

Booth v Neiman-Marcus Group, Inc.

2009 NY Slip Op 33365(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 108653/06

Judge: Marcy S. Friedman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

FILED
OCT. 28, 2009
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: Hon. Marcy S. Friedman, JSC

JOY BOOTH x

Plaintiffs,

Index No.: 108653/06

- against -

DECISION/ORDER

THE NEIMAN-MARCUS GROUP, INC., ET AL.

Defendants.

x

In this action, plaintiff Joy Booth sues to recover for personal injuries allegedly sustained when she slipped on water and fell on the floor of the employee locker room at the Bergdorf Goodman store on June 21, 2003. Defendants Control Air, Inc. ("Control Air") and Russell Auth move to dismiss the complaint and all cross-claims. Defendants Sweet Construction Corp., Sweet Construction of Long Island, LLC, and Steven S. Alessio (collectively "Sweet") move for summary judgment dismissing the complaint and all cross-claims. Defendants/third-party defendants Neiman Marcus Group, Inc. ("Neiman Marcus"), Bergdorf Goodman, Inc. ("Bergdorf Goodman"), 754 Fifth Avenue Associates, L.P. ("754 Fifth"), Newton Acquisition Inc. ("Newton"), TPG Capital L.P. ("TPG Capital"), and Warburg Pincus LLC ("Warburg Pincus") (collectively "third-party defendants") move for summary judgment dismissing Sweet's third-party complaint. Plaintiff moves for leave to reargue 754 Fifth's and Newton's motion for summary judgment dismissing the complaint which this court granted by decision and order dated January 30, 2008.

The relevant facts are as follows: Plaintiff was employed by Bergdorf Goodman as a

013

retail sales associate at its Manhattan store (“building”). On June 21, 2003, plaintiff allegedly slipped and fell on a puddle of water in the eighth floor locker room of the building, sustaining injuries. Bergdorf Goodman’s parent company is Neiman Marcus and its former parent company is Newton. Defendant 754 Fifth is the building’s landlord and defendants TPG Capital and Warburg Pincus are private equity firms which hold an ownership interest in Neiman Marcus. Defendant Control Air was a consultant to Neiman Marcus in connection with the chiller plant alteration on the rooftop and Russell Auth is Control Air’s principal. Sweet is a contractor that was hired to perform certain construction work at the building. Its principal is Steven Alessio.

Plaintiff claims that the puddle of water on which she slipped was the result of a leak from the ceiling caused by a problem with the air conditioning unit on the roof. In her amended complaint, plaintiff asserts causes of action for negligence, violations of Labor Law §§ 200 and 241(6), including violations of Industrial Code (“12 NYCRR”) §§ 23-1.7(a), (d), and (e), 23-1.30, 23-2.1, and 23-3.3(k).

Control Air and Russell Auth

As a threshold matter, Russell Auth seeks dismissal of plaintiff’s complaint for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8). Mr. Auth contends that he has never been served with process, that the time limit to do so under CPLR 306-b has expired, and that plaintiff has not moved for an extension of time to serve him. In opposition, plaintiff does not submit an affidavit of service showing that Mr. Auth was served with the original or amended pleadings. Plaintiff initially states that she does not oppose dismissal of the claims against Mr. Auth. However, plaintiff later argues that, by virtue of his status as the owner and president of Control Air, Mr. Auth is united in interest with Control Air and that service of the complaint on Control Air therefore constitutes service on Mr. Auth. This contention is without merit. Accordingly, the

complaint will be dismissed as against Russell Auth.

As to Control Air, it is well settled that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) The test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” (Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

In seeking dismissal of the Labor Law claims, Control Air first argues that plaintiff is not a covered person entitled to protection under the Labor Law. Labor Law § 2(5) defines an employee as “a mechanic, workingman or laborer working for another for hire.” It is well settled that in order “[t]o come within the special class for whose benefit absolute liability is imposed, a plaintiff must demonstrate that ‘he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent.’” (Abbatiello v Lancaster Studio Assocs., 3 NY3d 46, 50-51 [2004], quoting Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970, 971 [1979]; Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 [1990]; Ahmed v Momart Discount Store, Ltd., 31 AD3d 307 [1st Dept 2006].)

