

Mandry v City of New York

2010 NY Slip Op 32057(U)

July 23, 2010

Sup Ct, NY County

Docket Number: 402862/05

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Mendry, Luis

INDEX NO. 402862/05

- v -

MOTION DATE _____

City of New York, et al.

MOTION SEQ. NO. 003

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision. This action is hereby transferred to ~~the~~^{the} early settlement part.

FILED

AUG 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/10

CYNTHIA S. KERN J.S.C.
J.S.C.

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: Part 52

-----X
LUIS MANDRY,

Plaintiff,

Index No. 402862/05

-against-

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK CITY
HOUSING AUTHORITY, EAST HARLEM COUNCIL
FOR COMMUNITY IMPROVEMENT, INC. d/b/a
EHCCI, EHCCI HOME CARE SERVICES CORP.,
HELLGATE MANAGEMENT CORP., and NEW YORK
BILINGUAL INSTITUTE, INC.,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	5
Replying Affidavits.....	6
Exhibits.....	6

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Luis Mandry commenced the instant action to recover damages for personal injuries he allegedly sustained on January 29, 2004 when a metal chain link fence became unhinged and fell on him as he was attempting to close it. Defendants East Harlem Council for Community Improvement, Inc. d/b/a EHCCI ("EHCCI"), EHCCI Home Care Services Corp., Hellgate Management Corp. and New York Bilingual Institute, Inc. (collectively "the non-City defendants") move for summary judgment dismissing the complaint and any and all cross-claims.

The City moves for summary judgment dismissing plaintiff's claim and all cross-claims and cross-moves for indemnification. As an initial matter, the City's motion for summary judgment is granted in its entirety as plaintiff's counsel indicated at oral argument that plaintiff was not opposing the City's motion to dismiss the plaintiff's claim against it and the non-moving defendant has not opposed the City's motion to dismiss the cross-claims against it. As such, the opinion below will address only the summary judgment motion of non-City defendants (collectively "the movants").

The relevant facts are as follows. Plaintiff was employed by the Bobby Security Company to work as a security guard for EHCCI, a not-for-profit organization located at 413 East 120th Street in New York, New York. 413 East 120th Street is a building owned by the City and used as a multi-service center. Multi-service centers are City-owned buildings run by sponsor community-based organizations. The sponsors operate the centers under a contract with the City and essentially act as property managers. EHCCI was the sponsor organization for the multi-service center at 413 East 120th Street. As the sponsor, EHCCI was obligated under the contract to maintain the building and the adjoining parking lot.

As part of his duties as a security guard, plaintiff was responsible for closing the parking lot adjoining 413 East 120th Street at the end of the day. Closing the parking lot entailed closing a chain link fence gate that divided the parking area into two lots. That gate measured over 5 feet in height and was comprised of two parts, an affixed fence and a gate with wheels on the top and bottom that moved to meet the affixed portion when closed. The wheels on the top of the gate traveled on a metal tube affixed to the gate and the bottom wheels traveled directly on the ground. There was also a metal chain lock attached to the midrail of the gate used to lock the

fence once it was closed. On January 29, 2004, plaintiff had been employed as a security guard at EHCCI for approximately two weeks. Plaintiff testified that for two weeks leading up to the date of the injury, he had closed the gates on a nightly basis without problem. However, on January 29, 2004, around 7:15 p.m., as plaintiff pulled the gate closed and attempted to put the chain lock on, the entire gate unhinged from the fence and fell on him. According to Rafael Figueroa (“Figueroa”), the superintendent of EHCCI, EHCCI was solely responsible for maintaining the parking lot and the fence gate. Figueroa testified that he personally greased the top rolls of the gate on a monthly basis.

“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. Once this burden is met, the party opposing such motion must show facts sufficient to require a trial of any issue of fact.” *Meridian Management Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dept 2010) (internal citations omitted). In the instant action, the movants have failed to meet their initial burden.

First, the movants have failed to make a *prima facie* showing of entitlement to judgment as a matter of law on the ground that the doctrine of *res ipsa loquitur* does not apply in the instant action. In New York, “[t]o demonstrate the existence of a triable issue by relying on a *res ipsa loquitur* theory, the plaintiff must establish three things: (1) the accident is of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) the instrumentality causing the accident was within defendant’s exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff. However plaintiff need not conclusively eliminate all other possible explanations. It is enough to present evidence from which a reasonable jury

could conclude that it is more likely than not that defendant's negligence caused the injury."

Pavon v. Rudin, 254 A.D.2d 143, 145 (1st Dept 1998). For example, the *Pavon* court found that where an internal door in an office fell on a plaintiff when the upper hinge of the door became dislodged, the defendants were found to have exclusive control of the "instrumentality" as the "instrumentality" that caused the injury was the broken hinge, not the door itself. The *Pavon* court explained that "the appropriate inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached." *Id.* at 146. On the other hand, the court in *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 228 (1986) found that the defendant did not have exclusive control of a grab handle on a bus as a grab handle on a bus is an instrument continuously available for use by the public and the proof did not adequately exclude the possibility that the handle had been damaged by a bus passenger.

In the instant case, there are material issues of fact as to whether the non-city defendants should be found liable under a theory of *res ipsa loquitur*. The first and third elements outlined above are not disputed by the movants. As for the second element of exclusive control, the court finds that there are triable issues of fact as to whether the fence gate was in the movants' exclusive control. Unlike the bus grab handle in *Dermatossian*, the fence gate in the parking lot was not a gate intended to be opened or closed by the public. An employee of EHCCI opened the gate at the beginning of the day and plaintiff closed the gate at the end of the day. As such, a member of the public would not have any reason to handle the gate. Further, plaintiff has submitted the sworn affidavit of an expert engineer who opined that an inadequate top roller support system and the lack of a bottom wheel guide caused the gate to fall out of place.

