

Burns v Marcellus Lanes, Inc.
2019 NY Slip Op 34269(U)
June 17, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 2016EF1276
Judge: Gregory R. Gilbert
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF ONONDAGA**

JOSEPH BURNS,

Plaintiff,

vs.

MARCELLUS LANES, INC.,

Defendant.

DECISION & ORDER

Index No. 2016EF1276
RJI # 33-16-3468

HON. G. GILBERT, JSC

MARCELLUS LANES, INC.,

Third-Party Plaintiff,

vs.

R.J. FROST COMPANY, LLC,

Third-Party Defendant.

BACKGROUND

Plaintiff, Joseph Burns (“Burns”), was injured when he fell from the elevated bucket of a moving bucket loader being used as a scaffold to remove ice dams at a bowling alley operated by defendant, Marcellus Lanes, Inc. (“Marcellus”). Burns had been wearing a safety harness at the time. The safety line of the harness got caught on the moving bucket loader yanking him from the bucket. Burns struck his head in the fall and his head was then run over by the bucket loader. By all accounts, Burns sustained significant injuries.

Marcellus is solely owned by Gail Schenfeld (“Schenfeld”) who was not named as a defendant in the action. Both Marcellus and Burns filed motions for summary judgment. The Marcellus motion was granted dismissing the Labor Law 200 and 241(6) claims and denied as to Labor Law 240(1) as to which Burns was granted judgment for liability by Order filed April 10, 2018. A subsequent motion for re-argument by Burns was denied by Order filed May 17, 2018. The Bench Decision and Order were appealed and have been affirmed by the Appellate Division Fourth Department in all respects by Decision dated February 1, 2019.

Marcellus commenced a third party action against Burns’ employer, R.J. Frost Company, LLC (“Frost”) days after the initial motion Order by a third party summons and complaint dated April 13, 2018. This necessitated extension of the scheduling Order which was done on August 14, 2018. The trial note of issue was filed April 1, 2019 and trial has been set for August 12, 2019.

The Court now has before it a motion by Burns to amend to add Schenfeld as a party defendant. Marcellus has filed a cross motion to amend the third party complaint, dismiss the action and/or for summary judgment granting common law indemnification from Frost. Frost moves for summary judgment to dismiss the third party action. The parties concur that further disclosure is not needed.

DISCUSSION

Amend Action To Add Party Defendant

The present motion by Burns is solely to add Gail Schenfeld as a party by supplemental summons and amended complaint as attached to the moving papers. Schenfeld is sole owner of Marcellus but also title owner of the property on which Burns was injured. The answer originally admitted that Marcellus was title owner of the premises and Schenfeld testified in that fashion. Burns’ counsel finally obtained a copy of the deed which plainly shows that Schenfeld is the actual title owner. On its face, the amendment is proper and without prejudice. Any argument that the motion is late is addressed by Wojtalewski v. Central Square Central School District, 161 AD3d 1560 (4th Dept 2018).

The motion is opposed on the basis that Schenfeld, as a principal of the corporation, has no expectation of liability under Yellow Book USA v. Superior Limousine, Inc., 7 Misc.3d 1030(A) (Cortland County 2005). That case is factually inapplicable since suit was attempted against the individual after judgment had been filed against the corporate entity based on contract.

The liability in this matter is predicated on statute, Labor Law §240(1), which makes the owner liable for the fall from a height. Schenfeld ignores the fact that she either misrepresented or “forgot” her ownership of the premises. The statutory duty and resulting liability flows from ownership of the premises and not Schenfeld’s role in the corporation. See Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555 (1993) Also, there has been no showing of any tactical decision not to defend any aspect of the case as in Fischer v. Michael’s Banquet Facility, Inc., 59 Misc3d 1232(A) (Erie County 2016) and certainly no tactical advantage to Burns as discussed in May v. Buffalo MRI Partners, LP, 151 AD3d 1657 (4th Dept 2017). The Court thus concludes that the amendment is proper subject to consideration of whether it will relate back to the original filing.

