

Booth v Ecozone, Inc.
2019 NY Slip Op 31571(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 150531/2013
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

DOUGLAS BOOTH,

Index No. 150531/2013

Plaintiff

- against -

DECISION AND ORDER

ECOZONE, INC., MAURICE KOHANBASH,
MANAGEMENT INC. a/k/a and/or d/b/a
TOP BROADWAY, LTD, and/or TOP BROADWAY,
TOP DOG PLUMBING & HEATING CORP., C&T
PLUMBING & HEATING INC., ALVA ELECTRICAL
INC., and RAPID CONSTRUCTION AND
RENOVATION,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained November 21, 2012, when he fell into a stairway opening on premises undergoing renovation at 547 West 149th Street, New York County, owned by defendant Ecozone, Inc., of which defendant Kohanbash was the president and a co-owner. Kohanbash had hired plaintiff to market the premises, so plaintiff was previewing the premises in preparation for marketing them.

In an order dated June 2, 2014, the court (Mendez, J.) consolidated with this action, originally against only Ecozone and Kohanbash, plaintiff's subsequent action under Index No. 155343/2013 against defendants Management Inc., Top Dog Plumbing & Heating Corp., C&T Plumbing & Heating Inc., Alva Electrical Inc., and Rapid Construction and Renovation. Plaintiff

discontinued his action against defendants Top Dog Plumbing & Heating Corp., C&T Plumbing & Heating Inc., and Alva Electrical Inc. in stipulations dated November 10, 2014, and March 27, 2017.

Rapid Construction and Renovation, which plaintiff claims was the general contractor for the renovation on the premises where he fell, moves for summary judgment dismissing the complaint and all cross-claims against Rapid Construction and Renovation, C.P.L.R. § 3212(b), which claims it did not create the conditions that caused his injury. Defendants Ecozone and Kohanbash cross-move to amend their answer to include cross-claims against Rapid Construction and Renovation, which was not a party in the original action against Ecozone and Kohanbash. C.P.L.R. § 3025(b). They seek to reiterate Management Inc.'s cross-claims against Rapid Construction and Renovation that were in the subsequent action consolidated with this one. In a stipulation dated March 1, 2019, the parties discontinued with prejudice all claims against Management Inc. and its other business names Top Broadway Ltd and Top Broadway.

Ecozone and Kohanbash move separately for summary judgment dismissing the complaint against these two defendants, C.P.L.R. § 3212(b), on the ground that they did not supervise or control the renovation work and lacked notice of any hazardous condition. For the reasons explained below, the court grants Rapid Construction and Renovation's motion in part and the cross-motion by Ecozone and Kohanbash in part and denies these two defendants' separate motion.

II. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The complaint claims that defendants' negligent hiring and supervision of their employees and their failure to maintain the premises in a safe condition caused plaintiff's injuries.

A. Rapid Construction and Renovation's Omission of Pleadings

Ecozone and Kohanbash oppose Rapid Construction and Renovation's motion for summary judgment based on its omission of their answer and former defendant Management Inc.'s answer. When a party moving for summary judgment fails to include all the pleadings in support of the motion, the court may be constrained to deny the motion for that reason alone. Washington Realty Owners, LLC v. 260 Wash. St., LLC, 105 A.D.3d 675 (1st Dep't 2013); Weinstein v. Gindi, 92 A.D.3d 526, 527 (1st Dep't 2012); State of New York v. Metz, 241 A.D.2d 192, 198 (1st Dep't 1998); Matsyuk v. Konkalipos, 35 A.D.3d 675, 676 (2d Dep't 2006). Here, however, the record is sufficiently complete to determine Rapid Construction and Renovation's motion insofar as it seeks dismissal of the complaint against Rapid Construction and Renovation, despite its failure to present the answers of Ecozone and Kohanbash: an omission that inflicts no prejudice on them. C.P.L.R. § 2001; Guaman v. 1963 Ryer Realty Corp., 127 A.D.3d 454, 456 (1st Dep't 2014); Reyes v. Sanchez-Pena, 117 A.D.3d 621, 622 (1st Dep't 2014); Mercado v. Ovalle, 110 A.D.3d 539, 540 (1st Dep't 2013).

B. The Negligent Hiring and Supervision Claims

To be liable for negligent hiring or supervision, an employer must have received actual or constructive notice of an employee's propensity to engage in the misconduct that caused plaintiff's injury, Fein v. Cook, 153 A.D.3d 1168, 1169 (1st Dep't 2017); Stein v. Douglas Elliman, LLC, 149 A.D.3d 654, 655 (1st Dep't 2017); Vicuna v. Empire Today, LLC, 128 A.D.3d 578, 578 (1st Dep't 2015), or the employee's unsuitability for the work that caused the injury. Cross v. Supersonic Motor Messenger Courier, Inc., 140 A.D.3d 503, 505 (1st Dep't 2016); Gonzalez v. City of New York, 133 A.D.3d 65, 68 (1st Dep't 2015); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 569-70 (1st Dep't 2015). The employee also must have acted outside the scope of the employment in causing plaintiff's injury. Kerzhner v. G4S Govt. Solutions, Inc., 160 A.D.3d 505, 505 (1st Dep't 2018); Thompson v. City of New York, 159 A.D.3d 654, 654 (1st Dep't 2018); Lindsay-Thompson v. Montefiore Med. Ctr., 147 A.D.3d 638, 639 (1st Dep't 2017); Boyd v. City of New York, 143 A.D.3d 609, 610 (1st Dep't 2016).

The un rebutted affidavit by Deodath Motilal, the president of Rapid Construction and Renovation, attests that it performed no work and hired no subcontractors for renovation or any other work on Ecozone's premises. Maurice Kohan, the president of Ecozone, who changed his last name from Kohanbash in the 1990s, testified at his deposition only that Ecozone, the premises' owner, retained Rapid Construction and Renovation as a general

contractor, and he believed that it hired subcontractors to perform the plumbing, electrical, sheetrock, and heating, ventilation, and air conditioning work. Abraham Gabbay, the sole employee of Dansher Realty whom Kohan contacted to find a general contractor for the premises' renovation, also testified at a deposition only as to a belief that Rapid Construction and Renovation would perform the construction work and hire subcontractors. Neither Kohan nor Gabbay demonstrated any personal knowledge that Rapid Construction and Renovation in fact hired anyone.

Duane Poladian, the president of former defendant C&T Plumbing & Heating, and Houshang Aghajani, an employee of former defendant Alva Electrical, both testified at their depositions that Kohan himself hired their corporations to perform plumbing and electrical work, respectively. Both witnesses were unfamiliar with Rapid Construction and Renovation. It thus demonstrates that it did not hire any employee who created the dangerous condition at the premises as necessary to sustain a negligent hiring or supervision claim. Stein v. Douglas Elliman, LLC, 149 A.D.3d at 655; Chagnon v. Tyson, 11 A.D.3d 325, 326 (1st Dep't 2004).

Ecozone and Kohanbash maintain that they lacked knowledge of Rapid Construction and Renovation's unsuitability to perform the work for which they hired the general contractor. Ecozone and Kohanbash do not identify Rapid Construction and Renovation, however, as the entity responsible for leaving the stairway

opening without railings and unguarded, nor identify the entity or person responsible. As set forth above, Motilal denies that Rapid Construction and Renovation performed any work on the premises. Kohan testified that he did not know any of the workers and therefore whether Rapid Construction and Renovation or a subcontractor installed the stairway or, when a railing was installed around the stairway after plaintiff's fall, who performed that work. The absence of evidence demonstrating who created the condition that caused plaintiff's injury leaves no basis to determine whether Ecozone and Kohanbash lacked notice of that employee's unsuitability. Gonzalez v. City of New York, 133 A.D.3d at 68. See Fein v. Cook, 153 A.D.3d at 1169; Stein v. Douglas Elliman, LLC, 149 A.D.3d at 655; Cross v. Supersonic Motor Messenger Courier, Inc., 140 A.D.3d at 505; Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d at 569-70.

C. Rapid Construction and Renovation's Liability

To support dismissal of the complaint against Rapid Construction and Renovation, Motilal, its president, testified at his deposition that neither he nor any Rapid Construction and Renovation employee ever visited or performed work at Ecozone's premises. Ecozone and Kohanbash as well as plaintiff oppose dismissal of the claims against Rapid Construction and Renovation on the grounds that it is listed as the general contractor on work permit data for the premises, which the parties at oral argument stipulated were authenticated and admissible for purposes of determining the motions for summary judgment.

