Pillco v Volpi & Son Mach. Corp.
2017 NY Slip Op 32353(U)
October 27, 2017
Supreme Court, Queens County
Docket Number: 24931
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

QUEENS COUNTY
COUNTY CLERK
OCT 31 2017
FILED

MANUEL PILLCO,
Plaintiff,

- against -

VOLPI & SON MACHINE CORP., et al.,
Defendants.

89 STUEBEN CORP. i/s/h/a 89 STUEBEN CORP., and 89 STEUBEN CORP.,
Third-Party Plaintiff,
-against-

GOOD TASTE CORP.,
Third-Party Defendant.

Index No. 24931 2012

Motion Date August 24, 2017

Motion Cal. No. 166

Motion Seq. No. 5

Conference Date October 18, 2017

The following papers numbered 1 to 20 read on this motion by defendant/third-party plaintiff 89 Stueben Corp., i/s/h/a 89 Stueben Corp., and 89 Steuben Corp. (89 Stueben), for an order granting it summary judgment dismissing the complaint; and on this cross motion by third-party defendant Good Taste Corp. (Good Taste), for an order granting it summary judgment dismissing all claims against it.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	1 - 5
Notice of Cross Motion - Affirmation - Exhibits	6 - 9
Ans. Affs. - Exhibits	10 - 14
Reply Affs.	15 - 20

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages for injuries alleged to have been sustained by him due to a workplace accident which occurred on January 29, 2010, at approximately 9:30 p.m., at 89 Stueben Street, Brooklyn, New York, during the course of his employment for Good Taste. Plaintiff worked in a noodle making factory in a commercial space rented to Good Taste by 89 Stueben, the fee owner. Plaintiff testified that, while he was feeding dough into a dough-flattening machine (known as a "Dough Break Machine"), his right foot slipped into a ½-inch deep, 4-6 inch wide hole in the floor, causing his body to move forward and his left hand to go inside the machine, which was missing a guard, thereby causing amputation of his fingers. As a result, plaintiff commenced this suit against, inter alia, the manufacturer of the machine, Volpi & Son Machine Corp.[1], and 89 Stueben as the owner of the premises. 89 Stueben then impleaded Good Taste as a third-party defendant.

89 Stueben submits the deposition testimony of Tai Quen Tran (Tran), who was deposed on behalf of 89 Stueben and Good Taste, as a holder of 20% interest in each corporation. He testified to the following, in relevant part: he is one of four shareholders of both 89 Stueben and Good Taste; the shareholders are the same for both corporations; his responsibilities for Good Taste are separate from his responsibilities for 89 Stueben; both corporations maintain their offices in the subject building, each office separated by a door; it is "not likely" that there is a written lease agreement between 89 Stueben and Good Taste; 89 Stueben had no employees; as the owner of Good Taste, safety of his employees is of paramount concern, however, Seng Kai Wong, Good Taste's night shift manager, is primarily responsible for safety issues, a topic which he discussed with Wong "constantly"; "Mr. Liu" is the supervisor for Good Taste, whose responsibilities include product quality control; Mr. Liu remains on the factory floor his entire shift; as part-owner of Good Taste, Tran's responsibilities are limited to collecting money and going to and from the bank (a responsibility that he shares with one of the other part-owners); that the other two shareholders are "silent partners"[2]; the shareholders essentially never coordinated meetings to discuss the business of Good Taste; in the 12 months preceding the accident, he would visit the factory 2 to 4 times per week during the day to walk around and check to ensure the factory, which included the floors and machines, was clean; in approximately 2005, the company changed exclusively to a night shift – 7:00 p.m. to 4:00 a.m. – in order to accommodate customers who wanted their noodle deliveries in early morning; he was not at all involved in personnel issues; the machines at the factory were purchased in 1986, though he cannot be specific as to who purchased them; he is not aware whether there is any documentation to reflect the purchase, repair, maintenance, etc., of those machines; there

1. Plaintiff was awarded judgment by default against this defendant on the issue of liability by order dated February 20, 2014.