Relation Back Issue

Burns seeks a relation back under CPLR §203(b) on the amendment for Schenfeld’s individual liability as owner. There is opposition to this aspect of the motion arguing that Marcellus acting through Schenfeld does not have a unity of interest with Schenfeld as an individual-owner. The case relied on is Zehnick v. Meadowbrook II Associates, 20 AD3d 793 (3rd Dept 2005) appeal denied 5 NY3d 873. Relation back is critical given that the statute of limitations has expired. The point being made is sometimes referred to as the Buran-Coupal doctrine. Buran v. Coupal, 87 NY2d 173 (1995). See also Belair Care Center, Inc. v. Cool Insuring Agency, Inc., 161 AD3d 1263 (3rd Dept 2018) summarizing the argument as follows:

"The relation back doctrine permits a [plaintiff] to amend a [complaint] to add a [defendant] even though the statute of limitations has expired at the time of amendment so long as the [plaintiff] can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added [defendant] is united in interest with a previously named

[defendant], and (3) that the later-added [defendant] knew or should have known that, but for a mistake by [plaintiff] as to the later-added [defendant's] identity, the [action] would have also been brought against him or her" (Matter of Sullivan v Planning Bd. of the Town of Mamakating, 151 AD3d 1518, 1519-1520, 58 NYS3d 692 [2017] [citations omitted], lv denied 30 NY3d 906, 70 NYS3d 446, 93 NE3d 1211 [2017]).

Plaintiffs failed to establish the second prong of the relation back doctrine. HN5 "Unity of interest requires a showing that the judgment will similarly affect the proposed defendant, and that the new and original defendants are vicariously liable for the acts of the other" (Stokes v Komatsu Am. Corp., 117 AD3d 1152, 1155, 984 NYS2d 657 [2014] [internal quotation marks and citations omitted]; see McLaughlin v 22 New Scotland Ave., LLC, 132 AD3d 1190, 1193, 20 NYS3d 172 [2015]; LeBlanc v Skinner, 103 AD3d 202, 209-211, 955 NYS2d 391 [2012]; Zehnick v Meadowbrook II Assoc., 20 AD3d 793, 796-797, 799 NYS2d 604 [2005], lv dismissed and denied 5 NY3d 873, 842 NE2d 22, 808 NYS2d 136 [2005]). The proposed amended complaint alleges that Treiber—like all brokers—engaged in a cooperative strategy with CRM to market the trust; however, it contains no allegations that there was a jural, or legal, relationship between Treiber and CRM that would make either vicariously liable for the acts of the other. Thus, Supreme Court properly denied plaintiffs leave to amend the complaint to assert a negligence cause of action against Treiber.”

The same test applies in the 4th Department. See May v. Buffalo MRI Partners, LP, 151 AD3d 1657 (4th Dept 2017); Perillo v. Dilamarter, 151 AD3d 1710 (4th Dept 2017).

That the first prong of the test is met in this case is obvious. The third prong applies as well. May v. Buffalo MRI Partners, LP, 151 AD3d 1657 (4th Dept 2017). The focus of argument is the second prong concerning the unity of interest requirement. and Zehnick v. Meadowbrook II Associates, 20 AD3d 793 (3rd Dept 2005) appeal denied 5 NY3d 873.

Frost misapplies the Zehnick case which based the determination that two separate but interrelated entities did not “share precisely the same jural relationship in the action at hand”. Unity of interest was not established in Zehnick for the simple reason that the existing defendant would be in a position to make a viable cross claim over and seek indemnification from the newly added defendant. That is not the case here where Marcellus and Schenfeld will jointly seek indemnification from Frost and where, as shown below, both Marcellus and Schenfeld fall within the definition of “owner” for liability purposes.

Accordingly, the motion for leave to file and serve a supplemental summons and complaint to add Gail Schenfeld in the action is **GRANTED** in all respects and the same shall be filed and served forthwith and not later than June 27, 2019 with the answer thereto being served not later than July 16, 2019.

Motion To Amend Third Party Pleadings

Marcellus rightfully considers that when Schenfeld is added to the main action, this will necessitate amendment of the third party summons and complaint. This relief is appropriate for all of the reason set forth above.

Accordingly, the motion for leave to file and serve a supplemental summons and complaint in the third party action to add Gail Schenfeld thereto is **GRANTED** in all respects and the same shall be filed and served not later than June 28, 2019 with the answer there to being served not later than July 17, 2019.

Marcellus As “Owner” Under Labor Law §240(1)

The next argument made by Marcellus is that if Schenfeld is added as a party based on her ownership of the premises, then judgment against Marcellus Lanes would need to be vacated. Labor Law §240(1) applies to “contractors, owners and their agents”. Schenfeld’s deposition transcript has been reviewed and shows that she was the one who sought Frost out for the ice removal and entered into an oral contract with Frost in her capacity as Marcellus. She was also present at the time the work was being done and the accident took place.

