

Anzora v 81 Saxon Ave. Corp.
2015 NY Slip Op 31018(U)
May 29, 2015
Supreme Court, Suffolk County
Docket Number: 35453/2012
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 35453/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JUAN ANZORA, Administrator of the Estate
of MILTON ANZORA,

Plaintiff,

-against-

81 SAXON AVENUE CORP. d/b/a
PRESTIGE LAUNDRY, PRESTIGE FIRST
AVE. CLEANING CORP., PRESTIGE
INDUSTRIES HOLDINGS LLC d/b/a
PRESTIGE INDUSTRIES LLC, SE 86
HOLDING COMPANY LLC and CHICAGO
DRYER CO.,

Defendants.

ORIG. RETURN DATE: APRIL 30, 2013
FINAL SUBMISSION DATE: AUGUST 1, 2013
MTN. SEQ. #: 001
MOTION: MOT D

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Upon the following papers numbered 1 to 6 read on this motion _____
FOR DISMISSAL

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers
4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by defendants 81 SAXON AVENUE CORP. d/b/a PRESTIGE LAUNDRY ("81 Saxon") and SE 86 HOLDING COMPANY LLC ("SE 86") (collectively "defendants") for an Order, pursuant to CPLR 3211 (a) (1), (2) and (7), dismissing plaintiff's complaint as against defendants on the grounds that: (1) plaintiff's action is barred by Workers' Compensation Law §§ 11 and 29 (6) as against 81 Saxon; and (2) the action against SE 86 is without merit, as SE 86, as an absentee landlord, neither owed a duty to plaintiff nor breached any duty to plaintiff, is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition hereto from plaintiff JUAN ANZORA, Administrator of the Estate of MILTON ANZORA.

This action, commenced on or about November 14, 2012, seeks to recover damages relating to personal injuries allegedly sustained by Milton Anzora on November 26, 2011, during the course of his employment with 81 Saxon. 81 Saxon owns and operates a commercial laundry located at 75-81 Saxon Avenue, Bay Shore, New York ("Premises"). Plaintiff alleges, among other things, that Milton Anzora was an employee of 81 Saxon and was working as a mechanic's helper, wherein his duties included maintaining and repairing the commercial laundry equipment at the Premises. Plaintiff indicates that the laundry equipment was "designed, manufactured, sold and/or repaired" by defendant CHICAGO DRYER CO. Plaintiff asserts that Milton Anzora was injured when he got caught between the machinery of the commercial laundry operation, and was crushed to death.

Plaintiff's complaint asserts causes of action against 81 Saxon sounding in wrongful death and negligence, alleging that as the owner and operator of the commercial laundry, 81 Saxon had a duty to maintain the laundry operations and machinery in a reasonably safe manner and in accordance with all required laws, rules and regulations. Regarding SE 86, plaintiff alleges that it owned and operated the Premises and was also negligent in connection therewith.

Defendants have now filed the instant motion to dismiss the complaint as asserted against them. Defendants indicate that it is undisputed that Milton Anzora was employed by "Prestige Laundry a/k/a 81 Saxon" at the time of the accident, which is supported by the affidavit of Sang Cho, the president and CEO of both 81 Saxon and SE 86, as well as the relevant payroll and employment records. Therefore, defendants argue that plaintiff's action against 81 Saxon must be dismissed as plaintiff's exclusive remedy is Workers' Compensation. In fact, defendants inform the Court that a claim for benefits was made by plaintiff against the Workers' Compensation policy issued to 81 Saxon by National Fire Insurance Co. of Hartford c/o CNA as a result of the subject accident. In addition, defendants argue that plaintiff's action against SE 86 is without merit, as SE 86 is an out-of-possession landlord and owed no duty to plaintiff relative to the alleged failure to properly maintain the machinery and equipment at the Premises.

Defendants inform the Court that on or about December 5, 2005, SE 86 leased the Premises to 81 Saxon ("Lease"). The Lease provided that 81 Saxon shall "at its sole cost and expense . . . make all needed repairs . . . to the structural components of the demised premises . . . and [81 Saxon] further assumes the full and sole responsibility for the condition, operation, repair, replacement and maintenance . . . [of] all mechanical elements and all machinery and equipment of every kind and nature . . . erected or installed in or on the demised premises." Further, the Lease contains terms wherein 81 Saxon agreed to indemnify and hold harmless SE 86 from any and all claims, including claims for personal injuries arising out of or from the work being performed at the Premises.

In opposition, plaintiff urges a denial of the motion, arguing that plaintiff's action against 81 Saxon should not be dismissed as the Workers' Compensation Law permits cross-claims by a third-party, i.e. defendant CHICAGO DRYER CO., against an employer for accidents involving "grave injury." Further, plaintiff contends that SE 86 has failed to demonstrate as a matter of law that it is an out-of-possession landlord and, in any event, plaintiff has asserted claims against SE 86 for United States Department of Labor Occupational Safety and Health Administration ("OSHA") safety and design violations existing at the Premises on the date of the accident. Indeed, plaintiff has alleged that OSHA conducted an inspection of the Premises after Milton Anzora's death and issued five violations categorized as "serious," which resulted in 81 Saxon paying a penalty of \$31,500.00 to OSHA.

Regarding the terms of the Lease, plaintiff cites the "Second" paragraph thereof which states that SE 86 had a right of re-entry and was obligated to maintain and repair portions of the Premises. Thus, plaintiff argues that SE 86 was not an out-of-possession landlord as claimed by defendants.

Moreover, plaintiff alleges that the motion is premature as no discovery has been exchanged to date. Plaintiff claims that questions of fact and law exist as to whether defendants were negligent in causing, contributing to or creating a hazardous, dangerous and/or defective condition and whether they had actual or constructive notice of such condition. Plaintiff notes that although the Lease exists between the two defendants, the signatures for the landlord and tenant are from the same person, thereby raising questions as to whether SE 86 had knowledge of the dangerous and hazardous conditions of the commercial laundry operations at the Premises.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Furthermore, on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). However, the Court notes that in opposition to the instant application, plaintiff has merely submitted an attorney's affirmation.

Workers' Compensation Law § 11 provides in pertinent part:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death

(Workers' Compensation Law § 11). Workers' Compensation Law § 11 bars third-party lawsuits for contribution and indemnification against an injured employee's employer unless the employee suffered a grave injury, limited to death and the exclusive list of disabilities defined in § 11 (see *New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501 [2014]; *Fleming v. Graham*, 10 NY3d 296 [2008]). Under New York's Workers' Compensation scheme, an employee receives medical benefits and compensation for workplace injuries, regardless of fault, paid for by the employer. In exchange for this certain and swift remedy, the employee gives up the right to sue the employer for personal injuries (*New York Hosp. Med. Ctr. of Queens*, 22 NY3d 501). Workers' Compensation Law §§ 11 and 29 (6) provide that an employee who elects to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained (see *Smith-Lerner v Art Students League of N.Y.*, 118 AD3d 865 [2014]; *D'Alessandro v Aviation Constructors, Inc.*, 83 AD3d 769 [2011]).

Here, it is undisputed that Milton Anzora was employed by 81 Saxon on the date of the accident. Therefore, his claims against 81 Saxon for wrongful death and negligence must be dismissed. However, based upon the conflicting provisions of the Lease with respect to the responsibility to maintain the Premises, and the fact that Sang Cho is the president and CEO of both 81 Saxon and SE 86, the Court finds that further discovery is need to determine what actions SE 86 undertook prior to and during the period that the laundry business was commenced at the Premises, what knowledge SE 86 had concerning the alleged dangerous and hazardous conditions existing thereat, and what maintenance or repairs SE 86 performed at the Premises. It has been held that an out-of-possession landlord is not liable for personal injuries sustained on the premises unless the landlord retains control of the property or is contractually

obligated to perform maintenance and repairs (see *Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121 [2008]; *Ingargiola v Waheguru Mgmt.*, 5 AD3d 732 [2004]; *Reidy v Burger King Corp.*, 250 AD2d 747 [1998]).

In view of the foregoing, this motion is **GRANTED** solely to the extent that plaintiff's First and Fifth causes of action asserted against 81 Saxon are hereby dismissed. As there is no longer a direct action pending against 81 Saxon, defendant CHICAGO DRYER CO.'s cross claim may be maintained in a third-party action under the circumstances of this case (see *Soodoo v LC, LLC*, 116 AD3d 1033 [2014]; *Baten v Northfork Bancorporation, Inc.*, 85 AD3d 697 [2011]; *Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838 [2005]). Accordingly, CHICAGO DRYER CO.'s cross claim is hereby converted into a third-party cause of action (see *Soodoo v LC, LLC*, 116 AD3d 1033).

The foregoing constitutes the decision and Order of the Court.

Dated: May 29, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION