Sung Joo Hong v Dorchester Towers Condominium
2016 NY Slip Op 31403(U)
July 20, 2016
Supreme Court, New York County
Docket Number: 161867/13
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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SUNG JOO HONG,

Plaintiff,

-against-

DORCHESTER TOWERS CONDOMINIUM; OGDEN CAP PROPERTIES, LLC.; *and* P.S. MARCATO ELEVATOR CO., INC.,

Defendants.

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Index Number: 161867/13

Motion Sequence Number: 004

DECISION AND ORDER

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this court states that the following papers were used on this motion by plaintiff for leave to amend the complaint to add certain factual allegations and a claim for punitive damages:

Papers Numbered

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition 2
Reply (Memorandum of Law) 3

For the reasons set forth herein, and upon the foregoing papers, the instant motion is denied in part and granted in part. Plaintiff may amend the complaint to add additional factual allegations, but may *not* add a claim for punitive damages because, as a matter of law, the allegations, even assuming the truth thereof, would not warrant such a claim.

On December 26, 2013, Plaintiff Sung Joo Hong commenced this action against P.S. Marcato, the elevator repair company that services the residential building at 155 West 68th Street, Dorchester Towers Condominiums, which is the association that owns 155 West 68th Street, and Ogden Cap Properties LLC, which is the entity that manages the building. See Proposed Amended Complaint at ¶¶6-8. The bare bones original complaint sought to recover for personal injuries Mr. Hong allegedly sustained when a Dorchester elevator malfunctioned while he rode it. Defendants timely answered that complaint.

The parties conducted a significant amount of disclosure. To date, plaintiff has deposed the superintendent of the Dorchester (See Dogramaci Affirmation, Exh. E at 5), a Vice President at Marcato responsible for overseeing field activity (See id. Exh F at 5), and the repairperson present on the day of Mr. Hong's alleged injury, John Uzzolino. See id. Exh. N at 49.

Defendant produced "ELV 3" Department of Buildings elevator inspection reports (See id. Exh. D at 14); "BIN History Reports," which are the Dorchester's internal service records (See id. Exh. D at 15); "shift log notes," showing calls made from the Dorchester to Marcato (See id. Exh. G at 1); and "route sheets," which are Marcato's records of outgoing maintenance trips to the buildings that they service (See e.g. id. Exh. M at 7).

Mr. Hong now moves, pursuant to CPLR 3025(b), for leave to amend the complaint. Defendants oppose the motion.

Summary of Proposed Amended Complaint

Overview

The amendments in plaintiff's proposed amended complaint can be divided into three main items: (a) an elaboration of the events on the date of the accident, which details how Mr. Hong's injury affected his daily life, both immediately after, and in the years following the accident (See Proposed Amended Complaint at ¶¶14-18); (b) a claim for punitive damages based on the frequency with which the Dorchester's elevators malfunction, and Marcato's failure to consistently record its maintenance of same, as required by New York City Building Code, NYC Code § 3001.2 (See id at ¶¶26-39); and (c) allegations that Marcato violated New York City Administrative Code § 27-1006, which requires notification of the Department of Buildings by the owner or person in charge of an elevator whenever it injures a passenger. See id. at ¶ 39. Additionally, Mr. Hong would add a request to recover medical expenses paid for by his insurer (Proposed Amended Complaint at ¶1).

Plaintiff's Extended Version of Events on Date of Alleged Injury and in Years Following

Mr. Hong alleges that on October 25, 2013 at approximately noon, he entered the Dorchester's lobby to find a repairperson in the vicinity of one of the elevators. See Proposed Amended Complaint at ¶9. Mr. Hong asked the repairperson if the elevator was ready for use, to which the repairperson replied that it was. See id. at ¶10. Mr. Hong pressed the button for the 20th floor, where he lives, but instead of ascending, the elevator descended and stopped suddenly below the basement level, where it "seemed to have struck something at the bottom of the shaft" (Id. at ¶11), jostling Mr. Hong. After the repairperson opened the elevator doors from above and yelled for Mr. Hong to get out, Mr. Hong climbed out of the elevator, and emerged in the basement. See id. at ¶¶12-13.

Mr. Hong alleges that he began to experience "excruciating" back pain that evening, visited the emergency room the next day, suffered back pain and muscle spasms for the next twelve days, missed work for approximately three weeks during October 2013- November 2014, and still experiences pain when exercising. See id. at ¶¶14-18.

Punitive Damages For Code Violations and High Frequency of Malfunctions

Mr. Hong alleges that disclosure revealed that over a period of two years, the Dorchester's elevators stopped between floors 120 times, did so 41 times with a passenger inside of them, and that Marcato only recorded 19 of these "entrapments." Id. at ¶¶ 29-30. The date of Mr. Hong's injury was one of the occasions that a Dorchester elevator malfunctioned, and Marcato performed maintenance, but failed to record it. Id. at ¶ 34. Mr. Hong also alleges that Marcato

failed to notify the Commissioner of Buildings that an injury occurred, in accordance with New York City Administrative Code § 27-1006.

Parties' Arguments

Mr. Hong argues that the frequency of the Dorchester's elevator malfunctions, combined with Marcato's alleged failure consistently to record its maintenance work, justifies punitive damages because it shows not merely ordinary negligence, but "willful or wanton negligence," (Plaintiff's Memo. in Supp. at 5) or a policy of reckless disregard for legal obligations under NYC Code § 3001.2. See id. at 1.

Defendant disputes that the evidence plaintiff presented is legally sufficient to impose punitive damages because buildings code violations are merely evidence of ordinary negligence. See Aff. in Opp. ¶¶9-10.

Discussion

Amendment of Pleadings Generally

CPLR 3025(b) states:

> "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Despite this liberal standard, motions to amend a pleading are a) subject to judicial discretion, b) must be supported by evidentiary proof, c) must not prejudice the opposing party, and d) require "examination of the underlying merit of the proposed amendment." Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354 (1st Dept 2005).

Supporting Evidence

In the instant case, the plaintiff has provided ample evidence that Marcato's record keeping was deficient. For example, Mr. Hong has cited deposition testimony from elevator repairperson John Uzzolino that indicates that there were times in Mr. Uzzolino's career at Marcato that he did not record the location and nature of his maintenance (See e.g., Dogramaci Affirmation Exh. N at 32-34). Perhaps the strongest evidence in support of Mr. Hong's allegation that Marcato failed to keep complete records, however, is that Marcato admitted in a letter to the Court, dated August 13, 2015 that it has no record that any of its employees performed maintenance at the Dorchester on the date of Mr. Hong's injury. See id. Exh. K at 1.

Prejudice

Defendant Marcato has not argued that Mr. Hong's proposed amendments would prejudice it, and the Court does not believe that it would. See Loomis v Civetta Corinno Const. Corp., 54

NY2d 18, 23 (Ct App 1981) (stating that "[p]rejudice...is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position."). In the instant action, although punitive damages present greater liability for Marcato, said defendant's preparation would not be hindered because no note of issue has been filed and there is still time for further discovery. Even if it were otherwise, the facts in the proposed amended complaint do not differ from the original complaint to such a degree that Marcato could reasonably claim surprise. See id.

Merit

Although plaintiff has provided ample evidence that Marcato consistently failed to record the maintenance it performed, and despite the fact that said defendant would not be prejudiced by this amendment, the facts pled in the proposed amended complaint are legally insufficient to support adding a punitive damage claim. See Heller v Louis Provenzano, Inc., 303 AD2d 20, 25 (1st Dept 2003). As Marcato has pointed out, it is not appropriate to levy punitive damages against a defendant in a negligence case because of evidence that it may have violated administrative regulations. See id. (stating "mere evidence of [a] 'safety regulations' violation is insufficient to warrant the imposition of punitive damages.") The Court of Appeals has similarly said that violations of administrative safety regulations (as opposed to safety statutes) are not strict liability offenses, but rather, "only some evidence of negligence." Bauer v Female Academy of Sacred Heart, 97 NY2d 445, 453 (2002).

Despite this general rule, and the fact that punitive damages were traditionally reserved for intentional torts driven by an "evil or wrongful motive" (Lugo by Lopez v LJN Toys, Ltd., 75 NY2d 850 (1st Dept 1990)), the plaintiff is correct that at least one court has allowed punitive damages absent intent, where the alleged tortfeasor shows "wantonly reckless or grossly negligent conduct that tramples on the rights of others or puts their safety at risk." Randi A.J. v Long Is. Surgi-Ctr., 46 AD3d 74, 82 (2d Dept 2007) (expressing approval of punitive damages but ordering new trial on damages because lower court gave faulty instructions).

Randi A.J. is clearly distinguishable from the facts pled in the instant case, which fail to show either that Marcato intentionally caused harm (in accord with the traditional requirement for punitive damages), or that it acted with wanton recklessness or gross negligence that put Mr. Hong's safety at risk. See id. In Randi A.J., a nurse at an abortion clinic breached a patient's confidentiality by recklessly disclosing information to the patient's devoutly Catholic mother that led the mother to realize that her daughter had an abortion. See id. The Randi A.J. court recognized that intent should not be the sole factor in assessing the suitability of punitive damages, and held that courts should also consider the importance of the underlying right or public policy disregarded by the tortfeasor's conduct. See id. In Randi A.J., it was foreseeable that the clinic's lack of a clear confidentiality policy would cause a breach of the plaintiff's right to confidentiality. See id. In the instant case however, whether or not a lack of maintenance records foreseeably leads to passenger injuries generally, there is no evidence that Marcato's alleged failure to keep complete records caused Mr. Hong's injury. Despite 120 malfunctions in the past two years, the record is also bereft of any *prior instance* in which a passenger claims to have been injured by one of the Dorchester's elevators.

Moreover, there is no evidence that Marcato fails to provide maintenance when it is alerted to a dangerous condition in one of the elevators, but only that Marcato may have failed to *record* the maintenance that it *did* perform. Such a failure to record, in the absence of a causal influence on a given injury, or evidence of past such injuries, does not rise to the level of "wantonly reckless or grossly negligent conduct that tramples on the rights of others or puts their safety at risk" (See Randi A.J. at 82); however, it may be evidence of ordinary negligence.

The court has considered the parties' other arguments and finds them to be unavailing.

Conclusion and Disposition

Plaintiff's Motion for Leave to Amend is granted in part and denied in part. Plaintiff may amend the complaint as requested except may not add a claim for punitive damages. The allegations in the punitive damages section of the proposed amended complaint may remain to the extent plaintiff wishes to use them as evidence of ordinary negligence. Plaintiff is hereby directed to serve and file an amended complaint consistent with this Decision and Order, within 30 days of the date hereof.

Dated: July 20, 2016

Arthur F. Engoron, J.S.C.