According to both Motilal and Gabbay, since Rapid Construction and Renovation was an insured and licensed contractor, Motilal allowed Gabbay to use its name as the permit applicant, see N.Y.C. Admin. Code §§ 28-401.3, 28-401.9, in exchange for payment of its insurance premiums, but Ecozone and Kohanbash present no evidence of any other payment to Rapid Construction and Renovation for general contracting or any other work. Motilal further allowed the permit application to indicate that Rapid Construction and Renovation was the construction superintendent, despite believing that it would perform only flooring and finishing work. The permit documents indicating that Rapid Construction and Renovation was the general contractor or construction superintendent, however, do not by themselves demonstrate that status. Kosovrasti v. Epic (217) LLC, 96 A.D.3d 695, 696 (1st Dep't 2012); Martinez v. 408-410 Greenwich St., LLC, 83 A.D.3d 674, 675 (2d Dep't 2011); Kilmetis v. Creative Pool & Spa, Inc., 74 A.D.3d 1289, 1291 (2d Dep't 2010); Huerta v. Three Star Constr. Co., Inc., 56 A.D.3d 613, 613 (2d Dep't 2008).

Nor may the permit operate as a contract hiring Rapid Construction and Renovation as the general contractor, since the hiring party never signed the permit, and in signing it Rapid Construction and Renovation did not obligate itself to anyone other than the New York City Department of Buildings. Any remedy for Rapid Construction and Renovation having falsely affirmed that it would serve as the general contractor or construction superintendent is via a criminal prosecution. N.Y. Penal Law

art. 210.

Nevertheless, Kohan, the president of the premises' owner Ecozone, testified that it hired Rapid Construction and Renovation as the general contractor for the renovation work on the premises and that he believed Rapid Construction and Renovation hired the subcontractors to perform the work, which began at the end of 2011 or beginning of 2012. Gabbay's testimony that Kohan contacted Gabbay to find a general contractor for the premises' renovation, that Gabbay recommended Rapid Construction and Renovation and communicated with Motilal, who agreed to be the general contractor, and that Kohan approved this recommendation corroborates Kohan. Their accounts contradict Motilal's denial that Rapid Construction and Renovation undertook to perform any work at the premises, raising factual and credibility issues that preclude summary judgment dismissing the complaint against Rapid Construction and Renovation. Utica Mut. Ins. Co. v. Style Mgt. Assoc. Corp., 28 N.Y.3d 1018, 1019 (2016); S.A. De Obras y Servicios, COPASA v. Bank of Nova Scotia, 170 A.D.3d 468, 473 (1st Dep't 2019); Osguera v. Lincoln Props. LLC, 147 A.D.3d 704, 705 (1st Dep't 2017).

D. Liability of Ecozone and Kohanbash

Ecozone and Kohanbash contend that Kohanbash may not be held liable for plaintiff's injuries because no evidence establishes that he acted outside his capacity as president of Ecozone, and plaintiff did not plead a claim of piercing the corporate veil to

hold him individually liable. Kohanbash may be held individually liable, however, as a corporate officer participating in the commission of the corporation's tort, without piercing the corporate veil. Board of Mgrs. of the S. Star v. WSA Equities, LLC, 140 A.D.3d 405, 405 (1st Dep't 2016); Fletcher v. Dakota, Inc., 99 A.D.3d 43, 49 (1st Dep't 2012); Peguero v. 601 Realty Corp., 58 A.D.3d 556, 558 (1st Dep't 2009). Ecozone and Kohanbash bear the burden to establish a defense to this basis for liability. Peguero v. 601 Realty Corp., 58 A.D.3d at 559. Ecozone and Kohanbash fail to meet this burden by claiming merely that Kohanbash is not liable based on his status as a corporate officer. Id. at 559. As long as the court has sustained plaintiff's negligent hiring and supervision claim against Ecozone and Kohanbash, this corporate tort provides a basis for Kohanbash's individual liability. Board of Mgrs. of the S. Star v. WSA Equities, LLC, 140 A.D.3d at 405; Vogel v. Martos Dev., LLC, 130 A.D.3d 401, 402 (1st Dep't 2015); Fletcher v. Dakota, Inc., 99 A.D.3d at 51; Peguero v. 601 Realty Corp., 58 A.D.3d at 560. See Hersh v. One Fifth Ave. Apt. Corp., 163 A.D.3d 500, 501 (1st Dep't 2018).

Ecozone and Kohanbash further maintain that they are not liable because they neither created nor received notice of a hazardous condition on Ecozone's premises. If Ecozone and Kohanbash contracted the renovation work on the premises to another entity, such evidence would demonstrate that these defendants did not create the hazardous stairway opening.

DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 625 (1st Dep't 2015); Lopez v. Dagan, 98 A.D.3d 436, 438 (1st Dep't 2012). As discussed above, however, the contradictory testimony whether Ecozone and Kohanbash hired Rapid Construction and Renovation as a general contractor and the lack of evidence identifying who hired which contractor to construct the stairway leave factual and credibility issues that also preclude summary judgment dismissing the complaint against Ecozone and Kohanbash. Utica Mut. Ins. Co. v. Style Mgt. Assoc. Corp., 28 N.Y.3d at 1019; S.A. De Obras y Servicios, COPASA v. Bank of Nova Scotia, 170 A.D.3d at 473; Cruz v. Perspolis Realty LLC, 170 A.D.3d 426, 426 (1st Dep't 2019); Osguera v. Lincoln Props. LLC, 147 A.D.3d at 705.

Given the testimony by both Kohan and Poladian, Ecozone and Kohanbash also fail to demonstrate that they lacked notice of the hazardous unguarded stairway opening. Kohan testified that he and David Manesh, another co-owner of Ecozone, visited the premises every week or two. Poladian, former defendant C&T Plumbing & Heating's president, testified that as he installed plumbing he observed Kohan at the premises several times. Luebke v. MBI Group, 122 A.D.3d 514, 515 (1st Dep't 2014); Widawski v. 217 Elizabeth St. Corp., 40 A.D.3d 483, 485 (1st Dep't 2007). See DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d at 625-26; Lopez v. Dagan, 98 A.D.3d at 438-39.

Finally, Ecozone and Kohanbash contend that plaintiff was the sole cause of his injury. Kohan testified that he specifically prohibited plaintiff from entering the premises.

Plaintiff testified, on the other hand, that Kohan notified plaintiff only that the premises were under construction and not ready to market and therefore he was not to show them to prospective purchasers, but did not warn him not to enter the premises himself. This conflict in testimony presents factual and credibility issues also precluding summary judgment on this basis. Bajana v. Mercy Care Transportation, ___ A.D.3d ___, 2019 WL 1938701, at *2 (1st Dep't May 2, 2019); Cruz v. Perspolis Realty LLC, 170 A.D.3d at 426; Evans v. Acosta, 169 A.D.3d 438, 439 (1st Dep't 2019); Albino v. 221-223 W. 82 Owners Corp., 142 A.D.3d 799, 800 (1st Dep't 2016).

Moreover, while Kohan insists that he forbade plaintiff from entering the premises, Kohan does not deny that he hired plaintiff to market the premises and gave plaintiff a master key that allowed access to the premises, raising a question whether plaintiff's entry onto the premises and encounter with the hazards there were foreseeable by Kohan. Reaves v. Lakota Constr. Group, Inc., 154 A.D.3d 637, 638 (1st Dep't 2017). Plaintiff's testimony that, when plaintiff notified Kohan about plaintiff's injury, Kohan never raised the fact that he forbade plaintiff from entry further undermines Kohan's later insistence that Kohan did so.

The evidence that plaintiff knew the premises were under construction and therefore might be dangerous, and yet he continued walking through the dark building without using a flashlight or other illumination, merely shows his comparative

fault in encountering the unguarded stairway opening on the premises. Ecozone and Kohanbash fail to show that, were there no unguarded stairway opening, the insufficient lighting would have posed a hazard causing plaintiff to fall. Washington v. Autumn Props. II, LLC, 134 A.D.3d 456, 457 (1st Dep't 2015). This failure by Ecozone and Kohanbash to demonstrate the absence of their own fault in allowing the uncovered, unguarded stairway opening on premises not fully secured against entry precludes a finding that plaintiff's negligence was the sole proximate cause of his injuries. Reaves v. Lakota Constr. Group, Inc., 154 A.D.3d at 638; Washington v. Autumn Props. II, LLC, 134 A.D.3d at 457; Wolfe v. North Merrick Union Free Sch. Dist., 122 A.D.3d 620, 622 (2d Dep't 2014).