2. It appears that Good Taste is a corporation and not a partnership.

were guards on the machines when they were purchased; he had overheard workers discussing that it was their preference to take the guards off the machines to do the work; he never authorized their removal, and he always instructed/directed that they were to be put back on any time he saw that they were removed; he is unaware of the condition of the floors at the facility as of the date of the accident, as he does not "pay too much attention to it"; the factory floor is comprised of plastic tile which is glued to concrete underneath the tile; Good Taste retained the contractor to install the tile, which tile was in place as of the date of the accident; any repairs or maintenance was Good Taste's responsibility, as 89 Stueben merely rented the facility and is not otherwise involved; if there were a small hole, crack, or other defect which existed on the floor, employees of Good Taste would repair it, otherwise a contractor would be retained; he does not know if anyone was retained to maintain the floor; he has never seen holes and uneven areas on the work floor prior to the accident; none of the tiles upon which the machines rested were ever broken or cracked prior to the accident; he has seen the guard on the machine on which plaintiff had his accident, however, he does not recall the last time he saw it on prior thereto or if it was on the date of the accident; that another company, Dai Hang, a spring roll manufacturing company, also rented the front portion of the building as of the date of the accident, which is separated from the portion at which Good Taste maintains its factory operation; 89 Stueben was formed for the sole purpose of renting the premises, initially to Dai Hang, and then to Good Taste; he was present at the Good Taste factory as an owner of Good Taste; he learned of plaintiff's accident after it happened; he had never received any complaints from anyone from Good Taste prior thereto; after the accident, the layout of the factory floor was changed, which was paid for by Good Taste; this included the purchase of new automated machines and the reorganization of their placement in relation to the old machines.

Tran also submits his affidavit, in which he states that 89 Stueben has continually leased the premises to Good Taste since 1999. He reiterates that 89 Stueben has no employees; rather, it is a real estate company who had no presence at the site and merely collected rent from its tenant and that, when he was at the factory to inspect sanitary conditions, he was there as part of his duties with Good Taste. He explains that Good Taste is responsible for all maintenance and repair as well as machinery used in connection with the business, and that Good Taste owned the machines, including the one at issue in this lawsuit. Finally, he states that Good Taste was exclusively responsible for controlling all of its employees and that 89 Stueben has never been involved with same. He concludes that 89 Stueben was, and still is, an out-of-possession landlord.

89 Stueben also provides Wong's testimony. Wong, who has not worked for the company for approximately three years since his deposition conducted in March 2016, was employed by Good Taste for six to seven years and was supervisor of production. Wong testified to the following, in relevant part: Tran was his supervisor, who he saw – on average

– almost every day; they usually discussed work conditions and the workers; Tran showed him how the machines were operated when he joined Good Taste; he does not know the relationship between 89 Stueben and Good Taste; he was responsible for the supervision of about 20 employees; there was only one shift over which he supervised: 7:00 p.m. to 4:00 a.m.; before that shift, only Good Taste office personnel worked; no one worked on the factory floor other than on the night shift; that there were eight machines on the factory floor, two of which were dough flattening machines; that plaintiff's accident occurred with the dough flattening machine; he was working that day, but did not witness the accident, as he was in Good Taste's office at the time; he was informed on the same day it occurred about 30 minutes later, but cannot recall who told him; responsibility for cleaning or broom sweeping the floor around a particular machine fell on whichever Good Taste employee was working on that particular machine, which cleaning was to be done after the work is completed; he did not inspect the floor around the subject machine prior to the accident, but he looked afterwards upon learning of the accident; he is not aware of whether anyone at Good Taste is responsible for inspecting the floors, nor did he see anyone from Good Taste ever inspecting the floor; there were no instructions, policies, or procedures regarding the maintenance of the floor; he does not recall whether the factory floor was ever changed or otherwise modified; he does not know whether there were any repairs done to the floor; none of the guards on the machines were ever removed prior to the accident, nor did he ever instruct that they should be removed; he does not know who is responsible for repair of the machines, but a contractor would be hired to perform the repair; he never received any complaints, nor did he make any complaints, regarding the machines.

Plaintiff also testified in this matter, to the following, in relevant part (in addition to that testimony recapitulated, *supra*): he was working at Good Taste for approximately six months before the accident occurred; he began working with the dough flattening machine a month after he commenced employment; he learned to use it by watching other employees and also by talking with his friend Marco Espinoza, who helped him find the job; he used the machine every day, despite it always being "damaged"; that a "Chinese man" who worked in the building would always come and try to fix it every two or three days; another Chinese man was his manager, from whom he received his work instructions; both men were always in the factory when he was working; at the time of his accident, there was no guard on the machine, nor were there guards on any of the machines he saw in the factory; the factory floor was made of cement at the time of the accident; there were holes in the floor, he slipped, stepped into the hole, and his hand went in; that hole was located between the right side of the machine and the wall; he had stepped in it before prior to the incident but never before fell since he was very careful; otherwise, he would usually step around it; there was nothing else on the floor that caused him to slip other than the hole; when he returned to the factory post-accident, approximately two or three years later, the floor had been fixed to the extent that "everything was level" and the machine had the guard on it; he never complained

about the floors prior to his accident; the holes were present when he began working there; he does not know what 89 Stueben is.

89 Stueben also presents Espinoza's deposition testimony which states, in relevant part: he was employed by Good Taste as a flour mixer for three years as of 2010; he left the company approximately six months after plaintiff's accident; he does not know his supervisors' names and, instead, he used nicknames to refer to them; he would see two of them every day: one on the factory floor and one in the office; when asked whether he ever heard of 89 Stueben Corporation, he replied "not until I found out the address," which meant that he knew that the corporation existed once he learned of the address of the premises; approximately eight "Chinese people" worked for 89 Stueben in the building during January 2010; of those eight, one would make deliveries and the others worked the machines with him on the factory floor; he later stated that those employees worked for Good Taste also, and then that he meant to say they worked for Good Taste when he stated 89 Stueben; he became aware that they worked for 89 Stueben through his cousin; he later testified that his cousin never told him such a fact; no one there ever told him that they worked for 89 Stueben; at the time of the accident, he heard plaintiff scream, so he turned around, and pressed a button on the machine to remove plaintiff's hand; only one of the machines had a guard on it, and it was not plaintiff's machine; the machines were missing those guards when he first started his employment there; he understood that the accident occurred because there were holes and cracks in the floor; as of the date of the accident, the floor was comprised of tile, under which there was concrete; he never complained about the condition of the floor; he does not know if 89 Stueben would make any repairs if they were required to be made; 89 Stueben completely changed the floor approximately one month after the accident; he later testified that he does not actually know who was responsible for changing the floor; he does not know what 89 Stueben is, but he knows that it "does noodles," which is what Good Taste also does.

In support of its motion, 89 Stueben has advanced three arguments as to why it is not liable for the accident: (1) it did not exercise sufficient control over the factory floor sufficient to warrant the imposition of liability against it for an injury caused by an alleged defective condition and, to that end, Good Taste exclusively controlled the rented space and operations conducted therein; (2) it transferred all responsibility for maintenance, control, and repair of the premises to its tenant, Good Taste, and there was neither a lease between the parties, nor a statutory obligation for it to repair the premises; and (3) the alleged defect was not structural, sufficient to impose liability upon it.

In support of the first argument, 89 Stueben asserts that it did not retain control over the factory floor in the premises that it rented to Good Taste. Rather, Good Taste was fully responsible for training, production, worker safety, and maintenance and repair of the

commercial space. Further, though there was overlapping ownership of landlord and tenant, and though 89 Stueben's office was located on the premises, the witness who appeared on behalf of both corporations indicated that his duties as part owner of 89 Stueben and Good Taste were separate and distinct from one other. His regular appearances on the factory floor were solely made in connection with his obligations with Good Taste, to wit: collection of money and inspection for cleanliness of the factory.

As to the second point, similar to the first, 89 Stueben reiterates that Good Taste would have been responsible for any damage or condition present with respect to the factory floor. Moreover, each employee was responsible for cleaning the floor around a particular machine fell on whichever Good Taste employee had worked on that machine. Further, the course of conduct between 89 Stueben and Good Taste – given the absence of a written agreement delineating the respective rights and responsibilities of the parties with regard to repair and maintenance – reveals that the former exercised no supervision over the factory floor space, irrespective of the fact that 89 Stueben maintained an office in the building. Thus, it was merely an out-of-possession landlord who had no statutory or contractual obligation that would give rise to liability.

Finally, 89 Stueben argues that plaintiff has not alleged a significant structural or design defect such that would give rise to liability.

Good Taste cross-moves for an order dismissing the third-party complaint. To that end, it adopts all the statements of fact and arguments in support of dismissal of the action against 89 Stueben, and, if 89 Stueben's motion is granted, then the third-party complaint against Good Taste must also fail, as workers' compensation would be plaintiff's exclusive remedy.

Good Taste adds the argument that defendants would be prejudiced by plaintiff's belated change in his theory of liability and that the court should not consider plaintiff's allegations about there being a hole in the floor which caused his accident.[3] To that end, Good Taste points out that it was not until after plaintiff testified in 2015, and after the note of issue was filed, that his counsel's office served a supplemental verified bill of particulars claiming that there were holes in the floor. That allegation was not present in the complaint, nor was it present in the verified bill of particulars served two years after commencement of

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3. Though 89 Stueben points out that plaintiff appears to have changed his theory of liability, it did not argue against this court's consideration of same.

the action.[4] Good Taste argues that it would be severely prejudiced by being forced to defend against a new theory of liability over five years after the accident. However, if the court does consider same, there is no evidence that plaintiff put either 89 Stueben or Good Taste on notice of the holes.

