Mendez v City of New York
2019 NY Slip Op 31172(U)
April 24, 2019
Supreme Court, New York County
Docket Number: 152094/2016
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

----------X

EDWARD MENDEZ,

Plaintiff,

Index No.: 152094/2016

DECISION & ORDER

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,

Defendants.

----------X

HON. ALEXANDER M. TISCH, J.S.C.:

In this personal injury/negligence action, plaintiff Edward Mendez (Mendez) moves for partial summary judgment on the issue of liability on his first cause of action for violation of General Municipal Law §205-e, while the defendants City of New York (the City) and the New York City Police Department (NYPD; together, defendants) cross-move to dismiss the complaint (motion sequence number 003). Mendez also moves separately for leave to serve an amended complaint (motion sequence number 004). The motions and cross motion are decided as set forth herein.

BACKGROUND

On December 7, 2015, Mendez suffered injuries while employed as an NYPD facilities manager at the horse barn used by the NYPD's Mounted Unit at 553 West 53rd Street in the County, City and State of New York. *See* notice of motion (motion sequence number 003), Kremen affirmation, ¶ 4. Mendez states that he and two civilian maintenance workers were rolling an "aerial lift" to a portion of the barn located below some ceiling duct work which the maintenance workers intended to service. *Id.*, ¶ 5. While they were moving the lift, the safety

pin holding its rear swivel jack in place came loose. *Id.*, ¶¶ 6-8. As a result, the jack no longer held the lift erect, and it collapsed downward. *Id.* The ensuing crash drove the end of the lift that Mendez was holding sharply down, and it struck his left leg and ankle, causing injuries. *Id.*

Mendez filed a notice of claim, and thereafter commenced this action on March 10, 2016 by filing a summons and complaint which sets forth causes of action for violations of: 1) General Municipal Law § 205-e; 2) Labor Law § 240 (1); 3) Labor Law § 241 (6); 4) Labor Law § 200 (1); and 5) CPLR 1602. *See* notice of motion (motion sequence number 003), exhibit A (complaint). Defendants filed a joint answer on April 1, 2016, although they did not include a copy of it with their papers. In any event, discovery ensued, and Mendez filed a note of issue on February 8, 2018.[1] Defendants thereafter moved to strike the note of issue on February 28, 2018 (motion sequence number 001). That motion is still *sub judice*. Mendez then moved for partial summary judgment on his first cause of action, and defendants filed a cross motion to dismiss the complaint (together, motion sequence number 002); however, the parties later agreed to withdraw those motions in a stipulation dated July 5, 2018 and so-ordered by the Court on February 24, 2019. Now before the Court are the current motions and cross motion under motion sequence numbers 003 and 004.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier*

[1] Defendants motion to strike the note of issue (motion sequence number 1) will be decided by separate decision and order.

& Carreras v Lacher, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

Mendez seeks partial summary judgment on his first cause of action for the alleged violation of General Municipal Law § 205-e. *See* notice of motion (motion sequence number 003), exhibit A, ¶¶ 10-12. The Court of Appeals holds that "[t]o make out a valid claim under General Municipal Law § 205–a and survive a motion to dismiss, a plaintiff must '[1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [plaintiff] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the [plaintiff].'" *Giuffrida v Citibank Corp.*, 100 NY2d 72, 79 (2003); quoting *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441 (1995). Mendez asserts that he has demonstrated each of these elements. *See* notice of motion, Kremen affirmation, ¶¶ 16-43. He specifically avers that: 1) defendants failed to comply with Labor Law § 27-a (3) (a) (1) and 29 CFR 1910.244; 2) he "was injured when the aerial lift's jack collapsed and the hitch end of the lift fell against his leg"; and 3) defendants' negligence may be inferred from (a) "the City's failure to train its employees regarding the proper inspection, maintenance and repair of the jack . . . to, in fact, maintain and inspect the jack . . . [and] the failure to tag the jack and pull it from use until maintained and repaired," and (b) the City's failure "to furnish [him with] . . . a place of employment which was free from recognized hazards that are . . . likely to cause death or serious physical harm . . . [or to] provide reasonable

and adequate protection" from same. *Id.* The Court finds that these assertions are adequate to state a prima facie case of liability for a violation of General Municipal Law § 205-a, since they allege each of the three elements of such a claim. In particular, Mendez has identified the necessary statutory bases for his claim, and has also alleged sufficient facts (a) concerning the circumstances of his injury; and (b) from which to infer the element of causation arising from defendants' negligence. Mendez also correctly points out that, in making a General Municipal Law § 205-a or § 205-e claim, he is *not* legally obligated to establish that defendants had actual or constructive notice of the condition which caused his injury. *See, e.g., Alexander v City of New York*, 82 AD3d 1022, 1023-1024 (1st Dept 2011).

