

Sestak v Liberty Plastering & Tile, Inc.

2010 NY Slip Op 30967(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 100468/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden
Justice

PART II

John Sestak, et al.
- v -
Liberty Plastics, et al

INDEX NO. 100468/07
MOTION DATE 11/5/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the enclosed Memorandum Decision and order.

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 16, 2010

[Signature]
J.S.C.
HON. JOAN A. MADDEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
JOHN SESTAK and THERESA SESTAK,
Plaintiff,

-against-

Index No. 100468/07

LIBERTY PLASTERING & TILE, INC. MARY NALLY
and DERMOTT NALLY d/b/a LIBERTY PLASTERING
& TILE, ADRIATIC PLUMBING & HEATING CORP.,
925 PARK AVENUE CORP. and BROWN HARRIS,
STEVENS,
Defendants.

FILED
APR 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Joan A. Madden, J.

In this personal injury action, defendants Liberty Plastering & Tile, Inc. Mary Nally and Dermott Nally d/b/a Liberty Plastering and Tile (together, "Liberty") move for summary judgment dismissing the complaint and any cross claims against them (motion seq. no. 001). Defendant Adriatic Plumbing & Heating Corp. ("Adriatic") partially opposes Liberty's motion and cross moves for summary judgment dismissing the complaint against it. Plaintiffs John Sestak and Theresa Sestak (together, "Sestak") and Defendants 925 Park Avenue Corp. and Brown Harris Stevens (together, "925 Park Avenue") oppose the motion and cross motion for summary judgment. For the reasons stated below, the motion and cross motion are each denied.

Background

This action arises from personal injuries sustained by Sestak when he fell into an uncovered trench in the bicycle room of an apartment building located at 925 Park Avenue, New York, New York ("the premises" or the "Building"). The complaint alleges causes of action for common law negligence and for violations of Labor Law §§ 240(1), 241(6) and 200.

925 Park Avenue is the owner of the premises, and Brown Harris Stevens is the managing agent. Liberty is a corporation that was retained by 925 Park Avenue to perform excavation work, though it is primarily engaged in the plastering and tile business. Dermot Nally ("Nally") is the President of Liberty. Adriatic is a corporation which performs plumbing and heating services and is solely owned by Zeljan Ugarkovic ("Ugarkovic"), who is also Adriatic's President.

Sestak was employed by 925 Park Avenue as a porter at the time of the accident and he testified that he had worked at the premises for approximately thirty years prior to the accident. Sestak stated that his responsibilities as a porter included performing general cleaning, assisting the handyman on jobs, and operating the service elevator. Sestak dep. at 10. His supervisors were James Fenlon ("Fenlon"), the building manager, and Richard Fleszar ("Fleszar"), the handyman.

During 2005, 925 Park Avenue contacted Adriatic as a result of problems with the plumbing on the premises. After an initial evaluation, Adriatic determined that certain repairs needed to be undertaken, including the replacement of hose drain pipes located beneath the bicycle room in the basement of the premises. Since the problem was below the basement floor, the area needed to be excavated in order for the necessary work to be done. 925 Park Avenue retained Liberty to do this and other excavation work in the basement and Adriatic was to replace the pipes after the excavation was complete. Once Adriatic finished replacing the pipes, Liberty was supposed to refill the hole.

When asked to describe the holes that Liberty dug in the basement, Nally stated that "they started off as round holes, wound up being trenches." Nally dep. at 9. Nally said that the trench went from "the boiler room through the hallway, past the elevator, into the bicycle room."

Nally, 9. Sestak asserts in his opposition papers that the trench was about 15 feet long, 10 feet wide, and 5 feet deep.

The excavation work in the bicycle room commenced in either October or November of 2005. According to Nally the excavation work in the bicycle room was completed after the excavation work in the other parts of the basement. Nally testified, "when we originally started the digging [in the bicycle room] there was a lot of bicycles, but we had to remove all of them because the trench got a lot wider and deeper than we planned on." Nally dep. at 13. Nally further testified that Sestak would often come into the bicycle room to talk with Liberty's workers while the trench was being excavated, and that Nally would tell Sestak that he should not be in the room because it was dangerous. Nally dep. at 30-1.

Nally testified that after each day when Liberty was performing excavation work in the bicycle room, the super would come down and inspect the trench to make sure that Liberty covered it and that caution tape and a "DO NOT ENTER" sign were on the door. Nally dep. at 20, 26. Liberty asserts that it always covered the trench with planking and plywood once its excavation work was completed for the day and that Nally insisted that this be done. *Id.* at 20, 27. No cones were placed around the hole, but the bicycle room door was self-locking. However, Sestak and certain employees of the Building had keys to the bicycle room.

Nally testified that Liberty finished its excavation work in the bicycle room between two days and one week prior to the accident. Nally dep. at 12, 26. After Liberty finished excavating, Adriatic began replacing the piping. Ugarkovic testified that when he first saw the trench in the bicycle room, it was not covered. Ugarkovic dep. at 17. 925 Park Avenue and Adriatic assert that Adriatic finished replacing the piping prior to the accident and that Adriatic was "no longer on the premises" at the time of the accident. However, there is evidence that Adriatic was

performing work in the bicycle room at least until the day before the accident, including an invoice from 925 Park Avenue that includes a charge for services performed on the premises the day before the accident. In response to being questioned as to whether there was a cover on the hole when Ugarkovic left on the last day of Adriatic's work replacing the piping in the bicycle room, Ugarkovic stated that "the hole was open...Mr. [Fenlon] told me your job is done...[and] [t]he two of us left." Ugarkovic dep. at 23-4.

Ugarkovic testified that, while Liberty and Adriatic's work in the bicycle room was ongoing, the Building staff would occasionally pump water out of the trench. Ugarkovic dep. at 32-3. Sestak states that he was present on one occasion when Fleszar pumped water out of the trench in the bicycle room. Sestak dep. at 51.

It is unclear when Liberty was last on the premises prior to the accident. Although Liberty maintains that it had not begun refilling the hole in the bicycle room on the date of the accident, Nally testified at his deposition that Liberty put plywood on the floor the night before the accident and that he was on the premises on the day of the accident. Nally dep. at 22. Additionally, Nally's deposition testimony appears to indicate that Nally was present at least at one time when Adriatic was working on the pipes in the bicycle room, although Ugarkovic stated that he did not see Liberty on the job site itself. Nally dep. at 23, Ugarkovic dep. at 30. However, Nally also testified that Liberty left the site before Adriatic began replacing the pipes and did not return until the day when Nally was "called back for some reason," which he testified was one or two days after the accident. *Id.* at 15.

On the morning of the accident, Sestak testified that Vincent Corletta ("Corletta"), a porter in the Building, brought twenty chairs, which were owned by 925 Park Avenue, down to the basement. Sestak Aff. at 2. Sestak testified that he was aware that these chairs had

previously been stored on a platform in the bicycle room as he had observed them there. Sestak dep. at 51. Sestak brought these chairs to the bicycle room and began placing two chairs at a time on the platform, about 3 feet away from the trench. Sestak Aff. at 2. Sestak asserts that, immediately after he placed the third set of chairs on the platform, the platform and chairs collapsed and hit Sestak on the chest, and the pressure caused Sestak to fall backwards into the trench and hit his back and right shoulder on the pipes in the bottom of the hole. According to Sestak, at the time of the accident, the floor was not covered with plywood or any other material, and there was no barricade, cones, or tape around the opening. Neither Adriatic nor Liberty concede that the trench was not covered in their moving papers; however, Nally testified in his deposition that it would not have been possible for Sestak to fall into the trench if it had been properly covered with plywood at the time of the fall. Nally dep. at 29-30.

After his fall, Sestak called out for help and Corletta came to his aid and removed the chairs and platform from on top of Sestak. Sestak testified that neither of his supervisors were on the premises at the time of the accident. Bennett Flynn ("Flynn"), a doorman at the Building, came to the scene of the accident after Corletta and called 911 for assistance. Firemen came to help Sestak out of the hole and he was "put on a board and carried to a waiting ambulance." Sestak Aff. at 2. Sestak asserts that the extent of the injuries he suffered were such that he has been unable to work since the time of the accident. Sestak Aff. at 3.

Sestak commenced this action against Liberty and Adriatic by the filing a summons and complaint on or about January 11, 2007. Sestak commenced a second action on or about August 19, 2008, against the 925 Park Avenue. These actions were consolidated on August 19, 2009.

Liberty moves for summary judgment dismissing the complaint and all cross claims against it. Liberty asserts that it cannot be found liable for negligence because Sestak has not

demonstrated that Liberty created a defective condition that was the legal and proximate cause of the accident, or that Liberty had actual or constructive knowledge of such a condition. Liberty also asserts that the cause of the accident was Sestak's work placing the chairs on the platform and its subsequent collapse, and that Liberty was not aware that the platform may have constituted a dangerous condition. In the alternative, Liberty argues that, even if the trench also constituted a dangerous or defective condition which could be found to be a cause of Sestak's injuries, Liberty did not have a duty to make the trench safe on, or immediately before, the date of the accident because Liberty was not on the premises at this time. Rather, Liberty argues that this responsibility belonged to 925 Park Avenue or Adriatic, as the last contractor in the bicycle room.

Adriatic partially opposes Liberty's motion and cross moves for summary judgment dismissing the complaint against it. Adriatic asserts that all pertinent discovery has been conducted, and the undisputed facts show that Adriatic is entitled to summary judgment as a matter of law. Adriatic asserts that the trench was not a dangerous or defective condition because the digging of the trench was necessary to perform plumbing repairs in the Building, and that in any event, the open trench was not a proximate cause of the accident because it was the collapse of the platform that caused Sestak to fall backwards into the trench. Adriatic also claims that it cannot be held liable for negligence because it did not create or have actual or constructive notice that the shelf may have constituted a dangerous condition. Adriatic further argues that, even if the trench was also found to be a dangerous or defective condition, Adriatic cannot be held liable because 925 Park Avenue and Liberty were solely responsible for appropriately safeguarding the trench, at least when Adriatic was no longer on the premises, as was the case on the date of the accident.

925 Park Avenue opposes the motion and cross motion for summary judgment on the grounds that there are material issues of fact, including whether the trench was covered at the time of the accident and which defendant, if any, had the responsibility to safeguard the trench. 925 Park Avenue submits the affidavit of Corletta in which he states that he understands that Liberty claims that it covered the trench when the excavation was complete, but that he observed the trench several times after the excavation and found that it was not covered. 925 Park Avenue also argues that it has not had the opportunity to conduct all necessary discovery, or to participate in any of the depositions held in connection with the original action, including the depositions of Sestak, Nally, and Ugarkovic.

Sestak opposes the motion and cross motion for summary judgment, on the grounds that either or both Liberty and Adriatic were negligent in leaving the trench in the bicycle room unsecured and that there are material issues of fact which preclude a grant of summary judgment, including issues of fact as to who had the responsibility to safeguard the trench and whether the trench was actually covered.¹ Sestak also asserts that Liberty and Adriatic's arguments that the condition of the trench was not a proximate cause of the accident should be rejected because it was foreseeable that an employee of the Building would have a task to do in the bicycle room and that circumstances might occur which would cause the employee to fall into the trench. Thus, Sestak asserts that the uncovered trench was at least a contributing proximate cause of his injuries, even if the collapse of the platform was also a contributing cause. Furthermore, Sestak asserts that Adriatic and Liberty knew or should have known that the

¹ Sestak also asserts that the moving affirmations of Liberty and Adriatic, which were made by their respective attorneys who possess no firsthand knowledge of the facts, have no probative force. However, an affirmation of counsel is a proper vehicle for the submission of evidence in support of a summary judgment motion. Lewis v. Safety Disposal System of Pennsylvania, 12 AD3d 324, 325 (1st Dept 2004); Blueberry Investors Co. v. Ilana Realty Inc., 184 A.D.2d 906, 908 (3rd Dep't 1992).

failure to properly safeguard the trench created a dangerous condition from which liability in negligence may properly be found.

In reply, Liberty argues that whether it covered the trench each day after finishing its excavation work is irrelevant because Sestak's accident occurred immediately after Adriatic performed work in the subject trench and days after Liberty finished its excavation work. Liberty further asserts that 925 Park Avenue will not be prejudiced if summary judgment is granted to Liberty because Liberty has already given comprehensive testimony in this matter and it is clear that Liberty was not the last entity to perform work in the subject trench.

In reply, Adriatic asserts that Corletta's affidavit, in which Corletta states that he observed that the hole was uncovered several times after excavation was complete, is inadmissible as Corletta did not have firsthand knowledge with respect to the accident and hearsay evidence is insufficient to bar summary judgment.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

In a premises-related action, general contractors, such as Liberty and Adriatic, may be held liable for injuries caused by a defective condition if it is demonstrated that the contractor created the condition or that it had actual or constructive notice of an ongoing and recurring

dangerous condition that was routinely being left unaddressed. See Hauptner v. Laurel Development, LLC, 65 AD3d 900, 902 (1st Dep't 2009); Zisa v. City of New York, 39 A.D.3d 313, 314 (1st Dep't 2009).

Under this standard, the record raises triable issues of fact as to whether Liberty and/or Adriatic can be held liable to Sestak for negligence. As a preliminary matter, the defendants have not met their burden of showing that the trench, which was 5 feet deep and contained exposed piping, did not constitute a dangerous condition giving rise to liability for negligence if it was not adequately safeguarded. See Trenca v. Culeton, 59 A.D.3d 1098, 1099 (4th Dep't 2009). Although the digging of the trench was necessary in order for plumbing repairs to be performed, this does not relieve the responsible party or parties of an obligation to adequately safeguard the trench when it was unattended. Id.

There are also issues of fact precluding summary judgment in regard to whether Adriatic, Liberty, or both, had a duty to adequately safeguard the trench. With respect to Liberty, even if it made a prima facie showing that it stopped excavation work two days prior to the accident and before Adriatic began its work, Sestak has controverted this showing by pointing to portions of Nally's deposition testimony which indicate that Liberty may have been on the premises on the day before or the day of the accident. Additionally, Nally's testimony indicates that there were occasions when Adriatic and Liberty were working in the bicycle room on the same day. Thus, Liberty may have had a responsibility to cover the hole in the bicycle room when the hole was last left unattended and uncovered prior to Sestak's fall. It can be inferred from Nally's testimony, that both Liberty and 925 Park Avenue assumed a responsibility for taking adequate safety precautions with respect to the trench each day that it was on the premises.

As for Adriatic, the record raises issues of fact as to whether Adriatic failed to cover the trench after it finished its work, allegedly on the day before the accident, and whether this failure is a proximate cause of Sestak's injuries, particularly as there are factual questions as to whether Adriatic had actual or constructive knowledge that the trench was routinely being left uncovered when the trench was unattended. Furthermore, contrary to Adriatic's position, Corletta's statement in his affidavit that he personally observed that the trench was left uncovered on several occasions does not constitute hearsay.

Moreover, contrary to Liberty and Adriatic's arguments, it cannot be said as a matter of law that the uncovered trench was not a contributing proximate cause of Sestak's injuries. Whether an event is a proximate, or legal, cause of a plaintiff's injury rests on a variety of factors unique to each case; therefore, the question is usually reserved for a trier of fact to resolve. Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308 (1980). To demonstrate a prima facie case of negligence, "the plaintiff must generally show that the defendant's negligence was a substantial cause of the events that produced the injury. Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable." Id. at 315. An intervening act will only be held to constitute a superseding cause, serving to relieve the defendant of liability, if "the act is of such an extraordinary nature or so attenuates defendant's [conduct] from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant." Mack v. Altmans Stage Lighting Co., 98 A.D.2d 468, 471 (2nd Dep't 1984).

Here, there is evidence tending to show that it was foreseeable that the trench could cause substantial injury, if left uncovered, and that an employee in the Building who had keys to the bicycle room might enter the room in the course of his work, fall into the trench, and sustain

injury. While it may not have been foreseeable to Adriatic or Liberty that Sestak would have been propelled backwards into the trench as the result of the collapse of a platform, the exact manner in which Sestak's injuries occurred need not be foreseeable in order to be found a proximate cause. Thus, at the very least, there are factual questions regarding whether Liberty and Adriatic's alleged negligence in failing to cover the trench was a proximate cause of the accident.

As the motion and cross motion for summary judgment with respect to the negligence claims are denied, the issues regarding the propriety of 925 Park Avenue's request for further discovery shall be at the status conference scheduled below.

Finally, as Sestak conceded at oral argument that his claims seeking recovery under Labor Law Sections 240(1), 241(6), and 200, are without merit, these claims must be dismissed.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendants Liberty Plastering & Tile, Inc. Mary Nally and Dermott Nally d/b/a Liberty Plastering and Tile (motion seq. no. 001) is denied with respect to the common law negligence claims and granted without opposition to the extent that the motion seeks to dismiss Sestak's claims for relief against it under Labor Law Sections 240(1), 241(6), and 200; and it is

ORDERED that the cross motion for summary judgment by defendant Adriatic Plumbing & Heating Corp. is denied with respect to the common law negligence claims and granted without opposition to the extent that the motion seeks to dismiss Sestak's claims for relief against it under Labor Law Sections 240(1), 241(6), and 200; and it is further

ORDERED that the claims for relief under Labor Law Sections 240(1), 241(6), and 200 are dismissed.

ORDERED that the parties shall appear for a status conference in Part 11, Room 351, 60 Centre Street, New York, NY, on May 20, 2010 at 9:30 a.m.

A copy of this decision is being mailed by my chambers to the parties.

Dated: April ~~16~~ 2010



J.S.C.
HON. JOAN A. MADDEN
J.S.C.

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