

Bardales v Vam Realty Corp.

2013 NY Slip Op 30240(U)

January 29, 2013

Sup Ct, Suffolk County

Docket Number: 09-45377

Judge: Peter H. Mayer

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ORDERED that the motion by defendant Vam Realty Corp. and the motion by third-party defendant La Bottega of Huntington, LLC are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Vam Realty Corp. is granted; and it is further

ORDERED that the motion by third-party defendant La Bottega of Huntington, LLC, is denied, as academic.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Daniel Bardales on premises known as 9 Wall Street, Huntington, New York on September 21, 2009. The accident allegedly occurred when plaintiff, who was working at a restaurant operated by third-party defendant La Bottega of Huntington, LLC, was carrying a pot of boiling water down a staircase when he slipped and fell. Defendant Vam Realty Corp. owns the subject premises and leases it to La Bottega of Huntington. By his bill of particulars, plaintiff alleges that defendant Vam Realty was negligent in, among other things, allowing the stairway to remain in a poor state of repair and in failing to provide a handrail extending the entire length of the stairway. As a third-party claim, Vam Realty seeks indemnification from its tenant, La Bottega of Huntington, pursuant to the lease agreement.

Vam Realty now moves for summary judgement on the grounds that it is an out-of-possession landlord and did not have notice of the alleged defective condition of the stairway. Vam Realty also argues that there is no evidence the alleged defective condition proximately caused the accident, and that it was not involved in the construction of the stairway. In support of its motion, Vam Realty submits copies of the pleadings, its lease agreement with La Bottega of Huntington, transcripts of the parties' deposition testimony, an expert affidavit of Denise Bekaert, a report of plaintiff's expert Robert Swartzberg, and photographs of the subject stairway.

Plaintiff opposes the motion, arguing that Vam Realty retained a right to re-enter the premises and that there were significant structural defects on the subject stairway. In opposition, plaintiff submits, among other things, his own affidavit and a transcript of his deposition testimony, photographs of the stairway, an expert affidavit and report of Swartzberg, and a copy of the lease between Vam Realty and La Bottega of Huntington. Plaintiff's affidavit states that as he proceeded down the stairway, he rested his right elbow on the handrail for support, and that when he got to the second or third step from the bottom, the handrail ended and his elbow slipped off the end of the handrail, which caused him to slip and fall. It states that he tried to grab onto the handrail to stop himself from falling but could not reach it. It further states that he believes he fell because the handrail ended before the end of the steps and because the steps felt slippery.

La Bottega of Huntington moves for summary judgment dismissing the third-party complaint on the ground that Vam Realty has no right to indemnity, because plaintiff did not suffer a grave injury pursuant to Worker's Compensation Law Section 11. La Bottega of Huntington also argues that the third-party action is barred by the anti-subrogation doctrine. In support of its motion, La Bottega of Huntington submits copies of the pleadings, its lease agreement with Vam Realty, its insurance policy, transcripts of the parties' deposition testimony, and a medical report of Dr. Ralph Liebling. Vam Realty opposes La Bottega of Huntington's motion for summary judgment, arguing that the anti-subrogation

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rule does not bar it from obtaining indemnification. In opposition to the motion, Vam Realty submits its lease agreement with La Bottega of Huntington.

At his examination before trial, plaintiff testified that he was employed as a food preparer and kitchen helper at La Bottega of Huntington at the time of the accident. He testified that there is a stairway which leads from the kitchen to the basement with 13 to 15 steps and a handrail on the right side. He testified that at the time of the accident, he intended to bring a pot of boiling water down the stairway to the basement to prepare mozzarella cheese. He explained that the pot was filled almost to the top and weighed about 35 to 40 pounds. He testified that he was holding the handles of the pot with rags and that he put his right elbow onto the handrail as he walked down the steps. Plaintiff testified that he was holding the pot with his arms extended in front of him, and that it obstructed his view of the steps. He testified that he was about two steps away from the bottom of the stairway when he slipped and fell, causing the water to spill onto his body.

At his examination before trial, Frank Viteritti, an officer of Vam Realty, testified that the corporation owns the subject premises which is leased to La Bottega of Huntington. He testified that he has never inspected the subject premises and that La Bottega of Huntington would make repairs to the premises.

At his examination before trial, Joseph Quirke, a member of La Bottega of Huntington testified that when it first leased the subject premises, there was an exterior stairway leading to the basement, but there was no interior stairway. He testified that contractors and an architect were hired to renovate the premises, which included construction of an interior stairway leading from the kitchen to the basement. He testified that Viteritti was not involved in the construction of the stairway, other than approving the blueprints, and never inspected the premises after it had been renovated.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. “Proof of negligence in the air, so to speak, will not do” (*Martin v Herzog*, 228 NY 164, 170, 126 NE

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814 [1920], *quoting* Pollock, Torts (10 th Ed.), p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must demonstrate prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see Maheshwari v City of New York*, 2 NY3d 288, 778 NYS2d 442 [2004]; *Forman v City of White Plains*, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]; *Bardi v City of New York*, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139 [1998]; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908 [1987]; *Schneider v Kings Highway Hosp. Ctr.*, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (*Gayle v City of New York*, *supra*, at 937, 680 NYS2d 900; *see Grob v Kings Realty Assoc.*, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; *Collins v City of New York*, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). Plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see Gayle v City of New York*, *supra*; *Bernstein v City of New York*, *supra*; *Bardi v City of New York*, *supra*).

Vam Realty has established its entitlement to summary judgment as a matter of law by submitting deposition testimony showing that plaintiff is unable to identify what caused him to fall (*see Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; *DeSantis v Lessing's, Inc.*, 46 AD3d 742, 849 NYS2d 580 [2d Dept 2007]; *Pluhar v Town of Southampton*, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]). The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendant's alleged negligence was a proximate cause of plaintiff's accident (*see Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, plaintiff failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (*see O'Connor v Lakeview Assocs., LLC*, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 753 NYS2d 470 [1st Dept], *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf. Stanojevic v Scotto Bros. Rest. Enters., Inc.*, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). When plaintiff was asked at his deposition whether there was anything on the step which caused him to slip and fall, he replied, "[m]aybe water or something, anything." Plaintiff's affidavit submitted in opposition to Vam Realty's motion, which states that he fell because the handrail ended before the end of the steps and he could not reach the handrail, is insufficient to defeat summary judgement, as it merely attempts to create a feigned factual issue designed to avoid the consequences of

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his deposition testimony (*see Capasso v Capasso, supra; Hunt v Meyers*, 63 AD3d 685, 879 NYS2d 725 [2d Dept 2009]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]). Although plaintiff submits an affidavit and report from an engineer, who claims that the treads on the subject stairway did not conform to the requirements of the NYS Building Code, he presented no evidence that these alleged violations caused him to fall (*see Knudsen v Mamaroneck Post No. 90, Dept. of N.Y.-Am. Legion, Inc.*, 94 AD3d 1058, 942 NYS2d 800 [2d Dept 2012]; *Noel v Starrett City, Inc.*, 89 AD3d 906, 932 NYS2d 727 [2d Dept 2011]; *Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015, 864 NYS2d 175 [2d Dept 2008]). Moreover, the report of plaintiff's expert does not state that the inspection of the handrail revealed that it was in violation of the Building Code. Rather, it merely states that the expert was "advised that at the time of the accident the handrail did not extend to the lowest portion of the stairway." Furthermore, while plaintiff's expert states that the treads at the subject stairway do not comply with the Code requirements for nonslip surfaces, the expert did not visit the subject premises until almost one year after the subject accident. Thus, Vam Realty's motion for summary judgment dismissing the complaint against it is granted. La Bottega of Huntington's motion for summary judgment dismissing the third-party complaint is denied, as academic.

Dated: 1/31/13


PETER H. MAYER, J.S.C.