

Chalom v Elat Car & Limousine Serv. Inc.
2020 NY Slip Op 31195(U)
March 17, 2020
Supreme Court, Kings County
Docket Number: 506135/2017
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 17 day of March 2020

PRESENT:
HON. CAROLYN E. WADE,

Justice

-----X
MOISE CHALOM,

Plaintiff,

Index No. 506135/2017

-against-

DECISION and ORDER

ELAT CAR & LIMOUSINE SERVICE INC., ESQUIRE
AUTO BODY INC., T.J. CORPORATION,
1602 MCDONALD AVE. CORP., EILAT DELIVERY
AND MOVERS CORP.,

Defendants.
-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendant 1602 MCDONALD AVE CORP's motions and plaintiff MOISE CHALOM's cross-motions:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1,2
Cross-Motion and Affidavits/Affirmations.....	3,4
Answering Affidavits/Affirmations.....	
Reply Affidavits/Affirmations.....	5
Memorandum of Law.....	

Upon the foregoing cited papers and after oral argument, defendant 1602 MCDONALD AVE CORP. moves for an Order (1) granting summary judgment in its favor, and dismissing the Complaint as against it (motion seq. #5); and (2) striking plaintiff's Supplemental Bill of Particulars (motion seq. #6). Plaintiff MOISE CHALOM cross-moves for an Order: (1) granting summary judgment in his favor against defendants (motion seq. #8); and (2) granting him leave to serve a supplemental bill of particulars *nunc pro tunc* (motion seq. #9).

Relevant Facts

The underlying action was commenced by plaintiff MOISE CHALOM ("Plaintiff") to recover damages for personal injuries he allegedly sustained in a slip-and-fall accident on March 28, 2017. The accident occurred on a sidewalk adjacent to property located at 1602 McDonald Avenue, Brooklyn, New York (the "Premises"), owned by defendant 1602 MCDONALD AVE CORP ("1602 McDonald"), and leased to co-defendants ELAT CAR & LIMOUSINE SERVICE INC ("ELAT"), ESQUIRE AUTO BODY INC. and TJ. AUTOMOTIVE.

At his deposition ("EBT"), Plaintiff testified that he was a self-employed delivery driver (Miller aff, exhibit "8," pg 11). On March 28, 2017, he was notified that ELAT needed him to make a delivery (*id.*, pg 16-18). At around 3:00 p.m., Plaintiff parked his vehicle at a parking spot on McDonald Avenue, and walked to ELAT's office (*id.*, pg 20-22). He had difficulty walking from his car to ELAT's office, and opening its door due to ice (*id.*, pg 26-28). Plaintiff states that when he left ELAT's office, he pushed out the door, and then fell on the ground (*id.*).

On August 16, 2017, Plaintiff served a Verified Bill of Particulars upon the defendants. On November 13, 2018, Plaintiff filed the Note of Issue. On April 24, 2019, the Hon. Lizette Colon issued an Order denying Plaintiff's motion to extend the time to move for summary judgment without prejudice "to renew pursuant to *Brill*." On May 31, 2019, Plaintiff served a supplemental bill of

particulars, adding that (1) Defendants violated NYC Administrative Code § 7-210 (the “§ 7-210 claim”), and that (2) Plaintiff had a right hip heterotopic ossification, which required him to undergo arthroscopic surgery on August 7, 2018. By letter dated June 4, 2019, 1602 McDonald rejected the Supplemental Bill of Particulars. The instant motions ensued.

1602 McDonald's motion to strike plaintiff's Supplemental Bill of Particulars (motion seq. #6) and Plaintiff's cross-motion for leave to serve a supplemental bill of particulars nunc pro tunc (motion seq. #9)

Arguments

In support of its motion to strike the Supplemental Bill of Particulars, 1602 McDonald argues that Plaintiff's amendments are in violation of CPLR 3025, CPLR 3024 and CPLR 3043(b), as it alleged new injuries and added the § 7-210 NYC Administrative Code claim, without leave of court. 1602 McDonald also avers that Plaintiff's claims are devoid of merit.

Plaintiff, in opposition to 1602 McDonald's motion to strike, and in support of his cross-motion for leave to serve a supplemental bill of particulars *nunc pro tunc*, argues that leave to amend pleadings should be freely given, and does not prejudice his adversary. In reply, 1602 McDonald maintains that the § 7-210 NYC Administrative claim is meritless because ELAT was responsible for snow and ice removal. It further suggests that Plaintiff failed to provide a reasonable excuse for the lengthy delay in seeking to amend the bill of particulars.

In rebuttal, Plaintiff states that the proposed amendments to the bill of particulars assert neither a new cause of action nor a different theory of liability. He also avers that the Court must take judicial notice of the applicability of the § 7-210 claim, and that 1602 McDonald is not an out-of-possession landlord.

Analysis

At the outset, “Plaintiff’s self-labeled ‘supplemental bill of particulars’ was, in reality, an amended bill of particulars, as it sought to add new injuries and a new category of damages” (*Fuentes v City of New York*, 3 AD3d 549, 550 [2d Dept 2004])¹. Leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise (*see* CPLR 3025[b]).

However, “when plaintiffs seek leave to amend bills of particulars by asserting a new injury, they must show reasons for the delay in asserting the injury and include a medical affidavit showing a causal connection between the alleged injury and the original injuries sustained” (*Simino v St. Mary's Hosp. of Brooklyn*, 107 AD2d 800, 801 [2d Dept 1985] [internal citations omitted]). Here, Plaintiff neither proffered reasons for his delay in asserting the injury, nor included a medical affidavit establishing a nexus between the new injuries, right hip heterotopic ossification, and the original injuries asserted in his original bill of particulars (*id.*; *see also Kyong Hi Wohn v County of Suffolk*, 237 AD2d 412, 413 [2d Dept 1997]). Therefore, the branch of Plaintiff’s cross-motion for leave to the serve a supplemental bill of particulars to add a new injury is denied.

Furthermore, “[t]he bill of particulars, the purpose of which is to amplify the pleadings, limit the proof, and prevent surprise at the trial, may add specific statements of fact to a general allegation in the pleading but cannot add or substitute a new theory or cause of action” (*Castleton v Broadway Mall Properties, Inc.*, 41 AD3d 410, 411 [2d Dept 2007]). Here, Plaintiff asserts the § 7-210 claim only in the supplemental bill of particulars, which was served without leave of court, more than six months after the filing of the note of issue. Thus, the branch of his motion to amend the bill of particulars to add the § 7-210 claim is denied (*Sagarese v City of NY*, 2017 NY Slip Op 31662[U] [Sup Ct, NY County 2017] [declining to take judicial notice of the statutes listed in the plaintiff’s

¹ Indeed, Plaintiff, in his submissions, repeatedly refers his application as a motion to amend his bill of particulars under CPLR 3025 (b), as supposed to CPLR 3043 (b) which governs supplemental bill of particulars without leave.

supplemental bill of particulars, which was served after the filing of the note of issue without leave of court]).

Based on the above, 1602 McDonald's motion to strike plaintiff's Supplemental Bill of Particulars is granted; and Plaintiff's cross-motion for leave to serve a supplemental bill of particulars *nunc pro tunc* is denied.

1602 McDonald's motion for summary judgment (motion seq. #5) and Plaintiff's cross-motion for summary judgment (motion seq. #8)

Arguments

In support of its motion for summary judgment, 1602 McDonald argues that the alleged hazard that caused the accident was open and obvious to Plaintiff. It also alleges that 1602 McDonald is an out-of-possession landlord, and the duty to remove snow and ice from the premises was placed on ELAT, pursuant to a lease dated April 1, 1999 (the "Lease") (Miller aff, exhibit "11"). 1602 McDonald further asserts that it did not receive notices or complaints of any snow or ice conditions on the sidewalks adjacent to the Premises.

