Battle v Sol Goldman Invs., LLC
2016 NY Slip Op 31846(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 452817/2014
Judge: Geoffrey D. Wright
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 47

----------X

Juan Batista Battle,

Plaintiff,

-against-

Sol Goldman Investments, LLC, AMC Entertainment Inc., Tower East Properties Corp., Shawmut Design and Construction and Anthropologie, Inc. d/b/a Urban Outfitters,

Defendants.

----------X

Sol Goldman Investments, LLC and Tower East Properties Corp.,

Third-Party Plaintiffs,

-against-

Anthropologie, Inc. d/b/a Urban Outfitters,

Third-Party Defendant.

----------X

Index Number: 452817/2014

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other.....cross-motion.....	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Shawmut Design and Construction (Shawmut) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and any cross claims against it.

Underlying Allegations and Procedural Background

Plaintiff alleges that, on June 3, 2011, he was walking on the sidewalk adjacent to 1230 Third Avenue, New York, New York (the Accident Site), when he slipped and fell, causing him to suffer fractures of the fourth and fifth fingers of his right hand (bill of particulars, items 1-2; plaintiff EBT at 30-35). He contends that the sidewalk at the Accident Site was cracked and uneven and that this caused his fall (*id.* at 33-34).

Shawmut contends that, at the time of plaintiff's accident, it was performing construction work (the Project) near the Accident Site for TD Bank to build a new branch (Manning EBT at 12-13, 16-17, 22-23, 65). It states that the bulk of the work that it performed was inside the building and that the work it performed outside the building involved the revolving door and that this work occurred after plaintiff's accident (*id.* at 66-68, 103-104, 109-111, 117-119, 122-123, 128-132, 166).

On August 27, 2012, plaintiff commenced this action in Supreme Court, Bronx County. On October 10, 2014, Justice Allison Tuitt transferred the venue of the action to Supreme

Court, New York County. On October 29, 2015, plaintiff filed his note of issue. On January 14, 2016, pursuant to CPLR 3212 (a), this court extended the time to file dispositive motions for an additional 90 days. On April 15, 2016, the court granted Anthropologie, Inc.'s motion to dismiss the third-party complaint against it.

On March 15, 2016, Shawmut made its motion for summary judgment, seeking dismissal of plaintiff's complaint and all cross claims against it. On June 13, 2016, plaintiff served papers stating that he had "no opposition to defendant Shawmut's motion" and noting that he had signed a stipulation of discontinuance of his claims against Shawmut (Gertler affirmation, ¶ 3). No other party has submitted opposition to Shawmut's motion.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it

neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]).

Additionally, a defendant is entitled to summary judgment "dismissing it from the action, on the ground that it did not own, operate, manage or control the [site] on which plaintiff fell" (*Grullon v City of New York*, 297 AD2d 261, 261-262 [1st Dept 2002]; *see also Gounarides v Yankee Stadium Corp.*, 136 AD3d 440, 441 [1st Dept 2016]; *Smith v New York City Hous. Auth.*, 84 AD3d 669, 670 [1st Dept 2011]).

Contractors' Tort Liability

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party . . . [However,] under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]; *see also Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Those circumstances are "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm';(2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3)

where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [internal citations omitted]; *see also Church*, 99 NY2d at 111-112; *Megaro v Pfizer, Inc.*, 116 AD3d 427 [1st Dept 2014]).

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Glover v John Tyler Enters., Inc.*, 123 AD3d 882, 882 [2d Dept 2014]; *see also Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 612 [2d Dept 2014]). Where the contractor shows that it "did precisely what it was obligated to do under the contract, [the party opposing summary judgment must] raise an issue of fact [as to] whether [the contractor] performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff, for whose injuries it could be held liable" (*Miller v City of New York*, 100 AD3d 561, 561 [1st Dept 2012]; *see also Fernandez v 707, Inc.*, 85 AD3d 539, 541 [1st Dept 2011]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 493 [1st Dept 2010]).

Uncontroverted Facts

"Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]; *Tortorello*

v Carlin, 260 AD2d 201, 206 [1st Dept 1999]).

Discussion

Applying the above noted principles to this case, Shawmut's motion for summary judgment must be granted. It has presented evidence that it neither owned nor controlled the Accident Site when plaintiff's accident occurred (see *Gounarides*, 136 AD3d at 441; *Smith*, 84 AD3d at 670). This lack of ownership or control is undisputed and must, therefore, "be deemed to be admitted" (*Kuehne & Nagel*, 36 NY2d at 544) and, in the absence of control, Shawmut cannot be liable for the condition of the Accident Site.

Additionally, Shawmut has established that it was a contractor for TD Bank and consequently, dismissal of the claim against it is appropriate since this contractual relation generally does "not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138). None of the *Espinal* exceptions have been proffered by any party and, accordingly, Shawmut's motion for summary judgment dismissing plaintiff's complaint and any cross claims against it must be granted.

Order

It is, therefore,

ORDERED that Shawmut Design and Construction's motion for summary judgment dismissing the complaint and all cross claims against it is granted. The Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: September 30, 2016

GEOFFREY D. WRIGHT
A.J.S.C.

JUDGE GEOFFREY D. WRIGHT
A.J.S.C.