III. THE CROSS-MOTION BY ECOZONE AND KOHANBASH TO AMEND THEIR ANSWER TO INTERPOSE CROSS-CLAIMS

Ecozone and Kohanbash cross-move to amend their answer to interpose cross-claims for contribution, indemnification, and breach of a contract to procure insurance, which former defendant Management Inc. had cross-claimed against Rapid Construction and Renovation. Leave to amend pleadings is to be freely granted, C.P.L.R. § 3025(b); Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411 (2014); Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d 166, 170 (1989), but the proposed amendments must be denied if they lack merit, Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d at 170; Moyal v. Sullo, 139 A.D.3d 644, 645

(1st Dep't 2016); Sicilia v. City of New York, 127 A.D.3d 628, 628 (1st Dep't 2015), or prejudice the opposing party. Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580; Kimso Apts., LLC v. Gandhi, 24 N.Y.3d at 411; Goodwin v. Empire Subway Co., Ltd., 124 A.D.3d 559, 559 (1st Dep't 2015); Peach Parking Corp. v. 346 W. 40th St., LLC, 42 A.D.3d 82, 86 (1st Dep't 2007).

The requested amendments do not prejudice Rapid Construction and Renovation since it does not contend that they are unduly delayed, see Masterwear Corp. v. Bernard, 3 A.D.3d 305, 306 (1st Dep't 2004), and they do not hinder it in preparing its defense or in taking measures to support its position. Kimso Apts., LLC v. Gandhi, 24 N.Y.3d at 411-12; Goodwin v. Empire Subway Co., Ltd., 124 A.D.3d at 559. Ecozone and Kohanbash merely seek to interpose cross-claims against Rapid Construction and Renovation that a former defendant also owned by Kohanbash already had interposed before plaintiff discontinued his claims against that defendant. The evidence precluding dismissal of the action against Rapid Construction and Renovation demonstrates the potential merit of the proposed contribution and implied indemnification cross-claims against Rapid Construction and Renovation. Because these amendments may be meritorious if the evidence ultimately establishes Rapid Construction and Renovation's involvement in the renovation, and they do not prejudice this defendant, the court grants amendment of the answer by Ecozone and Kohanbash to include these cross-claims. C.P.L.R. § 3025(b); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d at 412-

13; Goodwin v. Empire City Subway Co., Ltd., 124 A.D.3d at 559; Collins v. Switzer Constr. Group, Inc., 69 A.D.3d 407, 408 (1st Dep't 2010).

Insofar as Ecozone seeks to add a cross-claim for breach of a contract to procure insurance, Ecozone presents no written contract. Motilal's denial of any agreement with Ecozone and the absence of any testimony by Kohanbash regarding the terms of the alleged agreement between Ecozone and Rapid Construction and Renovation fail to establish any terms requiring it to procure insurance or to indemnify Ecozone. Absent a contract, cross-claims for breach of contract and for contractual indemnification lack merit, requiring denial of amendment to Ecozone's answer to include such cross-claims. White v. 31-01 Steinway, LLC, 165 A.D.3d 449, 451 (1st Dep't 2018); Moyal v. Sullo, 139 A.D.3d at 645; Sicilia v. City of New York, 127 A.D.3d at 628; Peach Parking Corp. v. 346 W. 40th St., LLC, 42 A.D.3d at 86-87. See Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 581; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d at 173.

IV. CONCLUSION

As set forth above, the court grants defendant Rapid Construction and Renovation's motion for summary judgment to the extent of dismissing plaintiff's claim for negligent hiring and supervision against Rapid Construction and Renovation. C.P.L.R. § 3212(b) and (e). The court also grants the cross-motion by defendants Ecozone, Inc., and Kohanbash to amend their answer to add cross-claims against Rapid Construction and Renovation for

contribution and implied indemnification only. C.P.L.R. § 3025(b). The court otherwise denies Rapid Construction and Renovation's motion and the cross-motion by Ecozone, Inc., and Kohanbash. The court also denies their motion for summary judgment in its entirety. C.P.L.R. § 3212(b). Insofar as Rapid Construction and Renovation seeks dismissal of cross-claims, the court denies that branch of its motion as premature and without prejudice. This decision constitutes the court's order. The Clerk shall enter a judgment in accordance with this decision.

DATED: May 24, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.