

**Ionescu v Harvard Maintenance, Inc.**

2019 NY Slip Op 31211(U)

April 30, 2019

Supreme Court, New York County

Docket Number: 159495/2017

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

-----X INDEX NO. 159495/2017

EUGEN IONESCU,

Plaintiff,

MOTION SEQ. NO. 001

- v -

HARVARD MAINTENANCE, INC. and CLAUDIO PEREZ,

**DECISION AND ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40

were read on this motion to/for SUMMARY JUDGMENT

In this personal injury action, plaintiff Eugen Ionescu moves, pursuant to CPLR 3212, for partial summary judgment on liability as against defendants Harvard Maintenance, Inc. ("Harvard") and Claudio Perez ("Perez"). Plaintiff also moves, pursuant to CPLR 3212(a) and 3211(b), to dismiss defendants' first, third, sixth and seventh affirmative defenses. Defendants oppose the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff commenced the captioned action by filing a summons and verified complaint on October 25, 2017. Doc. 1. In his complaint, plaintiff alleged that he was injured on June 23, 2017 when he tripped and fell over a hose on the sidewalk near the loading dock of 60 Broad Street in Manhattan. Doc. 1 at par. 13. He claimed that the accident occurred due to the negligence of Harvard and its employee Perez. Doc. 1 at pars. 14-16.

Defendants joined issue by their verified answer, filed December 15, 2017, in which they denied all substantive allegations of wrongdoing and asserted affirmative defenses. Doc. 7.

A preliminary conference was held in this matter on March 20, 2018. Doc. 10.

In his bill of particulars, plaintiff alleged that, on June 23, 2017, Perez, an employee of Harvard, was using a hose “at or near the sidewalk abutting the loading dock for 60 Broad Street” and that Perez negligently “extended the hose as plaintiff was walking by causing [plaintiff] to fall.” Doc. 19 at pars. 2 – 4. Plaintiff further alleged, among other things, that defendants failed to warn him about the tripping hazard. Doc. 19 at par. 4. Additionally, plaintiff claimed that defendants had actual and constructive notice of the dangerous condition. Doc. 19 at par. 6.

On May 30, 2018, defendants served a supplemental discovery response, which included the following written but unsworn statement by Perez:

This morning approximately 7:45 a.m. when I was hosing down the sidewalk and the loading bay, a gentleman walking toward New St. and Exchange Place accidentally fell over the hose and caution sign while I was pulling the extra slack of the hose[.] Security Officer David [Lynch] and I help[ed] the gentleman to his feet[.] We offered assistance and he just continue[d] on his way.

Doc. 20.

Defendant’s supplemental response also refers to a video of the alleged incident exchanged by defendants, although it is unclear from the papers when the video was exchanged. Specifically, defendants’ counsel represents in the supplemental response that “[u]pon information and belief, the person with the hose in the video is [Harvard employee Perez].” Doc. 20.

On July 2, 2018, plaintiff filed the instant motion, pursuant to CPLR 3212, seeking summary judgment on liability. Doc. 16. Plaintiff also moved, pursuant to CPLR 3212(a) and 3211(b), to dismiss defendants’ first, third, sixth and seventh affirmative defenses. Doc. 16. In

support of the motion, plaintiff submits his own affidavit, an attorney affirmation, the bill of particulars, and defendants' supplemental discovery response. Docs. 17-20.

In an affidavit in support, plaintiff avers that he fell when Perez "pulled the slack out of a hose just as a [sic] I was passing by causing me to fall to the ground." Doc. 18. He further states that he reviewed the surveillance video he exchanged with defendants and that it fairly and accurately depicts the incident. Doc. 18.

Plaintiff's counsel argues in an affirmation in support that plaintiff is entitled to summary judgment on liability based on: 1) plaintiff's affidavit attesting to the fact that Perez caused the accident; 2) Perez's admission that he pulled the hose as plaintiff walked by; 3) the video confirming the manner in which the incident occurred; and 4) defendants' supplemental response conceding that Perez was in the video. Doc. 17. Counsel further asserts that defendants' third affirmative defense, asserting culpable conduct, and sixth affirmative defense, asserting culpable conduct including assumption of risk, must be dismissed since the evidence proves that he did not cause or contribute to the accident. Doc. 17. He also maintains that that part of defendants' sixth affirmative defense alleging assumption of risk must be dismissed since that doctrine is only applicable to athletic and recreational activities. Doc. 17. Additionally, counsel asserts that the seventh affirmative defense, alleging culpable conduct of third persons, must be dismissed since neither the surveillance video nor Perez's statement reflects that the accident was caused by anyone other than Perez.

In opposition to the motion, defendants' attorney argues that the motion must be denied in all respects since: 1) plaintiff fails to establish its entitlement to summary judgment on liability as a matter of law; 2) it is procedurally defective insofar as it does not annex all pleadings or the video thereto; 3) it is premature, since no depositions have been held and plaintiff still owes responses

to defendants' discovery demands; 4) the video is not authenticated; and 5) plaintiff was comparatively negligent. Doc. 24. Defendants claim that, at the very least, they are entitled to a deposition of plaintiff regarding what he observed before he fell, whether he had seen the hose on prior occasions, and whether he could have walked around, instead of over, the hose. Doc. 24. Counsel further asserts that defendants cannot be liable herein since they did not owe a duty to plaintiff. Doc. 24.

Additionally, defendants' attorney asserts that plaintiff is not entitled to the dismissal of its first, third, sixth and seventh affirmative defenses. He also maintains that David Lynch, an employee of Universal Protection, was at the site and is "also responsible for the subject accident" because he failed to prevent plaintiff from stepping over the hose. Doc. 24 at par. 29.

In an affidavit in opposition, Perez argues that the accident occurred because, "unbeknownst to [him], as [he] was pulling slack of the power washer hose to be able to reach further areas to power wash", plaintiff attempted to step over the hose. Doc. 25 at par. 2. Perez maintains that he did not see plaintiff until the moment he (plaintiff) attempted to step over the hose. Doc. 25 at par. 2. He maintains that the accident occurred solely because plaintiff tried to step over the hose. Doc. 25 at par. 4. Perez further maintains that he watched the surveillance video, which does not show a warning sign he had placed outside the loading dock area before he began power washing that day. Doc. 25 at par. 5.

In reply, plaintiff's attorney argues that this Court is not required to deny the motion simply because plaintiff did not efile all exhibits and the video; that the video was properly authenticated; that the motion is not premature because further discovery is not necessary to resolve it; that Perez admitted that he did not see plaintiff until the moment he tried to step over the hose; that even if there had been a warning sign at the site, it would only bear upon plaintiff's culpable conduct and

would not preclude summary judgment; that defendants had a duty to plaintiff; that the issue of whether the hose was open and obvious is irrelevant in determining summary judgment on liability; that plaintiff established that Perez's act of pulling the hose was the proximate cause of the accident; and that the aforementioned affirmative defenses must be dismissed. Doc. 36.

## LEGAL CONCLUSIONS:

### Partial Summary Judgment on Liability

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, plaintiff has established his prima facie entitlement to partial summary judgment on liability against defendants by submitting: 1) his affidavit, in which he stated under oath that Perez pulled the hose just as he was approaching it (Doc. 18); 2) Perez's written statement admitting that plaintiff fell when he (Perez) "pull[ed] the extra slack of the hose" (Doc. 20); and 3) the video, reviewed by this Court, clearly showing that the incident occurred when Perez pulled the hose with his head turned away from the direction from which plaintiff was approaching.

Defendants fail to raise a material issue of fact warranting the denial of the motion. Indeed, Perez concedes in his affidavit in opposition that he did not see plaintiff “until the moment [he attempted] to step over the [hose].” Doc. 25. Although Perez states in his affidavit that he had placed a warning sign near the loading dock which could not be seen in the video “but it was most certainly capable of being seen by pedestrians outside the building” (Doc. 25), such a speculative and conclusory contention is insufficient to defeat a summary judgment motion. *See Montiel v Sailsman*, 134 AD3d 470, 471 (1<sup>st</sup> Dept 2015). This is especially so given that Perez failed to describe the exact location of the sign.

Defendants’ contention that the video is inadmissible is without merit, since plaintiff properly authenticated the same by representing in his affidavit that the footage accurately depicted the occurrence. *See Patterson*, 93 N.Y.2d 80, 84 (1999); *People v Byrnes*, 33 NY2d 343, 347 (1974).

Although defendants correctly assert that the pleadings and the video were not filed with NYSCEF, this does not warrant denial of the motion. This Court may take judicial notice of court records, including pleadings, even if not annexed to a motion. *See Kinberg v Kinberg*, 85 AD3d 673, 674 (1<sup>st</sup> Dept 2011). Since the video footage was on a compact disc, which cannot be filed with the court, plaintiff should have efiled a “Notice of Hard Copy Exhibit Filing” (NYSCEF Form EF-21) in addition to providing defendants with the disc. Although plaintiff’s counsel did not file the form, this Court disregards his omission given that defendants, who admittedly received a copy of the disc from plaintiff (Doc. 24 at par. 13), were not prejudiced. *See CPLR 2001*. Plaintiff’s counsel is directed to efile form EF-21 upon receipt of this order, and such filing shall be effective nunc pro tunc.

Defendants' argument that the motion for partial summary judgment must be denied because plaintiff was contributorily negligent fails as well. Initially, contributory negligence was abolished in New York State in 1975, at which time the Legislature adopted comparative negligence. See CPLR 1411; *Custodi v. Town of Amherst*, 20 NY3d 83, 87 (2012). Further, plaintiff is "not required to demonstrate his own freedom from comparative negligence in order to be entitled to summary judgment as to defendants' liability." *Thompson v Coca-Cola Bottling Co.*, \_\_\_ AD3d \_\_\_, 2019 Slip Op 02285 (1<sup>st</sup> Dept 2019) citing *Rodriguez v City of New York*, 31 NY3d 312 (2018).

Also misplaced is defendants' argument that they owed no duty to plaintiff. "A cleaning contractor that fails to exercise reasonable care in the performance of its duties, thereby creating an unsafe condition, owes a duty of care to persons who may foreseeably be injured, notwithstanding that such persons are not parties to the cleaning services contract (see *DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 487 [1<sup>st</sup> Dept 2014]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 928 [2d Dept 2009])." *Levine v G.F. Holding, Inc.*, 139 AD3d 910, 911 (2d Dept 2016). Here, defendants failed to raise a triable issue of fact in response to plaintiff's showing that he was caused to fall by an unsafe condition created by Perez. See *Velez v New York City Hous. Auth.*, 91 AD3d 422 (1<sup>st</sup> Dept 2012).

Nor must the motion for partial summary judgment be denied as premature. Although defendants correctly assert that not all discovery has been completed in this matter, "[a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *Skura v Wojtowski*, 165 AD3d 1196, 1200 (2d Dept 2018) (citations omitted). Here, defendants have failed to identify how additional

discovery would lead to evidence warranting denial of plaintiff's motion for partial summary judgment on liability or that any additional facts were in the sole possession of plaintiff.

### **Dismissal of Affirmative Defenses**

As noted previously, plaintiff seeks to dismiss defendants' first (failure to state a cause of action), third (culpable conduct), sixth (culpable conduct including assumption of risk) and seventh (superseding acts of third parties) affirmative defenses.

Since this Court ruled above that plaintiff is entitled to partial summary judgment against defendants on liability, the first affirmative defense, asserting failure to state a cause of action, must be dismissed.

"Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence." (internal citation omitted). *Poon v Nisanov*, 162 AD3d 804, 807 (2d Dept 2018). Thus, a plaintiff may be entitled to partial summary judgment as to a defendant's liability even where a defendant raises a question of fact regarding plaintiff's negligence. *See Rodriguez, supra*. In such an instance, "[t]he issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff." *Da Wu v Continental Truck Body Corp.*, 2019 Slip Op 30571 (U) (Sup Ct New York County 2019). Since issues of fact exist regarding plaintiff's share of liability for the accident, such as, inter alia, whether he was paying sufficient attention to his surroundings, that branch of his motion seeking to strike the affirmative defense of culpable conduct is denied.

That branch of plaintiff's motion seeking dismissal of the sixth affirmative defense, "culpable conduct, including assumption of the risk," is granted. Doc. 7 at p. 3. Insofar as this affirmative defense asserts plaintiff's culpable conduct, it is duplicative of the third affirmative defense. Further, "[t]he defense of assumption of risk was abolished in 1975 with the adoption of CPLR 1411. Nevertheless, the Court of Appeals has explained 'that a limited vestige of the assumption of the risk doctrine—referred to as "primary" assumption of the risk—survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities.' Here, as the allegations in the [ ] complaint have nothing to do with athletic or recreational activities contemplated by the primary assumption of risk doctrine, it follows that . . . [defendants'] purported assumption of risk defense is barred by CPLR 1411." *Ballow v Lincoln Fin. Corp.*, 139 AD3d 988, 989 (2d Dept 2016) (citations omitted).

Finally, that branch of the motion seeking dismissal of the seventh affirmative defense, superseding acts of third parties, is granted, given that there is no evidence of such acts. Although plaintiff's counsel asserts that Lynch was "also responsible for the subject accident" because he failed to prevent plaintiff from stepping over the hose (Doc. 24 at par. 29), Perez does not mention Lynch in his affidavit in opposition (Doc. 25) and counsel's representation alone is insufficient to raise an issue of fact (*see Schwartz v 170 West End Owners Corp.*, 161 AD3d 693 [1<sup>st</sup> Dept 2018]), especially given its conclusory nature. *See Smith v New York City Hous. Auth.*, 84 AD3d 669, 670 (1<sup>st</sup> Dept 2011).

In light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion seeking summary judgment on liability pursuant to CPLR 3212 is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss defendants' first, third, sixth and seventh affirmative defenses pursuant to CPLR 3212(a) and 3211(b) is granted to the extent that the first, sixth and seventh affirmative defenses are dismissed, and that branch of the motion is otherwise denied; and it is further

ORDERED that, within 30 days after entry of this order, plaintiff is to serve a copy of this order, with notice of entry, on defendants, as well as on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's damages are to be determined at the time of trial or other resolution of this action; and it is further

ORDERED that the parties are to appear for a compliance conference on July 9, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff's counsel shall efile a NYSCEF form EF-21 reflecting that video footage of plaintiff's accident was submitted in connection with the instant motion, and the filing thereof shall be effective nunc pro tunc; and it is further

ORDERED that this constitutes the decision and order of this Court.

4/30/2019

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

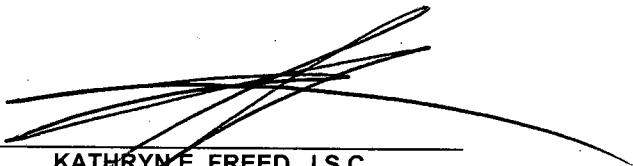
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

  
KATHRYN E. FREED, J.S.C.