Korenchuk v Clarendon Holding Co. Inc.
2020 NY Slip Op 30424(U)
January 23, 2020
Supreme Court, Kings County
Docket Number: 501472/2015
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of January, 2020.

P R E S E N T:
HON. WAVNY TOUSSAINT
Justice.

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OLEG M. KORENCHUK,

Plaintiff,

- against -

CLARENDON HOLDING CO. INC.,

Defendant.

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DECISION AND ORDER

Index No. 501472/2015

The following papers numbered 1 to 7 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4
Opposing Affidavits (Affirmations)	5 6
Reply Affidavits (Affirmations)	7
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Clarendon Holding Co. Inc. separately moves for an order (1) pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint (motion seq. #7), and (2) pursuant to CPLR 2104,

enforcing the November 27, 2018 mediation settlement agreement between the parties (motion seq. #8).

Relevant Background and Procedural History

Plaintiff, Oleg M. Korenchuk, a bus driver for Consolidated Bus Transit, brings this action for personal injuries allegedly sustained on January 16, 2015, at approximately 5:45 a.m. He alleges that he slipped and fell into a steam hole, while he was looking for his bus in the repair lot located at 50 Snediker Avenue, Brooklyn, New York. Defendant owned and maintained the Snediker Avenue lot, which was utilized by Consolidated Bus.

Plaintiff testified that January 16, 2015 was a cold day. The ground was very slippery, snow covered, with ice "everywhere around" (plaintiff's tr at 49 lines 17-23; at 64 lines 3-4). He stated that, after he arrived at the Snediker Avenue lot, he slowly walked around in search of his bus. While searching, he slipped and fell into the steam hole (*id.* at 54 lines 9-12; at 55 lines 19-23). He described the hole as the length of a big bus and deep enough that it reached his neck when he stood inside of it (*id.* at 45 lines 6-8, 15).

The hole in question is used by bus cleaners to steam the bottom of the bus engines and to check for oil leaks. Plaintiff was aware that the steam hole existed prior to his accident, as he had been to the Snediker Avenue lot at least 20 times (*id.* at 30 line 12 through 31 line 13). Plaintiff originally thought his bus was parked over the hole, because in the past he saw other buses parked over the hole to cover it (*id.*

at 62 lines 2-5).

Plaintiff was unable to identify what his foot slipped on (*id.* at 55 line 24 to 55 line 2). He did testify that the area where he fell was dark, (*id.* at 62 lines 23-24); there was no net over the hole at the time of his accident (*id.* at 58 lines 21-23), and there were no chain barricades around the hole (*id.* at 59 lines 8-11).

Jamal Chiles testified on behalf of defendant. Mr Chiles is a dispatcher for East New York Service, a subsidiary of Consolidated Bus Company. He testified that he assigned vehicles to their respective drivers and that if a bus underwent repairs, he might have to dispatch a driver to the Snediker Avenue lot to pick up the bus. Chiles saw plaintiff prior to his accident and told plaintiff to retrieve his bus from the Snediker Avenue lot. Chiles testified that when the steam hole was not being used it was protocol to put a chain around the perimeter and a net across the top. (*id.* at 35 line 24 through 37 line 25).

Chiles further testified that if snowfall was anticipated, the protocol was to lay salt on the ground in the lots. He asserted that when it snowed overnight, a crew would plow and spread salt early in the morning. Snow and ice removal was also done on the perimeter of the steam hole (*id.* at 39 lines 1-11). He could not remember if there was snow on the ground or if any snow or ice removal occurred on the date of plaintiff's accident (*see* Chiles' deposition tr at 26 lines 13-21; at 31 lines 7-13). Additionally, he did not know whether there were any snow removal logs for the Snediker Avenue lot (*id.* at 30 lines 12-15). Chiles testified that the Snediker

Avenue lot always had very good lighting, but he had no independent knowledge of the lighting conditions around the pit in January 2015 (*id.* at 42 lines 11-19).

After his fall, plaintiff reported the accident to Chiles. Chiles observed that plaintiff had a bruise and some bleeding on his head. Chiles went to the accident site sometime afterwards and observed a net over the pit. He did not recall whether there was snow or ice around the pit at that time (*id.* at 53 lines 20-22).

Kelvin Thomas, the supervisor of maintenance for East New York Service Corporation also testified on behalf of defendant. East New York Service is the maintenance company for Consolidated Bus Service. Mr Thomas testified that it was the company's protocol to shovel and put down salt in the lots when it snowed. He also testified that the net over the steam hole was always used when maintenance was not being performed. He further testified that if there was an accident or someone complained about the condition of the bus lots, he would personally investigate the situation, but he did not fill out any written logs or accident reports. He did not have any specific recollection regarding this accident.

On November 27, 2018, the parties appeared for mediation and entered into a post mediation agreement to settle the case for $350,000. The agreement, however, noted that it was "subject to worker's compensation consent" (*see* Morse affirmation, dated March 22, 2019, exh. H).