Moreover, a plaintiff who is not involved in construction activity or enumerated work will not be covered by the Labor Law. (See Spadola v 260/261 Madison Equities Corp., 19 AD3d 321, 323 [1st Dept 2005], lv denied and dismissed 6 NY3d 770 [2006] [holding that plaintiff, a computer technician employed by the entity for which the renovation work was being performed, was not entitled to protection under section 241[6] where “he was not hired to take part in any of the construction work, and did not supervise and/or inspect the progress of that work”].)

Here, Control Air submits evidence that conclusively shows that plaintiff is not a covered person under the Labor Law. Control Air cites to plaintiff’s bill of particulars and deposition testimony in which she stated that she was employed by Bergdorf Goodman first as a sales associate and, at the time of her accident, as a selling manager on the fifth floor. (See Bill of Particulars at 15[a], [b]; Booth Dep., November 12, 2007 [2007 Dep.] at 21-22.) She described her general duties as “[m]aking sure the floor was properly merchandised, evaluating sales people, and . . . selling and taking care of [her] clients.” (Booth 2007 Dep. at 30.)

Plaintiff argues that she was within the class of persons covered by the Labor Law because, in her capacity as sales supervisor, she held safety meetings, and that her role was thus integral to the construction work that was performed. (Id. at 75-78.) More specifically, plaintiff testified that she held a meeting with other sales associates to notify them of potential water hazards on the eighth floor after someone had injured herself. (Id. at 74.) However, plaintiff testified that she only first notified a supervisor of Bergdorf Goodman that she had conducted the meeting after it had occurred. (Id. at 77-78.) More importantly, plaintiff does not show, or even assert, that Bergdorf Goodman appointed her to this position or any other position that would involve construction or construction related work. Thus, plaintiff’s Labor Law causes of action must be dismissed.

Control Air also seeks dismissal of plaintiff’s negligence claim on the ground that it only

provided consulting services to Neiman Marcus in connection with the chiller plant, and did not supervise or control construction work at the time of plaintiff's accident. Control Air submits its consulting contract with Neiman Marcus, dated September 5, 2002, under which Control Air was to provide on-site consulting services for the chiller plant alteration for 16 hours per week.

(Control Air's Motion, Ex. D at Ex. C 1-2.) Control Air also submits an assumption agreement with Neiman Marcus, dated February 29, 2004, after plaintiff's accident, in which it assumed the general contractor responsibilities of non-party AJ Group, Inc., the company that Control Air maintains was the general contractor at the time of the accident for the chiller plant alteration.

(Id., Ex. E.)

These documents do not establish conclusively that Control Air did not supervise or control the construction work that plaintiff claims caused her accident. The Project Services section of the consulting contract expressly states that Control Air's services "will involve . . . supervision and assistance to the Neiman Marcus designated on-site project manager," "[o]n-site monitoring of construction as it relates to the project," "[a]ttend[ing] weekly construction meetings at the project site and field review of all items depicted at the weekly meetings," and "[a]ttend[ing] scheduled job-site walkthroughs." (Id., Ex. D at Ex. C2.) In addition, the meeting minutes that Control Air submits show that it was present at and participated in a meeting that was held four days prior to plaintiff's accident in which damage to the roof membrane was discussed. (Id., Ex. G [Meeting Minutes No. 7, dated June 17, 2003].)

While Control Air also relies on the affidavit of Russel Auth, his statements "do no more than assert the inaccuracy of plaintiff[s] allegations" and thus "may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint." (Tsimerman v Janoff, 40 AD3d 242 [1st Dept 2007] [internal citations omitted].) As there are triable issues of fact as to whether Control Air supervised or

controlled the work that caused plaintiff's accident, conversion of Control Air's motion to a summary judgment motion would not serve a useful purpose.

The branch of the motion of Control Air and Russel Auth to dismiss all cross-claims against them will, however, be granted without opposition.

Sweet

Sweet moves for summary judgment dismissing plaintiff's Labor Law and negligence claims. The Labor Law claims will be dismissed for the reasons stated above. As to the negligence claims, the standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is further settled that liability in a slip and fall case generally requires proof that "the defendant created a dangerous condition or had actual or constructive notice of it." (Frank v Time Equities, Inc., 292 AD2d 186 [1st Dept 2002]; Arnold v New York City Hous. Auth., 296 AD2d 355 [1st Dept 2002]. See generally Gordon v American Museum of Natural History, 67 NY2d 836 [1986].)

In seeking dismissal of plaintiff's negligence claim, Sweet submits the affidavit of its Project Manager Frank Locantore, stating that Sweet was not involved in any construction work and did not supervise or direct the project on the eighth floor. (Aff. of Frank Locantore, ¶ 4.) Mr. Locantore also testified that the only construction work that Sweet performed in the store in

June 2003 was on the ground floor on a renovation project called Package 4, and that Sweet and its subcontractors did not perform any work in 2003 on the eighth or ninth floors. (Locantore Dep. at 23-24, 85, 120.) He further stated that while the ground floor project was being performed, Sweet's workers went to the eighth floor only to use the employee cafeteria or bathrooms. (See *id.* at 27-28.) In addition, Sweet submits its construction purchase contract with Neiman Marcus which states the project's title as "1st and 2nd Floor Revisions," and does not identify any work to be performed by Sweet on the eighth floor or higher. (Sweet's Motion, Ex. 9.) Sweet also annexes records of safety meetings from October 1, 2002 up to and after plaintiff's accident regarding the HVAC Chiller Tower Project (later called BG HVAC Improvements, 8th Fl.), which show that Sweet was not present at the meetings. (Aff. of Frank Locantore, Exs. 4-27.) On this record, Sweet makes a prima facie showing that it did not supervise or control the construction work on the roof that plaintiff claims to have caused her accident.

In opposition, plaintiff submits her deposition testimony that she saw Sweet employees directing porters to put up plastic tarps in the employee locker room from April 11, 2003 until the date of her accident, in order to curb the leaks from the ceiling. (Booth 2007 Dep. at 67-68.) Plaintiff also testified that she recognized the Sweet employees who performed this work from prior conversations with them and from the Sweet T-Shirts that they wore. (*Id.* at 64, 68.) She further testified that the tarps were up on the day of her accident. (*Id.* at 70.)

Contrary to Sweet's apparent contention, a plaintiff's testimony based on personal knowledge may serve to raise a triable issue of fact in opposition to a motion for summary judgment. (See Zuckerman v City of New York, 49 NY2d 557 [1980]; Josephson v Crane Club, Inc., 264 AD2d 359 [1st Dept 1999].) Here, plaintiff's testimony raises a triable issue of fact as to whether Sweet was involved in controlling the leaks and whether it had notice of the condition

in the locker room. Thus, the branch of Sweet's motion to dismiss plaintiff's negligence claim must be denied.

Sweet argues, in reply, that plaintiff's claims against Steven Alessio should be dismissed because plaintiff does not oppose this branch of Sweet's motion. However, Sweet's moving papers do not argue any basis for dismissal of the claims against Mr. Alessio individually and thus Sweet does not make a prima facie showing that these claims should be dismissed.

The branch of Sweet's motion for summary judgment dismissing all cross-claims against Sweet will be granted without opposition.

Third-Party Defendants

Bergdorf Goodman, Neiman Marcus, and Newton (collectively "employer defendants"), as well as 754 Fifth, TPG Capital, and Warburg Pincus (collectively "owner defendants") move for summary judgment dismissing Sweet's complaint against them, which alleges causes of action, among others, for common law indemnification, contribution, and contractual indemnification.

Employer defendants contend that they cannot be held liable to Sweet for common law indemnification or contribution, as Workers' Compensation Law § 11 restricts their liability to cases involving "grave injury," and plaintiff did not sustain such an injury.

Workers' Compensation Law § 11 provides in pertinent part:

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.