Plaintiff, in opposition and in support of his cross-motion for summary judgment, claims that the Lease is illegible and not applicable in this action, as (1) the Lease was entered between 1602 McDonald and non-party Habirah Inc., which expired on March 31, 2007; (2) Habirah, Inc. is a defunct entity that was dissolved by proclamation on or around January 25, 2012, nearly five years prior to the date of the accident; and (3) the demised premises in the Lease does not include the area where the accident took place. Plaintiff also contends that 1602 McDonald is not an out-of-possession landlord, because (1) the mortgage, the deed, an Amended Easement, and the property tax bills indicate that 1602 McDonald maintains a principal place of business at the Premises; (2) Nicholas

Seccondro, the President of 1602 McDonald Ave, testified that he operated a separate business (co-defendant ESQUIRE AUTO BODY INC) at the Premises, and was present there approximately once a week, including the day of the accident. Further, Plaintiff avers that 1602 McDonald had a statutory obligation under NYC Administrative Code §7-210 to maintain the sidewalk abutting the Premises in good and proper condition. Lastly, he submits that defendants had both actual and constructive knowledge of the accumulation of snow and ice at the Premises.

In further support of its motion and in opposition to Plaintiff's cross-motion, 1602 McDonald states that Plaintiff's cross-motion should be denied as untimely. It also reiterates that the alleged hazard was open and obvious, and that 1602 McDonald was an out-of-possession landlord as the premises is divided between the tenants. It also avers that the Lease states that it was entered into between 1602 McDonald and Habirah Inc. d/b/a ELAT CAR SERVICES (Miller aff, exhibit "11"). 1602 McDonald further maintains that it did not have actual or constructive notice of the pertinent occurrence, because Mr. Seccondro was in Florida when the accident occurred (Miller aff, exhibit "13", pg 29-31). Lastly, it argues that NYC Administrative Code §7-210 is not applicable, because the responsibility for snow and ice removal rested on ELAT, not 1602 McDonald.

Lastly, in further support of its cross-motion, Plaintiff argues that his delay in bringing the summary judgment motion was caused by defendants' refusal to appear for depositions. He also avers that NYC Administrative Code § 7-210 applies to this action as a matter of law, and that the open and obvious nature of the defect does not absolve 1602 McDonald from liability.

Analysis

An out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696, 696 [2d Dept 2008]). Here, even

without consideration of the Lease which provides that the duty to remove snow and ice from the premises was placed on ELAT, Plaintiff still failed to show that 1602 McDonald was contractually obligated to repair unsafe conditions. Although 1602 McDonald was physically present on a portion of the property because its own business was located there, it did not retain a sufficient degree of dominion and control over the Premises as to impose liability against it (see *Zaglas v Girona*, 266 AD2d 282, 283 [2d Dept 1999]; see also *Dalzell v McDonald's Corp.*, 220 AD2d 638, 639 [2d Dept 1995]). And, in light of the Court ruling that § 7-210 claim was not properly pleaded, Plaintiff's argument that 1602 McDonald had a statutory obligation under the NYC Administrative Code §7-210 is rejected.

Given the Court's above ruling, 1607 McDonald's remaining contentions and plaintiff's cross-motion for summary judgment (motion seq. #8) are rendered moot.

Accordingly, based upon the above, it is

ORDERED that defendant 1602 MCDONALD AVE CORP's motion for summary judgment (motion seq. #5) and its motion to strike plaintiff's Supplemental Bill of Particulars (motion seq. #6) are **GRANTED**; Plaintiff MOISE CHALOM's cross-motion for leave to serve a supplemental bill of particulars *nunc pro tunc* (motion seq. #9) and its cross-motion for summary judgment (motion seq. #8) are **DENIED**.

This constitutes the Decision and Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE