Salas v Structure Tone, Inc.
2010 NY Slip Op 31588(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 115973/07
Judge: Doris Ling-Cohan
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SCANNED ON 6/25/2010

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

PRESENT: Hon. Doris Ling-Cohan, Justice

PART 36

Index Number : 115973/2007

SALAS, WALTER A.

vs.

STRUCTURE TONE

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

n this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by defendants for summary judgment of dismissal is granted in accordance with the attached memorandum decision.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/18/10

JUDGE DORIS LING-COHAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

WALTER A. SALAS,

Index No.: 115973/07

Plaintiff,

Motion Seq. No.: 003

-against-

STRUCTURE TONE, INC. and ST. JOHN'S UNIVERSITY,

Defendants.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S

Ling-Cohan, J.:

This is action arises from a slip and fall incident that occurred inside Albert Hall on the St. John's University campus located at 89-00 Utopia Parkway, Jamaica, New York on June 12, 2006. Defendants Structure Tone, Inc. (Structure) and St. John's University (St. John's) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint.

BACKGROUND

On the date of the accident, defendant Structure served as the construction manager for a project which included renovating a number of laboratories at the St. John's University campus (the campus). At the time of the accident, plaintiff was employed by non-party One Source Energy Solutions (One Source) as a painter. One Source, an independent contractor, served as the facilities maintenance company at the campus. One Source's office was located in Albert Hall.

In his affidavit, plaintiff stated that, on the morning of his accident, he entered through the Albert Hall's rear entrance, which was located to the right of a loading dock. Upon entering the building, plaintiff noticed pipes and parts of machines, some of them located in the hallway

next to the elevators and service elevator. Notably, plaintiff observed that one of the machines, which was located at the bottom of the stairs, was leaking fluid. Plaintiff stated that he told one of the men associated with the machine to clean up the fluid, and the unidentified man told him that he would clean it up when he was finished with what he was doing. The fluid accumulation measured approximately eight to 10 inches in diameter and ran approximately eight to nine steps from the stairs into an elevator.

Plaintiff explained that, as he walked up the stairs, he noticed that the clear fluid was present on every step. In fact, it was necessary for plaintiff to walk towards the left of the stairwell in order to avoid stepping on the fluid. Upon reaching the top of the stairwell, plaintiff noticed that the trail of fluid continued from the stairs into the hallway towards an elevator to another machine that was identical to the one he had observed at the bottom of the stairs.

Plaintiff stated that, after reaching the top of the stairs, he walked into his office and reported the condition to the receptionist. He then spoke to his supervisors about unrelated matters for approximately 35-40 minutes before beginning his exit from the building down the same steps he used earlier.

Plaintiff explained that, as he reached the top of the stairs, he looked downwards to ascertain whether the fluid had been wiped away. Plaintiff noted that the landing area looked as though it had been cleaned. As plaintiff stepped down with his left foot, he slipped and fell down the stairwell, injuring his left ankle and right knee. Once at the bottom of the stairs, plaintiff noticed that the stairs, which were unusually shiny, still had fluid on them. In addition, plaintiff noticed fluid on the boots that he was wearing. Shortly after the accident, plaintiff reported the accident to his supervisor, who filled out an accident report.

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DISCUSSION

"'The proponent of a summary judgment motion 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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Initially, it should be noted that plaintiff failed to address that part of defendants' motion seeking to dismiss plaintiff's Labor Law §§ 200 and 241 (6) causes of action. Thus, this court deems these claims abandoned, and defendants are entitled to summary judgment of dismissal on those causes of action (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]).

Plaintiff maintains that defendants were negligent in failing to maintain the premises in a reasonably safe condition (*see Rodriguez v 1201 Realty LLC*, 10 AD3d 253, 254 [1st Dept 2004]). "To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept

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2006]; *Marasco v C.D.R. Electronics Security & Surveillance Systems Company*, 1 AD3d 578, 580 [2d Dept 2003]; *Zavaro v Westbury Property Investment Company*, 244 AD2d 547, 547-548 [2d Dept 1997]).

Defendants argue that, because a finding of negligence must be based upon a breach of duty, a threshold and dispositive question in this case is whether defendant Structure owed a duty of care to plaintiff, a non-contracting party to the contractual arrangement between St. John's and Structure.

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 138). In the case of *Espinal v Melville Snow Contractors, Inc.* (*supra*), the Court identified three sets of circumstances as exceptions to this general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof (*id.* at 140; *see Church v Callanan Industries, Inc.*, 99 NY2d at 111; *Timmins v Tishman Construction Corporation*, 9 AD3d at 66).

Although plaintiff argues that the doctrine of no duty under *Espinal* is not applicable in this case because the contract between Structure and St. John's was not signed, the Supplemental Agreement to the Science Master Plan Contract, which specifically states that the term and conditions of the Science Master Plan Agreement remain in full force, was properly signed and executed.

Based upon the circumstances of this case, plaintiff fails to qualify under any of the exceptions. The first set of circumstances arises where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to

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others, or increases that risk (*Church v. Callanan Industries, Inc.*, 99 NY2d at 111). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*id.* quoting *H.R. Moch Company v Rensselaer Water Company*, 247 NY 160, 168 [1928]). Here, there is no evidence in the record that Structure created or increased the risk for plaintiff's accident beyond the risk which existed before these defendants entered into any contractual undertaking (*see Church v Callanan Industries, Inc.*, 99 NY2d at 112 [no evidence that defendant's incomplete performance of its contractual duty to install guide-railing created or increased the risk of plaintiff's divergence from roadway beyond the risk which existed before the contractual duty arose]).

The second set of circumstances giving rise to a promisor's tort liability arises where the plaintiff has suffered injury as a result of a reasonable reliance upon the defendant's continuing performance of a contractual obligation (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; *see also Eaves Brooks Costume Company v Y.B.H. Realty Corporation*, 76 NY2d 220, 226 [1990]). Here, as there is no evidence in the record to indicate that plaintiff had ever encountered a clear fluid at the work site before, it cannot be said that plaintiff detrimentally relied on defendant Structure's continued performance of its contractual obligation to assist in maintaining safety at the site.

The third set of circumstances wherein tort liability will be imposed upon a promisor is "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]). Here, Structure's duty as construction manager at the site was not of the type of "comprehensive and exclusive"

property maintenance obligation that would entirely displace St. John's duty to maintain the premises safely (*Timmins v Tishman Construction Corporation*, 9 AD3d at 66, quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 141).

In any event, defendants are entitled to summary judgment dismissing plaintiff's complaint against them, as it has not been established that they created or had actual or constructive notice of the existence of an allegedly dangerous condition that caused plaintiff's accident (*see Cruceta v Funnel Equities, Inc.*, 18 AD3d 693, 694 [2d Dept 2005]; *LaBella v Willis Seafood*, 296 AD2d 382, 382 [2d Dept 2002]). The plaintiff, in opposition, failed to raise a triable issue of fact (*id.*; *Ezzo v 2102 Union Boulevard, Inc.*, 278 AD2d 447, 447 [2d Dept 2000]).

To this effect, although plaintiff maintains that the slippery condition existed for the 35 to 40 minutes that he met with his supervisors in his office, plaintiff has failed to put forth any substantive evidence, to rebut defendants' assertions that they did not create or have actual or constructive notice of the slippery condition. Plaintiff merely asserts that a clear fluid on the stairs was created by a machine that was brought into the subject building by an unidentified individual at some point prior to his arrival to work on the morning of the accident.

In his deposition, Louis Teja (Teja), Structure's job supervisor, testified that he only learned of the incident eight months before his deposition. Teja explained that the renovation project included demolishing various labs and then rebuilding them. In addition to new countertops and walls, laboratory equipment was being installed in the labs. To that effect, Teja explained that lots of "hoods" had to be installed, and that "the laboratory company would place the hoods and then the plumber and electricians would hookup the various either water or air to

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it like that" (Defendants' Notice of Motion, Exhibit D, Teja Deposition, at 42).

However, Teja maintained that each subcontractor was in charge of its own deliveries, and these subcontractors had their own workers who would load and unload the equipment. When deliveries were made to Albert Hall, the most common way to transport the deliveries was up the freight elevator, and not the stairs. In addition, Teja did not remember seeing any loading or unloading of material on the date of the accident, and he was unaware of any deliveries being made the morning of the accident.

Further, Teja asserted that Structure laborers were only responsible for keeping the construction areas clear, and, if deliveries were brought into the building, Structure laborers would make sure the path to their assigned lab was clear for delivery. However, the school had a maintenance staff for things like keeping the hallway areas clean.

Moreover, in his affidavit, Teja stated that, although he was present at the job site on the day of the accident, he was never told about the presence of any clear fluid condition existing on the stairs in the sub-basement of Albert Hall. Teja also maintained that he did not use Albert Hall's sub-basement stairs on the day of the accident. In addition, Teja asserted that he "was unaware of how long the alleged clear fluid condition existed and who, if anyone, created the alleged clear fluid condition," and that he was "also unaware of any contractor working at St. Albert's Hall and involved with the Structure Tone, Inc. Job that utilized a machine that would contain clear fluid" (Defendants' Notice of Motion, Exhibit E, Teja Affidavit, dated November 12, 2009).

Denise Venck, St. John's Executive Director of Public Safety, testified that her department did not have any information regarding plaintiff's accident, and that she only found

out about it in February of 2009. Importantly, Venck testified that she was not aware of any motors being brought into Albert Hall, but that if a machine was being used for the construction project and leaked fluid, One Source would be the entity responsible for cleaning it up.

Thus, as it has not been established that defendants created or had actual or constructive notice of the unsafe condition that caused plaintiff's accident, defendants are entitled to summary judgment dismissing plaintiff's negligence claim.

CONCLUSION AND ORDER

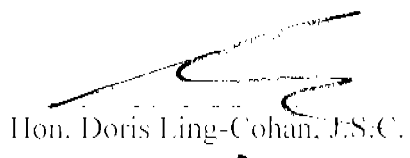
For the foregoing reasons, it is hereby

ORDERED that defendants Structure Tone, Inc. and St. John's University's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint is granted, and the action is dismissed, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff, with notice of entry.

DATED: 6/21/10



Hon. Doris Ling-Cohan, J.S.C.

FILED
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