

**Gallagher v 109-02 Development, LLC**

2013 NY Slip Op 33005(U)

November 22, 2013

Sup Ct, Queens County

Docket Number: 27449/11

Judge: Howard G. Lane

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inside the premises of 109-02 Rockaway Beach Boulevard, which premises are owned by defendant, 109-02 Development and which premises consist of an automotive repair shop owned by defendant Peninsula. Plaintiff maintains the mechanic's pit was not properly marked with warning signs or barricaded. Plaintiff, Stephanie Gallagher sues derivatively.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see id.).

Defendant 109-02 Development established a prima facie case that there are no triable issues of fact. Defendant 109-002 established that plaintiff's cause of action for common law negligence is barred by the firefighter's rule since he was injured during the course of performing his duties as a

firefighter, and the defendant 109-02 did not violate any federal, state, or local statutes, rules, or ordinances. The "firefighter's rule" bars common law negligence claims where the injury sustained is related to the particular dangers which firefighters are expected to assume as part of their duties. (Zanghi v. Niagara Frontier Transp. Com'n, 85 NY2d 423, 438 [1995].) This is in contrast to General Municipal Law § 205-a, which creates a right of action for a firefighter where the negligence of any person in failing to comply with the requirements of any statutes, ordinances or rules directly or indirectly caused the firefighter's injury during the discharge of his or her duty. In support of the motion, defendant 109-02 Development submits, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he avers that: despite heavy smoke in the building he attempted to make his way to the back of the building to investigate, that he never learned what caused him to slip and fall into the mechanic's pit; and the examination before trial transcript testimony of Paul Shields, who testified that he is a partner (landlord) of 109-02 Development and the sole owner of the repair shop, defendant Peninsula, that the pit area was part of the building when he purchased it 35 years ago, at no time was the garage issued violations from any City or State agencies, prior to the fire, the FDNY had performed inspections of the premises to ensure that there were fire extinguishers, at no time prior to the happening of the accident was he aware of any injuries occurring as a result of the mechanic's pit, and he was unaware of any regulation or ordinance that requires a mechanic's pit to be covered or barricaded.

Defendant Peninsula established a prima facie case that there are no triable issues of fact. Defendant Peninsula established that plaintiff's cause of action for common law negligence is barred by the firefighter's rule since he was injured during the course of performing his duties as a firefighter. In support he motion, defendant Peninsula submits, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testifies that: he did not ask anyone for any information regarding the building before he entered the building in connection with his firefighting duties, prior to arriving at the scene he did not review any documents or cards that described the building, he couldn't see anything due to the smoke, he did not know what caused him to slip, he did not see the mechanic's pit at any time before the accident; and the examination before trial transcript testimony of Paul Shields, who testified inter alia that: the Fire Department visited the premises once per year prior to the accident to perform inspections, each inspection took approximately one half hour, he was unaware of any other accidents involving the pit, he is not aware of any rule, regulation, or ordinance that required the use of any barricades or protective devices around the pit, and he

was never cited for failing to put a barricade around the mechanic's pit.

Additionally, defendants established that even if the firefighter's rule did not apply, the plaintiff's negligence claims would fail as defendants established that they did not either create or have actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]) via the testimony of plaintiff himself and of Mr. Shields.

In opposition to both motions, plaintiff failed to raise a triable issue of fact. Plaintiff failed to establish that defendants either created a dangerous condition or knew or should have known that a dangerous condition existed. Plaintiff relies upon his own examination before trial transcript testimony wherein he testifies that he was unable to see the unprotected pit due to the heavy smoke. Such does not raise a triable issue of fact.

Accordingly, defendants' motions for summary judgment are granted, and the matter is dismissed as against both defendants.

Plaintiff's cross motion for an order pursuant to CPLR 3025 granting leave to amend the complaint against moving defendants to allege statutory violations and for an order pursuant to CPLR 3042 granting leave to amend the Bill of Particulars to allege statutory violations is granted.

Under CPLR 3025[b], the Court may grant leave to amend the pleadings at any stage of the proceedings. It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; Wirhouski v. Armoured Car & Courier Serv., 221 AD2d 523 [2d Dept 1995]). Leave to amend a bill of particulars is ordinarily given in the absence of prejudice or surprise, unless the evidence is sought on the eve of trial" (Alvarado v. Beth Israel Medical Center, 78 AD3d 873 [2d Dept 2010][internal citations omitted]). "Leave to amend a complaint to add additional theories of law based upon facts formerly alleged should be freely given" (Stuart v. Board of Directors of the Police Benevolent Association of the New York State Police, Inc., 86 AD2d 721 [3d Dept 1982][internal citations omitted]). "It is necessary that the defendant have had notice of the facts out of which the original and new cause of action arose" (Allied Bank v. Fireman's Fund Ins. Co., 522 NYS2d 421 [Sup Ct, NY County 1987][internal citations omitted]). As it is not the eve of trial, as the new cause of action is based upon facts formerly alleged, as the defendants had notice of such facts, and as the record reveals no prejudice or surprise, the cross motion is

granted.

Accordingly, plaintiff is granted leave to file and serve an amended summons and complaint and amended bill of particulars within thirty (30) days from the date of service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: November 22, 2013

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**Howard G. Lane, J.S.C.**