

Sobarzo v Nanoia Recycling Equip., Inc.

2018 NY Slip Op 30319(U)

February 12, 2018

Supreme Court, Suffolk County

Docket Number: 15-10363

Judge: David T. Reilly

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INDEX No. 15-10363
CAL. No. 17-00385OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 7-7-17 (001)
MOTION DATE 9-6-17 (002)
ADJ. DATE 1-24-18
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

-----X
FREDDY SOBARZO and BARBARA
SOBARZO,

Plaintiffs,

- against -

NANOIA RECYCLING EQUIPMENT, INC.,

Defendant.
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 33; Answering Affidavits and supporting papers 34 - 35; Replying Affidavits and supporting papers 36 - 38; 39 - 40; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the cross-motion by plaintiffs for leave to amend is granted; and it is further.

ORDERED that the motion by defendant Nanoia Recycling Equipment, Inc. for an Order dismissing plaintiff's complaint against it, pursuant to Civil Practice Law and Rules (CPLR) §3212, is granted.

Plaintiff Freddy Sobarzo commenced this action to recover damages for injuries he allegedly sustained while emptying a trash compactor at a Waldbaums supermarket in the course of his employment. The accident allegedly occurred on June 21, 2012, when a bungee cord plaintiff was using to close the trash compactor struck his eye. The complaint alleges that the trash compactor was in a defective and hazardous condition because defendant Nanoia Recycling Equipment, Inc. (hereinafter

referred to as Nanoia) negligently maintained the device. Freddy Sobarzo's wife, Barbara Sobarzo, asserts a derivative cause of action.

Nanoia moves for summary judgment dismissing the complaint against it on the grounds that it did not own or operate the premises where the subject accident occurred. In support of its motion, Nanoia submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, an agreement between USM, Inc. and Nanoia, and invoices related to repairs done by Nanoia at the subject Waldbaums store.

Plaintiffs cross-move for leave to amend the complaint and oppose Nanoia's motion, arguing that a triable issue of fact exists as to whether it failed to exercise reasonable care in its duty to maintain the compactor. In support of the cross-motion and in opposition to Nanoia's motion, plaintiffs submit, among other things, plaintiff's own affidavit and an affidavit of Robert Crandall, photographs of the bungee cord and the trash compactor, and a transcript of Frederick Von Barga's deposition testimony. The proposed amended complaint and amended bill of particulars alleges, among other things, that Nanoia failed to maintain the trash compactor in a reasonably safe condition. Specifically, they allege that Nanoia disengaged a safety device, which would have shut off the compactor unit and prevented it from operating when the chute door to the compactor was open.

At his examination before trial, plaintiff testified that at the time of the accident, he was employed by Progressive Waste Solutions, Inc. as a roll-off truck driver, and that he would transport the trash compactor and haul it to the garbage dump. He testified that on the day of the accident, he was placing a "diaper," a rubbery cover which prevents the garbage from falling out of the compactor as it is being hauled away, on the subject trash compactor. He explained that he was injured when one side of the bungee cord he was using to secure the diaper "gave way" and struck his left eye. He further testified that there is a chute inside the Waldbaums store which leads to the subject trash compactor. He testified that before he would disconnect the hydraulic hoses of the compactor, the supermarket store personnel would press a button activating a blade that pushes garbage still in the chute into the trash compactor.

At his examination before trial, Frederick Von Barga, President of Nanoia, testified that the company repairs electric pallet jacks, garbage compactors, baling machines, loading docks and forklifts. He testified that Nanoia did work as a subcontractor for a company known as USM, repairing trash compactors and other machinery at clients of USM, including A&P, the parent company of Waldbaums. He testified that prior to the subject accident, Nanoia serviced the subject trash compactor four times when it received a request from USM and that there was no routine maintenance of the trash compactor.

Generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see Lariviere v New York City Tr. Auth.*, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; *Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; *Barnes Coy Architects, P.C. v Shamoon*, 53 AD3d 466, 863 NYS2d 216 [2d Dept 2008]). Absent evidence showing that defendants are surprised or prejudiced by the proposed amendment to the complaint, plaintiff's motion for leave to serve the

proposed amended complaint is granted (*see Pepe v Tannenbaum*, 262 AD2d 381, 681 NYS2d 138 [2d Dept 1999]). A motion for leave to amend or supplement a bill of particulars is governed by the same standards applied to motions to amend pleadings (*Scarangelo v State of New York*, 111 AD2d 798, 798, 490 NYS2d 781 [2d Dept 1985]).

Here, the proposed amendments cannot be characterized as palpably devoid of merit or insufficient as a matter of law, and there is no evidence defendants will be surprised or prejudiced by the delay in seeking to amend the complaint to add additional defendants (*see Guinta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *Gitlin v Chirinkin*, *supra*). Accordingly, plaintiffs' cross-motion for leave to amend the complaint and bill of particulars is granted and the amended complaint and amended bill of particulars shall be deemed served as of the return date of plaintiffs' cross motion.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (*Eisman v State*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Pulka v Edelman*, *supra*). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (*Church v Callanan Indus.*, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; *Waters v New York City Hous. Auth.*, 69 NY2d 225, 229, 513 NYS2d 356 [1987]). Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Pulka v Edelman*, *supra*, at 586; *see Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]).

Generally, a contractual obligation will not confer tort liability in favor of a third-party (*see Espinal v Melville Snow Contrs.*, *supra*; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d

220, 226, 557 NYS2d 286 [1990]; *Church v Callanan Indus.*, *supra*). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) “where the contracting party, in failing to exercise reasonable care in the performance of its duties, ‘launched a force or instrument of harm’” (*Espinal v Melville Snow Contrs.*, *supra*, at 140, 746 NYS2d 120, quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (*Church v Callanan Indus.*, *supra*, at 111); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party’s obligations (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner’s duty to safely maintain the property (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]).

The motion by Nanoia seeking summary judgment dismissing plaintiffs’ complaint against it is granted, as it established prima facie that it did not owe a duty to plaintiff. Here, the deposition testimony of Von Bargaen reveals that Nanoia made repairs to the trash compactor at the subject Waldbaums after receiving service requests from USM and that Nanoia did not conduct routine inspections of the trash compactor. Thus, it cannot be said that Nanoia undertook a comprehensive and exclusive property maintenance obligation intended to displace plaintiff’s duty, as the landowner, to safely maintain the property (*see Palka v Servicemaster Management Servs. Corp.*, 83 NY2d 579, 611 NYS2d 817 [1994]; *Roussos v Ciccotto*, 15 AD3d 641, 792 NYS2d 501 [2d Dept 2005]). Moreover, the record demonstrates that there is no evidence that the actions of Nanoia “advanced to such a point as to have launched a force or instrument of harm,” or that plaintiff detrimentally relied on its performance (*see Santos v Deanco Servs., Inc.*, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]; *Mougiannis v Dermody*, 87 AD3d 993, 929 NYS2d 323 [2d Dept 2011]; *Marchetti v Allstate Conveyor Serv., Inc.*, 67 AD3d 748, 888 NYS2d 597 [2d Dept 2009]). Von Bargaen testified that the last time Nanoia made repairs at the subject Waldbaums before the June 2012 accident was in February 2012.

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs contend that Nanoia was negligent in failing to maintain the compactor in a safe condition by permitting the compactor to be loaded with its chute door open which allowed the trash compactor to become overloaded and require plaintiff to use a diaper to cover the trash compactor. Here, it is undisputed that Nanoia had no control over the supermarket personnel who loaded the compactor with garbage. Moreover, the purported expert affidavit submitted by plaintiffs consisted of mere speculative and conclusory assertions unsupported by adequate foundational facts and accepted industry standards (*see Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 905 NYS2d 190 [2d Dept 2010]; *Pappas v Cherry Cr., Inc.*, 66 AD3d 658, 888 NYS2d 511 [2d Dept 2009]; *DeLeon v State of New York*, 22 AD3d 786, 803 NYS2d 692 [2d Dept 2005]). The affidavit merely concludes that Nanoia negligently maintained and repaired the compactor because it permitted a safety device to be disengaged, permitting supermarket personnel to load the compactor with garbage while it was running with its chute door open. However, plaintiffs fail to submit any evidence that Nanoia disengaged the safety device or knew it was disengaged. Even assuming that it did, at most under the circumstances, the disengaged safety device “merely furnished the

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condition or occasion for the occurrence of the event rather than one of its causes” (*Margolin v Friedman*, 43 NY2d 982, 983, 404 NYS2d 553 [1978]; see *Castillo v Amjack Leasing Corp.*, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]; *Vayser v Waldbaum, Inc.*, 225 AD2d 761, 640 NYS2d 177 [2d Dept 1996]).

Accordingly, plaintiffs’ cross-motion for leave to amend is granted and defendant’s motion for summary judgment dismissing the complaint against it is granted.

Dated: February 12, 2018


J.S.C.
HON. DAVID T. REILLY

FINAL DISPOSITION NON-FINAL DISPOSITION