Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

----------	Index No. 27449/11
BRIAN GALLAGHER and STEPHANIE GALLAGHER,	Motion
Plaintiffs,	Date July 29, 2014
-against-	Motion Cal. No. 54
109-02 DEVELOPMENT, LLC, et al.,	
Defendants.	Motion
----------	Sequence No. 4

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-10
Opposition.....	11-13
Reply.....	14-17

Upon the foregoing papers it is ordered that the motion by defendant, 109-02 Development, LLC ("109-02 Development") for summary judgment pursuant to CPLR 3212 and the cross motion by defendant Peninsula Spring and Wheel Alignment, Inc. ("Peninsula") for summary judgment dismissing the plaintiffs' Amended Verified Complaint and any and all cross claims asserted against them pursuant to CPLR 3212 are hereby decided as follows:

Plaintiff, Brian Gallagher brings this action to recover for personal injuries sustained on May 12, 2011, when while working as a New York City firefighter, for the New York City Fire Department, he slipped and fell into a mechanic's pit located 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.

At the outset, the Court notes that via decision/order of this Court dated November 22, 2013, plaintiffs' cross motion for an order pursuant to CPLR 3025 granting them 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 was granted. Plaintiffs subsequently served an Amended Verified Complaint.

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. Bradlee'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 [4th 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.).

Plaintiffs, via their Amended Verified Complaint now allege that with respect to General Municipal Law § 205-a, defendants failed to comply with the requirements of (1) United States Department of Labor, Occupational Safety and Health Administration (OSH) 29 CFR 1910.23(a)(1), and (2) Administrative Code of the City of New York Section C26-647.

Section 205-1 of the General Municipal Law 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. Said section states, in relevant part:

> In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured . . .

Defendant, 109-02 Development established a prima facie case that there are no triable issues of fact. Defendant 109-02 Development established a prima facie case that it did not violate United States Department of Labor, Occupational Safety and Health Administration (OSHA) 29 CFR 1910.23(a)(1), as a firefighter can only recover under a 205-a claim based upon a OSHA violation against one who is their employer responsible for workplace safety (Carro v. City of New York, 89 AD3d 1049 [2d Dept 2011). Defendant 109-02 Development established a prima facie case that it is not plaintiff, Brian Gallagher's employer, and thus it had no duty to enforce OSHA regulations (Pellescki v. City of Rochester, 198 AD2d 762 [2d Dept 1993]). Moving defendant also established that the mechanic's pit was not a "stairway floor opening" as contemplated by the OSHA regulation because it was an opening for an auto mechanic to gain access to the underside of a vehicle.

Additionally, defendant 109-02 Development established that it did not violate the Administrative Code of the City of New York, Section C26-647 as Section 26 has been repealed and

replaced by Section 28, but in any event, the old section C26-647 reveals that this provision applied to "shaft enclosures", specifically hoistways, elevators or well holes and the mechanic's pit is not a hoistway, elevator or well hole. Accordingly, this Administrative Code provision is inapplicable. 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: that he never learned what caused him to slip and fall into the mechanic's pit; and the examination before trial testimony of Paul Shields, who testified, inter alia, 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 of 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. In order for 205-a to apply, there must be evidence of "neglect, omission, wilful or culpable negligence" on the part of the defendant in failing to comply with a statute, rule, or ordinance. Defendant Peninsula established that there is no basis to maintain a claim under General Municipal Law § 205-a as there is no evidence that Peninsula was negligent or that it violated any applicable statute, rule, ordinance or law. In support of the cross motion, defendant Peninsula submits, inter alia, the examination before trial transcript testimony of Paul Shields, the President, Officer and Shareholder of Peninsula and a partner in 109-02 Development, LLC who testified, inter alia, that: the New York City Fire Department visited the premises once per year prior to the accident to perform inspections, he was unaware of any other accidents involving the pit mechanic's pit during the entire time that his company owned the premises, he is not aware of any rule, regulation, or ordinance that required the use of any barricades or protective devices around the pit, and Peninsula was never cited for failing to put a barricade or protective devices around the mechanic's pit; and the examination before trial transcript testimony of plaintiff himself, wherein he testified, inter alia, 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 could not 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.

Defendant Peninsula established a prima facie case that it did not violate United States Department of Labor, Occupational Safety and Health Administration (OSHA) 29 CFR 1910.23(a)(1), as a firefighter can only recover under a 205-a claim based upon an OSHA violation against one who if his employer responsible for workplace safety. Cross-moving defendant Peninsula established a prima facie case that it is not plaintiff, Brian Gallagher's employer (see, Carro, supra). Cross-moving defendant Peninsula also established that even if plaintiff could assert an OSHA violation, same is inapplicable to the instant case as such section relates to "stairway floor openings", and the mechanic's pit into which plaintiff allegedly fell does not constitute a "stairway floor opening" within the meaning of the OSHA provision, because it was an opening for an auto mechanic to gain access to the underside of a vehicle.

Finally, defendant Peninsula established that it did not violate Administrative Code of the City of New York, Section C26-647, as Section 26 has been repealed and replaced by section 28, but in any event, the old section C26-647 reveals that this provision applied to "shaft enclosures", specifically hoistways, elevators or wellholes and the mechanic's pit is not a hoistway, elevator or wellhole. Accordingly, this Administrative Code provision is inapplicable.

In opposition to both the motion and the cross motion, plaintiffs failed to raise a triable issue of fact regarding the violations of General Municipal Law § 205-a and the United States Department of Labor, Occupational Safety and Health Administration (OSHA) 29 CFR 1910.23(a)(1). Plaintiffs failed to present any contrary meritorious proof to sustain their position that the OSHA regulations do not only apply to employee/employee relationships. As the record reflects that defendants are not plaintiff's employer and plaintiff is not defendants' employee, OSHA is inapplicable in the instant matter and there are thus no triable issues of fact regarding these violations.

However, plaintiff has presented a triable issue of fact regarding Administrative Code of the City of New York, Section C26-647. There is a triable issue of fact as to whether the

mechanic's pit is considered a "wellhole" within the ambit of section C26-647 (McMichael v. Regal Rug & Carpet Cleaning Co., Inc., 33 AD2d 773 [2d Dept 1969]).

Accordingly, as there are triable issues of fact regarding the Administrative Code section violation, summary judgment is unwarranted and a trial is necessary for this branch only.

As such, moving defendants' motion and cross motion for summary judgment are granted regarding violations of General Municipal Law § 205-a and the United States Department of Labor, Occupational Safety and Health Administration (OSHA) 29 CFR 1910.23(a)(1), and denied regarding the Administrative Code of the City of New York, Section C26-647.

This constitutes the decision and order of this court.

Dated: September 18, 2014

.....

Howard G. Lane, J.S.C.