It is well settled that “[t]he grave injuries [in the amended statute] are deliberately both narrowly and completely described. The list is exhaustive, not illustrative.” (Castro v United Container Mach. Group, Inc., 96 NY2d 398, 402 [2001] [citing Governor’s Mem approving L 1996, ch 635, 1996 NY Legis Ann, at 460].)

Here, employer defendants make a prima facie showing that plaintiff has not suffered a grave injury. They first cite plaintiff’s deposition testimony that, although plaintiff claims she will need a therapeutic amputation of her leg, she has not yet made the decision to schedule this surgery. (See Booth Dep., April 28, 2008 [2008 Dep.] at 70-72.) Employer defendants also submit the report of Dr. Steven Sciafani who examined plaintiff on behalf of defendants on April 30, 2008. This report states that plaintiff “should continue wearing a knee brace,” and that “the examinee would not benefit from amputation. An amputation would not be indicated in this examinee.” (Third-Party Defendants’ Motion, Ex. Y at 3.)

Employer defendants also make a prima facie showing that plaintiff’s accident did not cause permanent and total loss of use of her leg. They cite her testimony describing the extent of her mobility, in which she states that she is able to ascend and descend four steps in order to get in and out of her apartment, and that she does not use anything to help her ambulate such as a cane or a walker but depends only on her brace. (Booth 2007 Dep. at 11.) Employer defendants also rely on plaintiff’s statement that she is able to walk her dog “a couple of blocks” and can go shopping. (Id. at 215-217.)

In opposition, Sweet fails to raise a triable issue of fact on whether plaintiff’s injury is grave within the meaning of the statute. Sweet cites plaintiff’s testimony that her doctors have discussed the possibility of a therapeutic amputation with her and that she is willing, if necessary, to have the procedure. (See Booth 2007 Dep. at 205-206; Booth 2008 Dep. at 95.) Sweet also

claims that plaintiff stated at the mediation that her condition has continued to deteriorate and that if she were to be re-examined by defendant's doctor, he might revise his opinion. (See Sweet Aff. in Opp., ¶¶ 12-13.) It clearly appears from plaintiff's deposition testimony that her understanding is that she will have to make an extraordinarily difficult decision as to whether to undergo an amputation. Significantly, however, Sweet does not submit a report from plaintiff's doctor or other competent medical evidence showing either that plaintiff has sustained a total loss of the use of her leg or that she will require an amputation. Nor does Sweet submit authority in support of its contention that the possibility that "plaintiff might have the amputation" (see Sweet Aff. in Opp., ¶ 10) is sufficient to satisfy the grave injury requirement.

The employer defendants also seek to dismiss Sweet's contractual indemnification claim against them. Paragraph 7 of the Construction Purchase Contract, dated April 4, 2002, between Neiman Marcus, as owner, and Sweet Construction, as contractor, does not require contractual indemnification of Sweet. This provision provides in pertinent part that "[t]he Owner accepts all risks covered by a standard builders all risk insurance policy." (Third-Party Defs.' Motion, Ex. X at 2.) However, the policy further provides that "[t]he Contractor hereby indemnifies and agrees to save the Owner harmless against any liability claims, whatsoever that may arise in connection with the Work." (*Id.*) The contract thus requires Sweet's indemnification of Neiman Marcus, not the employer defendants' indemnification of Sweet. The contractual indemnification claim must therefore be dismissed.

Owner defendant 754 Fifth also seeks dismissal of the third-party complaint against it on the ground that it is an out-of-possession owner. By order dated January 30, 2008,¹ this court granted 754 Fifth's summary judgment motion for dismissal of plaintiff's complaint against it on

¹Although dated January 30, 2007, the decision was issued on January 30, 2008.

the ground that 754 Fifth had demonstrated as a matter of law that it had no liability as an out-of-possession owner. This order denied the branch of 754 Fifth's motion to dismiss the cross-claims, on the procedural ground that the cross-claims were not annexed to the motion papers. Subsequent to issuance of this order, Sweet served the third-party action, alleging claims similar to the cross-claims.

In moving for summary judgment, 754 Fifth argues that the January 30, 2008 order is law of the case. Even assuming arguendo that the issue of 754 Fifth's liability may be revisited now that discovery has been completed, the court holds that 754 Fifth has again demonstrated as a matter of law that it is not liable for negligence.

As held in the prior order, an out-of-possession owner is not liable for negligence regarding a condition on the property "unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." (Johnson v Urena Serv. Ctr., 227 AD2d 325, 326 [1st Dept 1996], lv denied 88 NY2d 814; Gomez v 192 E. 151st St. Assocs., L.P., 26 AD3d 276 [1st Dept 2006].)

Here, 754 Fifth was not obligated to make repairs. Moreover, Sweet, like plaintiff on the motion decided by the prior order, fails to raise a triable issue of fact as to whether a structural defect caused the water accumulation on which plaintiff slipped. Sweet, at most, advances the proposition that the chiller project was a substantial alteration, involving removal of all or part of the roof, and that "no leap of the imagination" is required to find that a persistently leaking roof "was the result of a significant structural defect." (Aff. of Paul Carpenter [754 Fifth's attorney] in Opp. to Third-Party Ds.' Motion, ¶¶ 48-49.) Notably, 754 Fifth fails to submit any evidence

that the specific roof work that was performed was “structural” or, if so, that there was a violation of a specific statutory safety provision. (Compare Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559 [1987] [out-of-possession owner held liable where it had general responsibility for safe maintenance of building and specific obligations under Administrative Code regarding handrails and illumination in stairwell].) The court is unpersuaded by Sweet’s further contention that 754 Fifth is liable merely because it was required to sign off on permits for the chiller project. The legal obligation to sign the permit applications is insufficient to support liability under these circumstances in which it is undisputed that 754 Fifth did not contract for or supervise the work.

As Sweet fails to raise a triable issue of fact as to 754 Fifth’s liability, the third-party complaint and any cross-claims against it must be dismissed.

The motion of owner defendants TPG Capital and Warburg Pincus seeking dismissal of the third-party claims and all cross-claims will be granted without opposition.

Plaintiff’s Motion

Plaintiff moves for leave to reargue the motion of defendants 754 Fifth and Newton for summary judgment dismissing the complaint against them. This motion was granted by this court’s January 30, 2008 order. Pursuant to CPLR 2221(d)(2), a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” Reargument “is not designed to provide an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992], lv dismissed and denied 80 NY2d 1005, rearg denied 81 NY2d 782 [1993]; McGill v Goldman, 261

AD2d 593, 594 [2nd Dept 1999].)

Leave to reargue is denied. Plaintiff merely seeks to reargue issues already decided in the prior motion. This court is unpersuaded that it overlooked or misapprehended matters of fact or law.

It is accordingly hereby ORDERED that the motion of Control Air, Inc. to dismiss the complaint is granted to the extent of dismissing the Labor Law claims against it and is otherwise denied; and it is further

ORDERED that the motion of Russell Auth to dismiss the complaint is granted to the extent of dismissing the complaint against him; and it is further

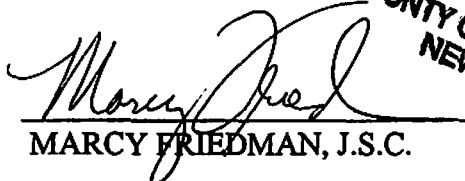
ORDERED that the motion of Sweet Construction Corp., Sweet Construction of Long Island, LLC, and Steven S. Alessio for summary judgment is granted to the extent of dismissing the Labor Law claims and all cross-claims against them and is otherwise denied; and it is further

ORDERED that the motion of Neiman Marcus Group, Inc., Bergdorf Goodman, Inc., 754 Fifth Avenue Associates, L.P., Newton Acquisition Inc., TPG Capital L.P., and Warburg Pincus LLC for summary judgment is granted to the extent of dismissing the third-party complaint and all cross-claims against them; and it is further

ORDERED that plaintiff Joy Booth's motion for leave to reargue the motion decided by this court's January 30, 2008 order is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 14, 2009


MARCY FRIEDMAN, J.S.C.

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK