barred by Workers' Compensation Law § 29(6).

area" at ground level, but could not find the requested door. He also looked in other bins at ground level prior to ascending to the catwalk. He testified that he looked in approximately ten bins while walking along the catwalk, but did not find the door for which he was looking. He then proceeded to climb up the bins, hand over hand, about 10 feet above the catwalk in order to look in bins located 12-15 feet above the catwalk. Plaintiff stated that his right foot was resting on a horizontal 2 by 3 or 2 by 4 piece of wood which was part of the bin, when he heard a cracking sound, and that his right foot gave way causing him to fall. Ronald Best, a co-worker testified that he had been standing near plaintiff when he heard a thump and saw plaintiff strike the catwalk and then fall onto the concrete floor below. Another co-worker, Darrin Nelson, testified that a 2 by 4 piece of wood had broken loose and was lying on the catwalk. Plaintiff's injuries from this accident rendered him paraplegic.

Plaintiff testified that prior to the accident he had climbed on the bins on a daily basis, perhaps twice a day in the plywood storage area, and perhaps three or four times a day in the moldings storage area, and that he had observed four other co-workers climbing the bins on a daily basis. He stated that the only other method he used to access the bins was to stand on the forklift blades. Prior to this accident, he had fallen from the bins once, but was not seriously injured. He stated that he was never told to climb on the bins and that he was never told not to climb on the bins. He stated that neither he nor any other workers used scaffolding to reach the bins.

Prior to his death in 1992, Alan Bernstein ran Maxwell Supply, at the subject premises. In approximately 1985, Alan Bernstein's son, Mark Bernstein, began working for his father at the subject premises. Following his father's death, Mark Bernstein operated Maxwell Supply at the subject premises from 1992 to 1997. Alan Bernstein's Last Will and Testament provided that title to the subject premises be transferred to a Trust, and named as Co-Trustees, his wife, defendant Gail Bernstein, and his friend and attorney, defendant Herbert Resnik. The Trust provides that upon defendant Gail Bernstein's death, Mark Bernstein shall receive a share in the Trust. On March 11, 1993, title to the subject property passed by deed from defendants Gail Bernstein and Herbert Resnik as Executors of the Last Will and Testament of Alan Bernstein, to defendants Gail Bernstein and Herbert Resnik as Trustees Under the Will of Alan Bernstein.

There was no written lease agreement between Maxwell Supply and either the Estate of Alan Bernstein or the Trust. In 1997, Mark Bernstein ceased operating Maxwell Supply, and became a

vice-president and employee of LeNoble. Between 1997 and 2000, LeNoble occupied the premises without a written lease. Matthew Dienstag, the president of LeNoble, testified he entered into a written lease for the subject premises for a lease term commencing January 1, 2000 and ending December 31, 2004, and that a new lease was entered into for the period of September 2005 through August 2012. He stated that there was no written agreement in effect for the period between the expiration of the first lease and the second lease. Mr. Dienstag testified that the mezzanine storage bins were in existence from the time LeNoble occupied the premises; that he did not know who originally built them; that in some places pieces of wood had been added for support or to replace broken areas and that the height of some of the bins was altered depending on what was stored in the bins. He stated that employees could access these bins by placing a ladder on the catwalk or by standing on a pallet that would be raised and lowered by a forklift, and that the employee would then either hand down the wood to another employee, place it down on the catwalk, or place it onto a pallet held up by a forklift. He further stated that four or five years after LeNoble took occupancy, it removed the wood railing that was on the catwalk, as it got in the way of the materials stored in the bottom bins located just above the catwalk.

Defendant Gail Bernstein, a Co-Trustee, testified that she never went to the subject premises when her husband Alan Bernstein was alive, and that the only time she ever was in the subject premises was several years prior to the accident, at which time she and other family members met Mark Bernstein in the office and went out for lunch. Defendant Herbert Resnik, a Co-Trustee, testified that he went to the subject premises perhaps on one occasion prior to Alan Bernstein's death but had no recollection of that visit, and that after Alan Bernstein died, he never visited the subject premises.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (Zuckerman v City of New York, supra).

In order to prove negligence, the plaintiff must demonstrate (1) the existence of a legal duty owed to the plaintiff;

(2) a breach of that duty; and (3) injury to the plaintiff proximately resulting from the breach (see Boltax v Joy Day Camp, 67 NY2d 617 [1986]). Where there is no duty, there can be no breach, and therefore no liability in negligence (Pulka v Edelman, 40 NY2d 781 [1976]).

An out-of-possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises or is contractually obligated to perform maintenance and repairs (see Brewster v Five Towns Health Care Realty Corp., ___ AD3d ___, 2009 NY Slip Op 1076, 2009 NY App Div LEXIS 1141 [2009]; Rosado v Bou, 55 AD3d 710 [2008]; Nikolaidis v La Terna Restaurant, 40 AD3d 827 [2007]; Tragale v 485 Kings Corp., 39 AD3d 626 [2007]; Rhian v PABR Assoc., LLC, 38 AD3d 637, [2007]; Lowe-Barrett v City of New York, 28 AD3d 721 [2006]). Reservation of a right to enter the premises for the purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision (see Brewster v Five Towns Health Care Realty Corp., *supra*; Conte v Frelen Assoc., LLC, 51 AD3d 620, 621 [2008]).

In support of their motion for summary judgment, Co-Trustees, defendants Gail Bernstein and Herbert Resnik, have satisfied their burden by submitting documentary evidence and deposition transcripts demonstrating that they are out-of-possession landlords, and are not contractually obligated to maintain or repair the premises. In opposition, plaintiff has failed to raise a triable issue of fact (see CPLR 3212[b]). Plaintiff's assertion that defendants are not out of possession landlords rests entirely upon unfounded allegations regarding Mark Bernstein. However, Mark Bernstein is neither a named Co-Trustee under the will of Alan Bernstein, nor an owner of the property pursuant to the deed. His status as an officer, shareholder and co-employee of plaintiff's employer, the tenant in possession of the premises, as well as his being a contingent beneficiary of the Trust, is irrelevant with respect to the issue of the landlord's possession of the real property.

Finally, plaintiff's counsel's speculation as to possible answers Mark Bernstein would have made at his deposition to unasked questions regarding the management of the premises, does not raise a triable issue of fact as to the landlord's possession of the subject premises. A motion for summary judgment may not be defeated by arguments and contentions based upon surmise, conjecture, and suspicion (Shaw v Time-Life Records, 38 NY2d 201 [1975]; Shapiro v Health Ins. Plan, 7 NY2d 56,

63 [1959]; Dombrowski v County of Nassau, 230 AD2d 705 [1996]; Mayer v McBrunigan Constr. Corp., 105 AD2d 774 [1984]).

Although defendants retained a right to enter the leased premises, plaintiff has neither established that the alleged defect constituted a specific statutory violation, nor has he raised a triable issue of fact with respect to this issue (see Conte v Frelen Assoc., LLC, 51 AD3d 620, 621 [2008]). The court finds that although defendants assert that the 1938 rather than the 1968 Building Code is applicable here, the documentary evidence submitted fails to establish when the subject premises was constructed. Therefore, the court will assume that the 1968 Building Code is applicable, as plaintiff claims.

Plaintiff, in his first supplemental bill of particulars, alleges violations of Administrative Code of City of NY §§ 27-127, 27-128 and 26-228. These statutory provisions are general safety provisions which do not constitute a sufficiently specific predicate for liability (see O'Connell v L. B. Realty Co., 50 AD3d 752 [2008]; Nikolaidis v La Terna Restaurant, 40 AD3d 827, 828 [2007]; Reddy v 369 Lexington Ave. Co., L.P., 31 AD3d 732, 733 [2006]). Further, plaintiff, in his cross motion for summary judgment, asserts that the wrought iron staircase leading from the open interior space at ground level to the catwalk or mezzanine constitutes interior stairs, pursuant to the Administrative Code of the City of New York § 27-232 and that the failure to provide a handrail on the catwalk landing is a violation of Administrative Code § 27-375. Plaintiff did not assert a violation of this section of the Administrative Code in either his complaint or his supplemental bill of particulars, and has not sought leave to amend the pleadings. The assertion of a violation of this section of the Administrative Code at this juncture therefore is improper. However, even if the bill of particulars was properly amended, contrary to plaintiff's contention, the subject staircase does not qualify as "interior stairs" within the meaning of Administrative Code of the City of New York § 27-232, and as governed by Administrative Code of the City of New York § 27-375, because it does not serve as a required exit from the building (see Schwartz v Hersh, 50 AD3d 1011 [2008]; Dooley v Vornado Realty Trust, 39 AD3d 460 [2007]; Mansfield v Dolcemascolo, 34 AD3d 763 [2006] Weiss v City of New York, 16 AD3d 680, 682 [2005]; Walker v 127 W. 22nd St. Assoc., 281 AD2d 539 [2001]). Plaintiff's present assertion of a violation of Administrative Code § 27-375, therefore, is without merit.

Plaintiff's claim that defendants created or maintained a dangerous condition or defect on the premises, or had actual or constructive notice of the same is without merit. Plaintiff's own

testimony establishes that his employer reinforced and constructed some of the upper bins and removed others, and that his employer also removed the railing from the catwalk. To the extent that plaintiff has now states in an affidavit that there were no rails on the catwalk at anytime, this self-contradictory statement does not raise an issue of fact, as there is no evidence that the current property owner constructed or maintained any of the bins plaintiff climbed on, or that the current property owner removed the railing from the catwalk. In addition, there is no evidence that the current property owner had actual or constructive notice of these conditions. Finally, the documentary evidence presented establishes that pursuant to the terms of the lease, at the time of plaintiff's accident, his employer, and not the landlord, had a duty to maintain the premises.

Defendants Gail Bernstein and Herbert Resnick, Co-Trustees under the Trust, thus have established their prima facie entitlement to judgment as a matter of law by demonstrating that they were an out-of-possession landlord which retained no control over the premises where plaintiff's accident occurred, did not obligate themselves to maintain or repair the premises, and did not violate a specific statutory provision (see Roveto v VHT Enters., Inc., 17 AD3d 341, 342 [2005]; Grippio v City of New York, 45 AD3d 639, 640 [2007]; Tragale v 485 Kings Corp., *supra*; Knipfing v V & J, Inc., 8 AD3d 628, 628-629 [2004]; Chery v Exotic Realty, Inc., 34 AD3d 412 [2006]; Gavallas v Health Ins. Plan of Greater N.Y., 35 AD3d 657 [2006]; Couluris v Harbor Boat Realty, Inc., 31 AD3d 686 [2006]). In view of the foregoing, defendants' motion to dismiss the complaint in its entirety is granted and plaintiff's cross motion for partial summary judgment in his favor is denied.

Dated: March 16, 2009

J.S.C.