

Scotti v City of New York
2015 NY Slip Op 31349(U)
March 23, 2015
Supreme Court, Richmond County
Docket Number: 101312/13
Judge: Thomas P. Aliotta
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SCOTTI v. THE CITY OF NEW YORK

Island, New York. Plaintiff Albert A. Scotti (hereinafter "plaintiff"), a laborer for the New York City Department of Citywide Administrative Services (hereinafter "DCAS"), claims to have twisted and injured his left knee when he stepped into a hole while loading carpentry materials into a DCAS van. According to plaintiff, the defect was the result of a few missing bricks. As plaintiff testified at his July 9, 2014 EBT: "The other two carpenters also were loading stuff into the van. I went back in to get some more stuff, came out, put it in the van, took about a step or two to my left, and I turned to my left and felt my knee twist. And when I looked down my foot was in a hole...[T]here were four [or] five bricks missing from the edge of the steps...meaning that there was a few steps and then there was a flat area with bricks and that's where the bricks were missing..." (see City's Exhibit E, pp 31-39). Plaintiff also circled the precise location of the accident on a photograph of the steps produced at his deposition (see City's Exhibit F). At the time in question, DCAS was engaged in assisting City carpenters in making repairs to an exterior door.

It is undisputed that 111 Canal Street is owned by the City (see City's Exhibit I), "which has the maintenance and repair responsibility for the structure"¹ (*id.* para 4), and that HHC operated the "Stapleton Family Health Center" therein. It is

¹City had no written lease with HHC (see Reply Affirmation of Monica Kelly, Esq. para 8).

SCOTTI v. THE CITY OF NEW YORK

likewise conceded that following the accident, plaintiff applied for, and to date has received, Workers' Compensation benefits for the injury to his left knee in the amount of \$2,376.21, plus \$7,436.28 for medical bills (see July 8, 2014 Affirmation of Paul Zaragoza, Esq.; City's Exhibit G).

In its motion, the City requests, in part, the entry of an order pursuant to CPLR 3025(b) allowing it to serve an amended verified answer *nunc pro tunc* which includes the exclusivity of Workers' Compensation Law as an affirmative defense and, if granted, dismissal of the complaint against it. Additionally, the City seeks dismissal of the complaint as against HHC inasmuch as the latter is not a proper party to the action.

In support of its motion the City argues, *inter alia*, that plaintiff's receipt of workers' compensation benefits bars his action against the City, since the "sole and exclusive remedy of an employee against his employer for injuries in the course of employment is compensation benefits" (Gonzalez v. Armac Indus., 81 NY2d 1, 8). In addition, the City maintains that plaintiff's effort to circumvent the exclusivity of the Workers' Compensation Law based on the City's dual capacity as his employer and the property owner is unavailing. A case in point is Weiner v. City of New York, (19 NY3d 852), where the Court of Appeals reiterated that "[w]e have long refused to condone the circumvention of the workers' compensation scheme by means of a theory that would allow

SCOTTI v. THE CITY OF NEW YORK

an employer to be sued in its capacity as property owner...[A]n employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment" (19 NY3d at 855, *citing* Billy v. Consolidated Mach. Tool Corp., 51 NY2d 152, 160 [*internal quotation marks omitted*]). Lastly, the City seeks dismissal of the complaint as against HHC because it rather than HHC owned the property in question, and was therefore obliged to maintain the premises, including the exterior of the building, in a reasonably safe condition (see City's Exhibit H).

In opposition, plaintiffs focus their arguments on that branch of the City's motion which seeks dismissal of the complaint as against HHC. Thus, plaintiffs argue that HHC's status as a tenant operating a public clinic imposes upon it a "nondelegable duty to provide safe ingress and egress to all persons lawfully upon the premises" (Backiel v. Citibank, 299 AD2d 504, 507-508). Moreover, plaintiffs argue that the City's refusal to provide a copy of HHC's lease pursuant to its March 18, 2014 discovery demand provides them with the benefit of an adverse inference, and compels this Court to find that the existence of triable issues preclude an award of summary judgment to the City.

It is well settled that leave to amend a pleading is within the sound discretion of the court and should be freely given unless the amendment is "palpably insufficient or patently devoid of merit" (Schwarz v. Sayah, 83 AD3d 926). Here, the proposed

SCOTTI v. THE CITY OF NEW YORK

amendment to the City's answer (see City's Exhibit A) is clearly meritorious, as plaintiff has already begun to receive some portion of his Workers' Compensation benefits. In addition, plaintiffs have failed to demonstrate any prejudice arising out of the granting of the City's motion (see Hartford Cas Ins Co v. Vengroff Williams & Assoc., 306 AD2d 435, 436-437). Accordingly, the motion for leave to amend the City's answer is granted, and the amended answer is deemed served upon the plaintiffs *nunc pro tunc*.

Furthermore, since plaintiff's sole and exclusive remedy against his employer for injuries sustained in the course of his employment is workers' compensation (see Gonzalez v. Armac Indus. 81 NY2d 1, 8; see also Cunningham v. State of New York, 60 NY2d 248, 252), the complaint as against the City must be dismissed.

Finally, this Court finds no basis on which to hold HHC, a licensee of a portion of the premises where plaintiff was injured, as a party defendant. Plaintiffs at bar have offered only speculative assertions in response to the City's affirmed statement that no lease existed between itself and HHC. Thus, there is no evidence before the Court on which to predicate the adverse inference claimed by plaintiffs. Neither have plaintiffs asserted a need for further disclosure in order to fully respond to the City's motion (*cf.* CPLR 3211[d]).

Accordingly, it is

SCOTTI v. THE CITY OF NEW YORK

ORDERED, that defendants' motion for leave to amend their answer to assert Workers' Compensation as an affirmative defense is granted; and it is further

ORDERED, that the amended answer is deemed served; and it is further

ORDERED, that defendants' motion to dismiss the complaint is granted; and it is further

ORDERED, that the complaint is dismissed; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: March 23, 2015