Defendant's Motion for Summary Judgment

In support of its motion for summary judgment, defendant asserts that it did not breach its duty of care and that the purported accident was not causally related

to any negligent conduct on its part. Defendant asserts that plaintiff was unaware of what caused him to slip and fall; that reasonable snow and ice removal was performed at the premises; and that the subject steam hole was adequately lit and covered.

In opposition, plaintiff argues that questions of fact exist as to whether defendant was negligent and whether the area where plaintiff fell was dangerous and hazardous. Plaintiff alleges that at the time of his accident, the steam hole was not covered, there was inadequate lighting and the ground was slippery, as it was covered in snow.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*,

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it." (*Seedat v Capital One Bank*, 170 AD3d 769, 769 [2d Dept 2019]; *Winder v Executive*

Cleaning Servs., LLC, 91 AD3d 865, 865 [2d Dept 2012]). A defendant can make a prima facie showing warranting summary judgment by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation (*Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). However, proximate cause of an accident may be established "without direct evidence of causation", but rather by inference from the circumstances of the subject accident (*Constantino v Webel*, 57 AD3d 472 [2d Dept 2008]; *Grande v Won Hee Lee,* 171 AD3d 877, 878 [2d Dept 2019]). "The record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict upon the logical inferences to be drawn from the evidence" (*id.,* quoting *Thomas v New York City Tr. Auth.,* 194 AD2d 663, 664 [2d Dept 1993]).

In the instant action, questions of fact exist which preclude summary judgment in favor of defendant. Although defendant's witnesses testified regarding protocols in place to remove regularly occurring hazards, and safety measures undertaken regarding steam hole in question, plaintiff testified that there was snow and ice on the ground in the lot, that the ground was very slippery, that the steam hole had no protective covering and that the lot had inadequate lighting at the time of his accident. Plaintiff's testimony has created a logical inference that one or more of defendant's alleged failures to follow protocol could have created the condition or combination of conditions which caused his fall even if plaintiff himself cannot identify the specific defect or danger. (*see Latalladi v Peter Luger Steakhouse*, 52

AD3d 475, 476 [2d Dept 2008]). Accordingly, defendant's motion for summary judgment is denied.

Motion to Enforce Mediation Agreement

Defendant argues that on November 27, 2018, during a mediation session at National Arbitration and Mediation (NAM), the parties settled this matter for $350,000, with a settlement agreement being executed on this date. On January 31, 2019, all parties appeared before Justice Sherman in the Jury Coordinating Part (JCP). At that time, counsel for plaintiff advised that there were issues with the workers compensation carrier's acceptance of the settlement. According to defendant, after plaintiff discussed the matter with Justice Sherman, it was announced that the workers compensation issue was resolved and that the only outstanding item was whether there was a Medicare lien on the file. The matter was adjourned, in order to confirm that no Medicare lien existed.

On February 27, 2019, counsel for plaintiff advised that plaintiff was refusing to accept the mediation settlement. Plaintiff reiterated this refusal at a March 6, 2019 conference before Justice Sherman. Defendant now seeks to enforce the settlement agreement.

In opposition, plaintiff contends that defendant misrepresented the sequence of events in its motion papers. Plaintiff alleges that the settlement of $350,000 was subject to worker's compensation consent and was acceptable only if the workers' compensation lien was reduced from over $280,000 to $125,000, as clearly

enumerated on the agreement. Counsel for plaintiff further asserts that the approval for the reduction was never given by the supervisor overseeing the workers' compensation lien. Counsel for plaintiff asserts that she emailed counsel for defendant in December 2018 an advised that the matter could not be settled, as the workers compensation carrier would not approve the reduction of the lien from $280,000 to $125,000.

CPLR § 2104 states:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk

Stipulations of settlement are favored by the courts and not lightly cast aside (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). "To be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104", whereby they must be in writing and signed by the parties to be bound by it (*DeVita v Macy's East, Inc.*, 36 AD3d 751 [2d Dept 2007]). "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d at 230).

The instant mediation settlement agreement was in writing and signed by both parties. Further, it states that the settlement was subject to workers' compensation

consent. Plaintiff however never indicated that workers compensation did not consent to the settlement or how much workers compensation would take in satisfaction of its lien. The fact that plaintiff was not satisfied with the amount of money he would receive after payment of the workers compensation lien does not constitute a sufficient ground to invalidate the mediation agreement (*Lenge v Eklecco Newco, LLC,* 172 AD3d 843, 844 [2d Dept 2019]). Accordingly, it is hereby:

ORDERED, that defendant's motion for summary judgment, seeking dismissal of plaintiff's complaint is denied; and it is further

ORDERED, that defendant's motion to enforce the settlement agreement dated November 27, 2018 is granted.

The foregoing constitutes the decision and order of this Court.

E N T E R,

J.S.C.

HON. WAVNY TOUSSAINT

KINGS COUNTY CLERK FILED 2020 JAN 31 AM 9:20