89 Stueben submits a partial opposition to the cross motion, stating that, if the court denies its motion, it should also deny Good Taste's cross motion since, inter alia, Good Taste admitted to being responsible for maintenance of the factory floor.

In opposition to the motion, plaintiff first argues that same is premature since there was a pending motion before this court to compel further discovery, namely, inter alia, certain documentation regarding maintenance and repair of the floor and post-remedial repairs. Plaintiff states the uncertainty as to control is illustrated by the conflicting testimony in this case as to whether 89 Stueben employees were present on the factory floor.

Plaintiff otherwise argues that a jury may reasonably conclude that Tran's testimony that he conducted frequent inspections of the factory floor evidences a course of conduct by 89 Stueben indicative of maintenance and control of the floor. Plaintiff also points out the contradictory testimony between Tran and Espinoza, thereby raising issues of credibility only a jury may decide. Specifically, inter alia, a jury may determine that Espinoza's testimony that employees of 89 Stueben were present on the factory floor, thus inferring that the company had actual notice of a dangerous and defective condition on the floor. Moreover, he also indicated that 89 Stueben "changed" the floor after the accident, establishing control.

Plaintiff also argues that 89 Stueben should not be able to use the absence of a written lease to its advantage. He also argues that Tran's affidavit should not be considered, as it is used merely to avoid the consequences of his testimony.

As to the issue of defendants' argument regarding an alleged change in plaintiff's theory of liability, plaintiff states that he merely clarified facts at his deposition – a tool used to discover the details of the accident – what it was on the floor that caused him to fall.

In reply, 89 Stueben states that plaintiff has already received the disclosure to which he is entitled and has not otherwise raised an issue of fact sufficient to defeat the motion. 89 Stueben argues that plaintiff mischaracterizes Espinoza's testimony, since the latter admitted

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4. Counsel for Good Taste also points out that plaintiff's firm was on the service list for plaintiff's Worker's Compensation claim, filed approximately one month after the accident. Thus, "[d]espite being represented by counsel within weeks of the subject accident, Plaintiff never made any claims regarding holes in the floor until his deposition on June 12, 2015."

that he mistakenly assumed that the people seen on the factory floor were employees of 89 Stueben. It also sates that Tran's preference for safety and cleanliness is not evidence of control "but of his conscientious adherence to his limited obligations to Good Taste, which included inspecting for cleanliness and collecting rent."

Further, 89 Stueben argues that the parties' course of conduct evidences that it was Good Taste's responsibility to maintain and repair the premises and that aside from renting the premises to Good Taste and maintaining an office in the building, 89 Stueben transferred control of the factory floor to its tenant.

As to Good Taste's reply, it argues that plaintiff's changed theory of the case clearly prejudices defendants, as one claim involves a transient condition (i.e., dust and debris). Further, though the amendment was not made on the eve of trial, it was made years after the accident occurred and long after defendants could fully photograph the floor to properly refute plaintiff's claims.

Finally, irrespective of those issues, Good Taste admits that it is responsible for repair and maintenance of the floor, and there is no evidence that 89 Stueben had any responsibility therefor. If the court finds otherwise, the cross motion must, in any event, be granted since 89 Stueben cannot be indemnified for its own negligence.

Generally, liability for a dangerous condition on real property is predicated upon ownership, occupancy, control, or special use of the property (*see Futter v Hewlett Sta. Yogurt, Inc.*, 149 ADd3d 912 [2d Dept 2017]; *Casson v McConnell*, 148 AD3d 863 [2d Dept 2017]; *Micek v Greek Orthodox Church of Our Savior*, 139 AD3d 830 [2d Dept 2016]). "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (*Casson*, 148 AD3d at 712-13 [internal quotation marks omitted]; *see Chalouh v Lati, LLC*, 144 AD3d 621 [2d Dept 2016]; *Beeker v Islip U-Slip, LLC*, 143 AD3d 749 [2d Dept 2016]; *Keum Ok Han v Kemp, Pin & Ski, LLC*, 142 AD3d 688 [2d Dept 2016]).

On the papers submitted to the court, it cannot be said that 89 Stueben has established, prima facie, that it was an out-of-possession owner of the premises (*see generally Elsayed v Al Farha Corp.*, 132 AD3d 942 [2d Dept 2015]; *Figuero v Gueye*, 66 AD3d 638 [2d Dept 2009]; *Taylor v Lastres*, 45 DA3d 835 [2d Dept 2007]). Specifically, Espinoza's testimony is problematic, to the extent that his own apparent confusion regarding the two entities calls for the matter to be resolved by a jury. It is not for the court to decide – as 89 Stueben suggests in its papers – that Espinoza simply corrected earlier testimony in which he otherwise implicated 89 Stueben. For example, in less than a page's worth of deposition

transcript, Espinoza goes from stating that eight 89 Stueben employees worked with him on the factory floor (50:13-20), to then stating that those employees *also* worked for Good Taste (51:2-6), to then stating that he meant that they worked for Good Taste, when he originally said 89 Stueben (51:7-10). To dismiss Espinoza's testimony regarding 89 Stueben's involvement as a simple blunder is also to ignore the final responses he gave at his deposition, to wit: that both 89 Stueben and Good Taste were in the noodle business. Indeed, "[r]esolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]).

Moreover, it is noted that 89 Stueben's counsel represented, for example, in his reply papers (quoted, *supra*, at p. 8), that Tran, in connection with his obligations to Good Taste, "collect[ed] rent." This would appear to be a duty performed by Tran in connection with his obligation to 89 Stueben and not Good Taste. This issue, taken together with, inter alia, the identical composition of shareholders of both corporations, Espinoza's testimony, and Tran's testimony (specifically acknowledging his presence almost daily on the factory floor), at the very least, creates an issue of fact for the jury to determine whether 89 Stueben was an out-of-possession landowner (*see e.g. Massucci v Amoco Oil Co.*, 292 AD2d 351 [2d Dept 2002]).

Since 89 Stueben's remaining arguments in support of dismissal involve its scope of duty (or absence thereof) as an out-of-possession landowner, given the above discussion, it is not necessary to consider those arguments.

Turning to Good Taste's cross motion, contrary to its contention, the court will consider the allegations set forth in plaintiff's supplemental bill of particulars. Notably, it is irrelevant whether one considers the bill to be an amended or supplemental one; even if Good Taste were correct that it constituted an amendment served without leave, the note of issue was vacated approximately three months after the bill was served, rendering moot Good Taste's objections to it (CPLR 3042 [b]; *see e.g. Leach v North Shore Univ. Hosp. at Forest Hills*, 13 AD3d 415 [2d Dept 2004]).

Furthermore, Good Taste places much emphasis on the five-year gap between the accident and the service of the supplemental bill. However, it is through no fault of plaintiff that 89 Stueben initially defaulted in appearance, causing delay in the prosecution of this case, and it is further through no fault of plaintiff that Good Taste was impleaded as a third-party defendant in February 2014. Thus, whether plaintiff alleged in his first bill that he was caused to fall as a result of a hole or whether he stated it in his deposition and subsequent bill seven and eight months later, respectively, Good Taste would still be in the same position in terms of passage of time. To the extent that Good Taste argues that plaintiff did not advise

Good Taste that there were holes in the floor in connection with plaintiff's Workers' Compensation claim, Good Taste provides no evidence to that effect. In any event, Good Taste is free to explore any potential inconsistencies in plaintiff's claims at trial, where a jury will be required to weigh the evidence and make a determination as to what caused him to fall. Finally, plaintiff cannot be expected to detail specifics of his accident at the pleadings stage, nor is he required to do so. In any event, plaintiff indeed testified – in accordance with his complaint and first bill of particulars – that he slipped. He also alleged in the complaint that the premises was, inter alia, "unlevel, . . . defective and hazardous." That Good Taste would have conducted its post-accident inspection of the premises differently is not plaintiff's concern.

Finally, while it does not appear that Good Taste was actually notified of any alleged defect on the factory floor, testimony suggests that said defect may have present long enough to constitute constructive notice (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Bergin v Golshani*, 130 AD3d 767 [2d Dept 2015]).

Since movant and cross-movant have failed to meet their burden, the court need not consider the sufficiency of plaintiff's opposition papers (see Calderon v 88-16 N. Blvd, LLC, 135 AD3d 681 [2d Dept 2016]; *Elsayed*, 132 AD3d 944).

Accordingly, the motion is denied.

Dated: October 27, 2017

J.S.C.

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