

Ronca v Pelmar, Inc.
2016 NY Slip Op 32675(U)
June 30, 2016
Supreme Court, Westchester County
Docket Number: 53253/2014
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

-----X
DANIEL P. RONCA,

Plaintiff(s),

- and -

CITY OF NEW ROCHELLE,

Plaintiff-Intervenor,

- against -

PELMAR, INC.,

Defendant(s).
-----X

ORDER

Index No. 53253/2014
Motion Date: 3/2/2016

Defendant Pelmar, Inc. (defendant) moves for an order, granting summary judgment in its favor pursuant to CPLR 3212 and, striking plaintiff's supplemental bill of particulars pursuant to CPLR 3043 (b).

The following papers were read:

Notice of Motion-Affirmation-Exhibits (25)-Affidavit of Service	1-28
Affidavit of Paul Vacca-Exhibit-Affidavit of Service	29-31
Affirmation in Opposition-Exhibits (2)-Affidavit of Robert Reilly-Exhibits (11)	32-46
Memo of Law in Opposition-Affirmation of Service	47-48
Reply Affirmation-Exhibits (2)-Affidavit of Service	49-52
Correspondence to Chambers dated February 29, 2016-Sur-Reply	53-54
Correspondence to Chambers dated March 1, 2016	55

By way of background, this is an action for personal injuries sustained by plaintiff Daniel P. Ronca (Mr. Ronca or plaintiff) during the course of his employment as a firefighter with the City of New Rochelle Fire Department. The incident occurred on February 1, 2014 at 470 Pelham Road, New Rochelle, New York (Premises), where Mr. Ronca was responding to a structural fire. At issue in this case is the structural integrity and design of a portico, a structure located at the entrance of the Premises. The portico is

supported by anchorage into the building's brick, has two support columns, and a decorative railing along its perimeter. On the subject date, Mr. Ronca responded to the Premises as a result of a fire and was conducting firefighting operations in apartment 3D. At some point, Mr. Ronca was allegedly injured when he attempted to retreat from the oncoming fire through a window in the subject apartment. Specifically, Mr. Ronca testified that as he leaned out the window, he saw a balcony (*i.e.* the portico) "not that far." Mr. Ronca testified that the balcony was approximately two to three feet to the right of the window and about one foot down. Mr. Ronca testified that when his left foot made contact with the edge of the balcony, it gave way, causing him to fall to the ground and suffer injuries.

Mr. Ronca commenced the instant action with the filing of a summons and complaint on March 4, 2014. The complaint alleges causes of action under General Municipal Law (GML) Section 205-a and General Obligations Law (GOL) Section 11-106. Regarding the former, plaintiff's complaint alleges violations of specific Property Maintenance Code sections of the State of New York, to wit: 301.2, 302.7, 304.6, 304.7, 304.8, 304.9, 304.10, and 304.12. Issue was joined by defendant on April 20, 2014. Plaintiff served a verified bill of particulars on June 11, 2014. Thereafter, a motion to intervene was filed by the City of New Rochelle, asserting a right of recovery from defendant in accordance with GML 207 (a) (7). By stipulation dated December 9, 2014, plaintiff and defendant consented to the City of New Rochelle's intervention. A series of compliance conferences were held and discovery orders were entered on February 26, 2015, April 6, 2015, June 11, 2015, and July 17, 2015. On August 19, 2015, the Court (per Hon. Joan B. Lefkowitz, J.S.C.) issued a trial readiness order. Plaintiff filed a note of issue on the same day indicating, among other things, that the bill of particulars was served and that all discovery was complete. On August 24, 2015, plaintiff served a supplemental bill of particulars. Defendant now moves to strike the supplemental bill of particulars and for summary judgment dismissing the complaint.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining such a motion, the Court must view the evidence in the light most favorable to the non-moving party (*see Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues' " (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], quoting *Andre*, 35 NY2d at 364).

GML 205-a establishes a statutory cause of action for firefighters who suffer injuries in the line of duty "as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the . . . city governments" (GML 205-a [1]). "On a motion for summary judgment the defendant bears the initial burden of demonstrating 'either that [he or she] did not negligently violate any relevant government

provision or that, if [he or she] did, the violation did not directly or indirectly cause plaintiff's injuries' ” (*Anderson v Columbari*, 79 AD3d 679, 680 [2d Dept 2010], quoting *Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to offer proof that the alleged violations increased the likelihood of a fire or the danger of any firefighting operations, or that the alleged violations were otherwise a direct or indirect cause of plaintiff's injuries (*Anderson*, 79 AD3d at 681).

By contrast, GOL 11-106 provides, in relevant part:

“In addition to any other right of action or recovery otherwise available under law, whenever any ... firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that ... firefighter's employer or co-employee, the ... firefighter suffering that injury ... may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury.”