Marcellus is not an agent in the classic statutory sense. See Barreto v. Metropolitan Transportation Authority, 25 NY3d 426 (2015) where a safety coordinator was found to be an “agent” delegated as responsible for the activity surrounding the injury. See also Walls v. Turner Construction Company, 4 NY3d 861 (2005) where there was a specific agency contract and actual supervision and control on behalf of the owner school district. Marcellus exercised no actual authority or supervision with respect to the work being done. See Sikorski v. Springbrook Fire District, 225 AD2d 1041 (4th Dept 1996); Phillips v. Wilmorite, Inc., 281 AD2d 945 (4th Dept 2001).

Marcellus does have liability as an owner which would include a lessee who is in a position to insist that safe construction practices be followed by the contractor. Compare Kieger v. Pat Construction, Inc., 112 AD2d 10 (4th Dept 1985) no liability in the absence of a right to control the work and Sweeting v. Board of Cooperative Educational Services, 83 AD2d 103 (4th Dept 1981) appeal denied 56 NY2d 503 where lessee hired the contractor and thus had the power to fire. A lessee in possession, under the circumstances presented here, is an “owner” or “agent” of the owner within the meaning of the statute and is directly liable under Labor Law §240(1). Glielmi v. Toys “R” Us, 62 NY2d 664 (1984).

Given that Marcellus hired Frost to do work for the benefit of Marcellus as lessee and Schenfeld as owner, Marcellus is either “owner” or “agent” for owner and liable together with Schenfeld. See Karwowski v. 1407 Broadway Real Estate, LLC, 160 AD3d 82 (1st Dept 2018); Alfonso v. Pacific Classon Realty, LLC, 101 AD3d 768 (2nd Dept 2012); Seferovic v. Atlantic Real Estate Holdings, LLC, 127 AD3d 1058 (2nd Dept 2005); Kane v. Coundorous, 293 AD2d 309 (1st Dept 2002); Prass v. Viva Loco of 110, Inc., 275 AD2d 403 (2nd Dept 2000) and Kwong Ho Kim v. D&W Shin Realty Corp., 47 ADd3d 616 (2nd Dept 2008). Any argument that Marcellus is not a lessee of the premises on this record would be wholly without merit.

Two cases are cited in support of the motion, both of which are distinguishable from the facts in this matter. The first, Ryba v. Almeida, 27 AD3d 718 (2nd Dept 2006) involved a lessee who did not contract to have the work performed. Where Marcellus hired, it could also fire and had the right (and statutory obligation) to supervise. Kwong Ho Kim v. D&W Shin Realty Corp., 47 ADd3d 616 (2nd Dept 2008). The lessee in Ryba was also found not to be in control of the property and here

Marcellus was in control of every aspect of the business premises/bowling center. The second case, Sanchez v. Palmiero, 118 AD3d 860 (2nd Dept 2014) involved a claim against the owner of a scissor lift being used by the employee of another contractor. The Court simply held that the owner of the lift was not the school district-owner of the premises or general contractor. Neither case is applicable.

Accordingly, the motion for summary judgment to dismiss the action as to Marcellus Lanes, Inc. is **DENIED** in all respects.

Summary Judgment For Indemnification Based On Grave Injury

Marcellus seeks summary judgment on the third party claim under Labor Law §240(1) by reason of grave injury and for indemnification from Frost. The indemnification issue is governed by Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555 (1993). The liability of Marcellus (or Schenfeld) is completely vicarious allowing for indemnification provided that there is a finding of “grave injury”.

The statutory basis for the “grave injury” claim is Workers’ Compensation Law §11 for “an acquired injury to the brain caused by an external physical force resulting in permanent total disability”. The main case interpreting this provision is Rubeis v. Aqua Club, Inc., 3 NY3d 408 (2004) with a direct holding that “permanent total disability” results “when the evidence establishes that the injured worker is no longer employable in any capacity”. Marcellus seeks summary judgment as to “grave injury” based on a series of cases as follows:

Cullin v. Makely, 80 AD3d 1042 (3rd Dept 2011) - below the knee left leg amputation. Not applicable here.

Castillo v. 711 Group, Inc., 41 AD3d 77 (2nd Dept 2007) affirmed 10 NY3d 735 - loss of index finger. Not applicable here.

Benedetto v. Carrera Realty Corp., 32 AD3d 874 (2nd Dept 2006) - total loss of a foot. Not applicable here.

Fresco v. 157 East 72nd Street Condominium, 2 AD3d 326 (1st Dept 2003) appeal dismissed 3 NY3d 630 - permanent and severe facial disfigurement. Not applicable here.

Knauer v. Anderson, 2 AD3d 1314 (4th Dept 2003) affirmed 3 NY3d 408 - brain injury with directed verdict as to indemnification following trial. The Court notes that the nature and extent of the injury sustained by the plaintiff and the effect upon his ability to hold employment in any capacity was not at issue. The Fourth Department agreed with the analysis of the Third Department to focus on employment rather than the Second Department which at that time used the test of total inability to engage in day to day functions.

The cases Galindo v. Dorchester Tower Condominium, 56 AD3d 285 (1st Dept 2008) and Grech v. HRC Corp., 150 AD3d 829 (2nd Dept 2017) both involve brain injuries in which motions for summary judgment as to indemnification were granted with a claim of grave injury as a matter of law not being rebutted by the third-party defendant-employer.

The motion must be supported by sworn medical affidavits or certified records to establish a finding, as a matter of law, that Burns “is no longer employable in any capacity”. To constitute evidence in an admissible form, the medical record submitted has to be affirmed under penalty of perjury. Unsworn medical reports do not constitute evidentiary proof in admissible form and may not be considered in support of a motion by defendant for summary judgment. Compare Bissell v. Town of Amherst, 41 AD3d 1228 (4th Dept 2007) appeal dismissed 12 NY3d 878 with Barrette v. General Electric Co., 144 AD2d 983 (4th Dept 1988); Pagano v. Kingsbury, 182 AD2d 268 (4th Dept 1992); Pagels v. PVS Chemicals, Inc., 266 ADd2d 819 (4th Dept 1999) and Castro v. DADS National Enterprises, Inc., 165 AD3d 601 (4th Dept 2018).

The surgical record from Upstate is certified but does not address the employability issue. The Upstate Concussion Clinic records are not certified and, in any event, do not address the issue with any permanent finding. The affirmation and report by Dr. McCaffrey makes no mention of employability beyond noting that Burns has not returned to work and suffers from neuropsychological impairment. No finding of permanent and total disability is presented from the workers’ compensation

board (and would not be determinative if it had been made). Burns was granted social security disability and while that is helpful to his cause, it is not determinative.

There is a report attached to a affirmed PS-4 workers' compensation reporting form by Dr. Rebecca Gavett. The specific pertinent finding made was: "...it is highly doubtful that the patient could return to meaningful employment". There was also an affirmation/report by Dr. Mark Matloff finding a 100% disability "at this time" with permanent cognitive symptoms. Dr. Matloff also found that Burns was unable to return to work "at this time" and that he was "unable to provide a reliable return-to-work date". As to grave injury, Burns submits a detailed affirmation/report of Dr Claudine Ward stating that he "is not capable of being gainfully employed" and that he is "totally and permanently disabled" causally related to the February 25, 2015 accident.

In opposition to the Marcellus motion and in support of its motion for summary judgment, Frost submits a vocational rehabilitation expert opinion and the report under affirmation of Dr. Kishore Ranade. The pertinent finding by Dr. Ranade was that Burns "can engage in any work activity that does not require multitasking, that does not require him to drive a motor vehicle, work at heights greater than 4' or use heavy machinery". The opinion by rehabilitation counselor Paul Lukasik is that Burns "is capable of employment" and that "he is *not* 'unemployable in any capacity'".

Frost urges the most narrow possible reading of Rubeis v. Aqua Club, Inc., 3 NY3d 408 (2004) and the phrase "any capacity". The argument by Frost is that since Burns has shown the ability to occasionally sell scrap metal to a junk yard or infrequently been seen to have carried plywood or sheetrock that he must be held, as a matter of law, to be capable of employment in some capacity if only in some sheltered workshop under extensive supervision.

There are circumstances that lend themselves to a determination as a matter of law on the issue of grave injury involving the brain found in the cases that have followed since Rubeis and these are reviewed as follows:

Tzic v. Kasampas, 93 AD3d 438 (1st Dept 2012) determined grave injury where plaintiff had no orientation to place and time, had a court-ordered guardianship, was

required to have 24-hour-a-day supervision at a nursing facility and was not capable of providing testimony in his own action.

Anton v. West Manor Construction Corp., 100 AD3d 523 (1st Dept 2012) found no grave injury based on daily headaches and plaintiff's frustrating loss of focus.

Alulema v. ZEV Electric Corp., 168 AD3d 469 (1st Dept 2019) held that conditions such as depression and post-concussion syndrome would not constitute a grave injury in the absence of proof that an individual was rendered unemployable in any capacity.

Grech v. HRC Corp., 150 AD3d 829 (2nd Dept 2017) upheld denial of summary judgment for asserted injuries consisting of "mild traumatic brain injury and postconcussion syndrome" described in the lower court opinion at 48 Misc3d 859.

Purcell v. Visiting Nurses Foundation, Inc., 127 AD3d 572 (1st Dept 2015) found that summary judgment dismissing the third party claim should have been granted where plaintiff's condition consisted of only of headaches and post-concussion syndrome.

Galindo v. Dorchester Tower Condominium, 56 AD3d 285 (1st Dept) provides that the employer does not meet the burden on summary judgment by expert opinion that a plaintiff may become employable "with continued improvement" in a "traumatic brain injury work program" and further fails to state what plaintiff's actual abilities are and what types of jobs he could possibly perform. See in similar fashion Chelli v. Banle Associates, LLC, 22 AD3d 781 (2nd Dept 2005) appeal denied 7 NY3d 703.

The head and brain injuries sustained by Burns in the February 25, 2015 fall were extensive. He sustained an acute displaced fractures of bilateral craniotomy flaps, an acute subdural hematoma, parenchymal and subarachnoid hemorrhage, encephalomalacia in the inferior frontal lobes. These conditions were treated operatively with a bilateral frontotemporal depressed skull fracture repair, bilateral frontotemporal cranioplasty and evacuation of the left epidural and left subdural hematomas.

Plaintiff's doctor has stated that Burns continues to experience seizures not controlled by medication during which he is unresponsive to the environment, trembles, sweats profusely, can be incontinent, and occasionally has auditory hallucinations. The seizures leave Burns confused and fatigued. Seizure triggers include lack of sleep and physical exertion. He has severe headaches that can last for days and constant headaches that vary in severity. He receives three hours of home health aide service seven days per week in the morning when he is confused and suffers impairment of vision in his left eye. He has occasional loss of balance, gets dizzy with bending or with headaches. The left side of his head swells with repetitive bending and is hypersensitive to even light touch.

Burns has significant cognitive impairment, memory impairment and has difficulty coping with changes in his routine or environment. His mood is volatile although not physically violent. Some activities of daily living require supervision to a limited degree. He has limited attention to task of 20 minutes and is not able to manage food preparation or his finances. He evidences post traumatic stress disorder.

Medications currently prescribed for Burns include: Trileptal 900 mg in the morning and 1,200 mg in the evening; Depakote 750 mg twice per day and Ibuprofen as needed. Treatment recommendations include cognitive behavioral therapy, psychological counseling and specialized PTSD treatment for the remainder of his life.

Even assuming that either Marcellus or Frost have met the standard needed for summary judgment, this is not a case where the determination of whether or not Burns "is no longer employable in any capacity" should be made as a matter of law. See Bush v. Mechanicville Warehouse Corp., 79 AD3d 1327 (3rd Dept, 2010); Miranda v. Norstar Building Corp., 79 AD3d 42 (3rd Dept 2010); Mendez v. Union Theological Seminary in the City of New York, 26 AD3d 260 (1st Dept 2006). What has been presented are ultimately questions of fact and credibility between the experts to be determined by a jury at trial.

Accordingly, the Marcellus Lanes, Inc. motion for summary judgment for indemnification by R.J. Frost Company, LLC based on grave injury and the cross motion for summary judgment by R. J. Frost Company, LLC to dismiss the third party action of Marcellus Lanes, Inc. based on grave injury are **DENIED**.

Frost Motion To Dismiss

The balance of the argument by Frost is that it was not negligent. Frost apparently thought it was a good idea to use a bucket loader as a scaffold and to have Burns standing in the raised bucket as the bucket loader was in operation. It is for a jury to determine if this conduct was negligent. The claim that Burns was the sole proximate cause of his accident has no merit where Frost directed the work and provided all of the safety equipment that was in use.

Accordingly, the R.J. Frost Company, LLC cross motion for summary judgment to dismiss the third party action of Marcellus Lanes, Inc. on all grounds other than “grave injury” is **DENIED**.

IT IS SO ORDERED

ENTER

Dated: June 17, 2019
Syracuse, New York


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE