

Perez v Gateway Realty LLC

2015 NY Slip Op 30405(U)

February 19, 2015

Supreme Court, Bronx County

Docket Number: 302081/09

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

RAFAEL PEREZ and MARIA L. DEPEREZ,

Plaintiffs,

-against

GATEWAY REALTY LLC and BP ELEVATOR CO.,

Defendants.

**MEMORANDUM
DECISION/ORDER**
Index No. 302081/09

HON. MARK FRIEDLANDER

Defendant, Gateway Realty LLC (“Gateway”), moves for an order, pursuant to CPLR§3212, granting summary judgment in favor of Gateway dismissing plaintiffs’ complaint.

This is an action by plaintiff, Rafael Perez (“Perez”), to recover monetary damages for personal injuries allegedly sustained by him on October 1, 2007. More specifically, Perez alleges that he was pushing a dolly containing a 500 – 600 lb. elevator motor. The back tire of the dolly fell into a crack in the sidewalk adjoining Gateway’s property. Perez attempted to lift the dolly in order to push the stuck wheel out from the crack. While doing so, Perez alleges that he injured his neck and back. Maria L. Deperez, the wife of Perez, has asserted a derivative claim for loss of comfort, society, services and consortium of her husband.

The relevant facts, as culled from the pleadings, transcripts of deposition testimony, affidavits, photographs, and exhibits submitted, are as follows: Gateway is the owner of the premises located at 363 Seventh Avenue, New York, New York (“the building”). Perez was employed by Empire Realty Management Co., Inc. (“Empire”), working as a superintendent in the building. On Friday, September 28, 2007, BP Elevator Co. (“BP”), an independent

contractor, removed an old elevator motor and left it near the freight elevator on a four wheel dolly. On Monday, October 1, 2007, the old elevator motor was still present. A truck driver from "McIntosh" arrived with flatbed truck and crane to retrieve the motor. The truck was parked on Seventh Avenue. However, personnel from BP had not yet arrived to transport the old elevator motor to the waiting truck.

Perez was informed by the building security doorman that, as per Fred Ohebshalom, the president and shareholder of Empire and the sole member of Gateway, Perez was to remove the motor from the freight elevator. The truck driver offered to help Perez. The dolly had a rope attached to the front. The driver was pulling the rope and guiding the dolly, while Perez pushed it from the back. There were cracks in the sidewalk of the 30th Street side of the building, near the freight entrance. Perez informed the truck driver to avoid the cracks outside the freight door and along the route to the truck. They managed to get the dolly past the cracks directly outside the freight door, but the dolly got stuck in cracks in front of a standpipe. The dolly's back left tire fell into the crack. After about a minute, Perez bent down and attempted, by himself, to lift the dolly and motor, which he estimated weighed between 500 and 600 pounds. Perez lifted the motor less than an inch and pushed it while the truck driver pulled the rope to free the tire from the crack. Perez testified that, as soon as he lifted the elevator motor by himself, he felt pain in his back and neck. The wheel of the dolly was freed from the crack on the first attempt. After the dolly wheel was freed, Perez continued to push the motor while the truck driver pulled the rope. When they reached the truck, a hauling machine brought the motor into the bed of the truck.

Gateway's motion for summary judgment seeks dismissal of plaintiffs' complaint on the

grounds that: (1) there was no causal connection between Gateway's alleged negligence and Perez's accident; (2) Perez is barred from bringing this lawsuit, pursuant to Workers' Compensation Law §11, based upon his status as an employee/special employee of Gateway and his receipt of Workers' compensation benefits; (3) Perez is barred from bringing this lawsuit, pursuant to Workers' Compensation Law §29(6), because the sole member of Gateway and the officer and shareholder of Empire is the same individual, Fred Ohebshalom, and Perez cannot bring a suit arising from the alleged negligence of his co-employee; and (4) Gateway and Empire are integrated entities, which bars Perez from bring an action against his employers, pursuant to Workers' Compensation Law §11.

Perez's claim against Gateway is predicated upon §7-210 of the Administrative Code of the City of New York, which provides in relevant part, as follows:

“Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.”

Perez asserts that Gateway, as the owner of the real property abutting the sidewalk where his accident took place, was under an affirmative duty to maintain the sidewalk in a reasonably safe condition and that Gateway violated that duty by failing to repair cracks in the sidewalk. Perez

further asserts that the cracks in the sidewalk were the proximate cause of his accident.

“Although the issue of proximate cause is generally one for the finder of fact (*Deriarian v. Felix Constr. Corp.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666), ‘liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes’ (*Ely v. Pierce*, 302 A.D.2d 489, 489, 755 N.Y.S.2d 250; *see Salvino v. City of New York*, 5 A.D.3d 581, 774 N.Y.S.2d 82).” *Castillo v. Amjack Leasing Corp.*, 84 A.D.3d 1298 (2nd Dept. 2011). Here, any alleged negligence on the part of Gateway in not maintaining the sidewalk did not proximately cause Perez’s accident. Perez was not injured when the dolly got stuck in the crack. The sole proximate cause of the accident was Perez’s own independent decision and negligence in seeking to lift, by himself, a dolly with an elevator motor resting on top of it, which Perez knew weighed between 500 and 600 pounds. It is not reasonably foreseeable on the part of Gateway, that, if a dolly carrying a load of between 500 and 600 pounds, were traversing the sidewalk abutting Gateway’s building, and got caught in a crack in that sidewalk, that an individual would then, unassisted, attempt to lift it out of the crack. *See, e.g., Castillo v. Amjack Leasing Corp., supra.*

Gateway’s motion for summary judgment is granted and plaintiffs’ complaint is dismissed in its entirety. Plaintiffs’ complaint having been dismissed on the ground that Perez’s actions were the sole proximate cause of the accident, the Court need not address the various defenses asserted by Gateway under the Workers’ Compensation Law.

The foregoing constitutes the Decision and order of the Court.

Dated: 2/19/15


MARK FRIEDLANDER, J.S.C.