(*Alcalde v. Riley*, 73 A.D.3d 1101, 1103 [2d Dept 2010]). GOL 11-106 “largely abolished the former so-called ‘firefighter’s rule’ by allowing firefighters to assert causes of action sounding in negligence for injuries suffered while in the line of duty against entities other than municipal employers and fellow workers” (*Cassidy v Korik*, 119 AD3d 831, 832 [2d Dept 2014]). A defendant moving for summary judgment on a claim under GOL 11-106 must demonstrate that it did not create, or have actual or constructive notice of, any condition on the premises that caused or related to plaintiff's injuries (*see Alcalde v Riley*, 73 AD3d 1101, 1104 [2d Dept 2010]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In support of the motion, defendant has proffered the affidavit of John Flynn, who identifies himself as a professional engineer and certified fire and explosion investigator. Mr. Flynn opines within a reasonable degree of engineering and fire science certainty that plaintiff's alleged injuries were separate and distinct and in no way related to any action or inaction or any alleged Property Maintenance Code violation on the part of defendant. Based hereon, defendant contends that no defective condition on the portico caused plaintiff to fall and that the alleged code violations at the Premises are not related to plaintiff's fall.

In opposition, the City of New Rochelle has submitted an affidavit from Paul Vacca, who identifies himself as the code enforcement officer for the City of New Rochelle. Mr. Vacca disputes Mr. Flynn's opinion in regards to the applicability of sections 304.7 and

304.8 of the Property Maintenance Code of New York. In opposition, plaintiff points to deposition testimony of Silvan Marcus, the owner of Pelmar, and argues that the testimony raises factual issues. Plaintiff also proffered an affidavit from Robert Reilly, who identifies himself as a licensed architect. Mr. Reilly “categorically disagree[s]” with Mr. Flynn’s conclusion that there is no evidence that Pelmar was in violation of code provisions identified by plaintiff. Mr. Reilly opined that to a “high degree of architectural certainty[,]” on the subject date, “defendant was clearly not in compliance with a number of property maintenance code provisions.”

The general rule is that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] [“Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury.”]). Here, plaintiff and defendant have proffered, among other things, competing expert affidavits, which make summary judgment inappropriate on plaintiff’s claim under GOL 11-106.

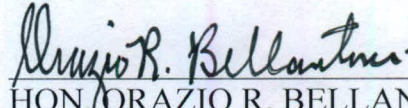
However, defendant’s motion for summary judgment as to plaintiff’s GML 205-a claim is partially granted. Here, defendant made a *prima facie* showing that the alleged violations of Property Maintenance Code were not directly or indirectly related to plaintiff’s fall. In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff’s expert affidavit did not supply “any specific statutory or code violations” and, as such, is insufficient to defeat the defendant’s entitlement to summary judgment on the GML 205-a claim (*see Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 360 [1st Dept 2006]; *Bohan v F.R.P. Sheet Metal Contr. Corp.*, 58 AD3d 781, 781 [2d Dept 2009]). Nevertheless, the affidavit of Mr. Vacca raises a triable issue of fact as to whether the alleged violation of Property Maintenance Code sections 304.7 and 304.8 was a direct or indirect cause of plaintiff’s injuries. Next, the Court addresses defendant’s motion seeking to strike plaintiff’s supplemental bill of particulars.

Pursuant to CPLR 3043 (b), “[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities . . . [p]rovided however that no new cause of action may be alleged or new injury claimed.” The reason for this is that the purpose of a bill of particulars is to “amplify the pleadings, limit the proof, and prevent surprise at trial” (*Jurado v Kalache*, 93 AD3d 759, 760 [2d Dept 2012]). A plaintiff seeking to serve a supplemental bill of particulars post note of issue must seek leave of the Court (*see Rosse-Glickman v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 309 AD2d 846, 846 [2d Dept 2003]; *Stewart v Dunkleman*, 128 AD3d 1338, 1339 [4th Dept 2015]). Here, plaintiff did not seek leave of the Court prior to serving his supplemental bill of particulars.

Accordingly, it is hereby ordered that defendant's motion is decided as follows: defendant's motion for summary judgment on plaintiff's GML 205-a claim is granted to the extent that the claim is based on the alleged violations of Property Maintenance Code sections 301.2, 302.7, 304.6, 304.9, 304.10, 304.12 and denied to the extent that it is based on the alleged violations of Property Maintenance Code sections 304.7 and 304.8; defendant's motion for summary judgment on plaintiff's GOL 11-106 claim is denied; and defendant's motion to strike plaintiff's supplemental bill of particulars is granted. This order is being filed electronically.

This matter is scheduled for a Settlement Conference on August 2, 2016 at 9:15 a.m. in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: June 30, 2016
White Plains, New York


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Justice of the Supreme Court

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