Defendants first contend in opposition that the complaint should be dismissed "for failure to state a cause of action." *See* notice of cross motion, Nielson affirmation, ¶¶ 12-19. Defendants base this argument on the requirement that "statements in a pleading shall be sufficiently particular," which is set forth in CPLR § 3013. *Id.* Defendants' CPLR § 3013 argument is misplaced, since a challenge to the sufficiency of the pleadings is not the same thing as a challenge to a plaintiff's offers of proof. Defendants' argument also lacks merit because the Court has already determined that Mendez has sufficiently established and supported all of the elements of a General Municipal Law §§ 205-a/205-e claim.

Next, defendants contend that "the City is entitled to summary judgment because it did not have actual or constructive notice of the condition that allegedly injured plaintiff." *See* notice of cross motion, Nielson affirmation, ¶¶ 20-41. However, as previously noted, plaintiff's employment as a police officer means that General Municipal Law §§ 205-a and/or 205-e do not obligate him to establish defendants' notice of a dangerous/defective condition, as would be

required under a common-law theory of negligence. *Alexander v City of New York*, 82 AD3d at 1023-1024.

Next, defendants contend that "the City is entitled to summary judgment because it did not cause or create the condition that allegedly caused the plaintiff injuries." *See* notice of cross motion, Nielson affirmation, ¶¶ 42-45. Like defendants' previous argument, this one lacks merit because General Municipal Law §§ 205-a and/or 205-e do not require a plaintiff to establish the element of "causation" in the same manner that applies to a common-law negligence claim. Instead, "the plaintiff must only establish that 'the circumstances surrounding the violation indicate that it was a result of neglect, omission, willful or culpable negligence on the defendant's part.'" *Alexander v City of New York*, 82 AD3d at 1024 (citation omitted). *Fink v Board of Educ. of City of N.Y.* (117 AD2d 704 [2d Dept 2004]), which defendants cited to support their argument to the contrary, is inapposite, since it did not involve a General Municipal Law §§ 205-a/205-e claim. Moreover, defendants failed to challenge the factual bases that Mendez asserted to support his inference of defendants' negligence. Instead, defendants merely alleged that "plaintiff has not produced any evidence that the City in some way made some type of affirmative act that caused the boom to collapse." *See* notice of cross motion, Nielson affirmation, ¶ 45. This is incorrect. The Court has already determined that Mendez's allegations that defendants owned the aerial lift which collapsed and caused his injuries, and that they failed to inspect, maintain or repair it, or to sufficiently train their employees in its proper use, are sufficient to establish the quantum of causation that is required by General Municipal Law §§ 205-a and/or 205-e. Defendants' argument does nothing to refute this finding.

Finally, defendants contend that "because the City is entitled to summary judgment as

there was no actual or constructive notice, and the City did not cause and create the condition, plaintiff's motion must fail as a matter of law." *See* notice of cross motion, Nielson affirmation, ¶¶ 62-54. This argument is merely an amalgamation of the three arguments already rejected by the Court. Accordingly, having found that Mendez has established a prima facie case with respect to his first cause of action for defendants' violation of General Municipal Law §§ 205-a and/or 205-e, the Court grants so much of Mendez's motion as seeks partial summary judgment on the issue of liability with respect to that cause of action, and denies so much of defendants' cross motion as seeks summary judgment to dismiss that cause of action. Defendants' cross motion for summary judgment to dismiss Mendez's other causes of action is denied, both because the Court's decision on Mendez's motion has rendered the request moot, and because defendants' cross motion is devoid of any argument directed against any of those causes of action.

In light of the above, plaintiff's motion for leave to serve and file an amended complaint, pursuant to CPLR 3025 (b) is denied as moot (see Kremen affirmation, ¶ 16 [noting that plaintiff's motion was made in the event that the Court found defendants' cross motion of merit with respect to the sufficiency of plaintiff's pleading]).

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Edward Mendez (motion sequence number 003) for partial summary judgment on his first cause of action for defendants' violation of General Municipal Law §§ 205-a and/or 205-e is granted to the extent of awarding plaintiff summary judgment on the issue of liability; and it is further

ORDERED that the matter shall proceed to a trial on damages, subject to the decision and order on motion sequence number 001 concerning the note of issue and discovery; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of the co-defendants City of New York and New York City Police Department (motion sequence number 003) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3025 (b), of plaintiff Edward Mendez (motion sequence number 004) is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 24, 2019

ENTER:

Hon. Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH