

Tarasiuk v Levoritz
2020 NY Slip Op 31218(U)
May 6, 2020
Supreme Court, Kings County
Docket Number: 509527/18
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of May, 2020.

PRESENT:

HON. PAMELA L. FISHER, J.S.C.

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Aliaksei Tarasiuk,

Plaintiff,

- against -

Yonatan S. Levoritz, Law Office of Yonatan S. Levoritz P.C. d/b/a The Levoritz Law Group, RFR Holding Corporation, RFR Holding LLC, RFR Realty LLC, 17 State Owners LLC,

Defendants.

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The following e-filed papers read herein:

DECISION AND ORDER

Index No. 509527/18

Mot. Seq. 1 - 4

NYSEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

23-29, 42, 44-56, 59-64, 65-70

Opposing Affidavits (Affirmations) _____

31-32, 76, 71-72, 77-78

Reply Affidavits (Affirmations) _____

82,83, 71-72,81, 79-80

Other Papers: Memorandum of Law in Support _____

Upon the foregoing papers, defendants Law Office of Yonatan S. Levoritz P.C. d/b/a The Levoritz Law Group (The Levoritz Law Group) moves for an order, pursuant to CPLR 3212, granting summary judgment, dismissing all claims against The Levoritz Law Group on the grounds that any claims asserted against them is barred by the exclusivity provision under Worker’s Compensation Law § 11 (mot. seq. one).

Defendant Yonatan S. Levoritz (Levoritz), individually, moves for an order, pursuant to CPLR 3212, granting him summary judgment, dismissing all claims against Levoritz on the grounds that they too are barred by Worker's Compensation Law § 11 (mot. seq. two). Plaintiff, Aliaksei Tarasiuk (plaintiff), cross moves for an order, pursuant to CPLR 3212, granting him summary judgment as to liability on the basis that defendants Levoritz and The Levoritz Law Group intentionally injured plaintiff and therefore cannot avail themselves to the exclusivity provision of Workers' Compensation Law § 11 (mot. seq. three).

Defendants RFR Holding Corporation (RFR Corp.) RFR Holding LLC (RFR Holding), and building manager RFR Realty LLC (RFR Realty, or collectively, the RFR defendants), and 17 State Owners LLC (17 State), also move for an order, pursuant to CPLR 3212, granting them summary judgment, dismissing all claims alleged against these defendants (mot. seq four).

Background

On August 24, 2017, plaintiff was employed as a paralegal at The Levoritz Law Group and suffered injuries when he was allegedly assaulted by defendant Levoritz, the principal of The Levoritz Law Group. The alleged assault occurred on the 40th floor of 17 State Street, New York NY (premises), owned by defendant 17 State and managed by defendant RFR Realty.

Plaintiff filed for workers' compensation benefits on September 8, 2017. The Workers' Compensation Board issued a decision on October 27, 2019, wherein the board found prima facie medical evidence of plaintiff's injuries to the left knee, left hip, right

elbow and back. On July 3, 2018, plaintiff was awarded workers' compensation benefits in the amount of \$1,700.00 for a period of 23.6 weeks from August 25, 2017 to February 7, 2018 (*see In Regard to Aliaksei Tarasiuk*, WCB Case #G198 7296). Plaintiff commenced the underlying action against Levoritz on May 9, 2018 seeking damages for injuries sustained on August 24, 2017. Plaintiff amended his complaint on August 17, 2018 to add The Levoritz Law Group, the RFR defendants, and 17 State as named defendants as well as to assert three causes of action for (1) assault and battery, (2) respondeat superior, and (3) negligence in failure to provide adequate security.

**Defendants Levoritz Law Group, Levoritz, and Plaintiff's
Motions for Summary Judgment (mot. seqs. one, two and three)**

In general, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). 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 in admissible form demonstrating the absence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]). The court's role in deciding a summary judgment motion is solely to determine if any triable factual issues exist, not to determine

the merits of such issues (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]; *Jablonski v Rapalje*, 14 AD3d 484, 486 [2d Dept 2005]); *Liu v Park Ridge at Terryville Assn.*, 196 AD2d 579, 580 [2d Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Workers' compensation is intended to be the exclusive remedy for unintentional injuries sustained during the course of employment (Workers' Compensation Law §§ 11, 29 [6]; *see Macchirole v Giamboi*, 97 NY2d 147, 149 [2001]; *Kruger v EMFT, LLC*, 87 AD3d 717, 718 - 719 [2d Dept 2011]; *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2d Dept 2008]). A plaintiff loses his right to sue his employer, even where he has been injured intentionally, by his choice to avail himself of and accept Workers' Compensation benefits (*see Werner v State of New York*, 53 NY2d 346, 354 [1981]; *see also O'Conner v Midiria*, 55 NY2d 538, 540 - 541 [1982]; *Mera v Adelphi Mfg. Co.*, 160 AD2d 781, 782 [2d Dept 1990]). Whether the Workers' Compensation Board determines the injuries were accidental or not, a plaintiff is nevertheless barred from maintaining a separate action against his employer once he has applied for and received workers' compensation benefits (*Orzechowski v Warner-Lambert Co.*, 92 AD 2d 110, 113 - 114, [2d Dept 1983]).

In the present case, Levoritz and The Levoritz Law Group have established their prima facie burden on their request for summary judgment. Defendants have shown that a Workers' Compensation claim was filed on plaintiff's behalf and that the plaintiff accepted

and received payments as a result of such claim (*see Werner*, 53 NY2d at 354; *O'Conner*, 55 NY2d at 540-541; *Mera*, 160 AD2d at 782).

Similarly, Levoritz's motion seeking summary judgment must also be granted. Although Levoritz may be the principal of The Levoritz's Law Group, the parties are also co-employees in "all matters arising from and connected with their employment" (*Heritage v Van Patten*, 59 NY2d 1017, 1019 [1983]; *see also Kupke v Mullane*, 215 AD2d 531 [2d Dept 1995]). As a result, under the authority of *Werner*, Levoritz individually, like The Levoritz Law Group is protected by the Workers' Compensation Law.

Having made their prima facie burden, the burden now shifts to the plaintiff to produce evidentiary proof in admissible form establishing the existence of material issues of fact which require a trial of the action (*see Garnham & Han Real Estate Brokers*, 148 AD2d at 493). Initially, the plaintiff does not dispute that he filed and received a settlement from his Workers' Compensation claim. Further, plaintiff's argument that the defendants are barred from protection under Workers' Compensation Law because his injuries were intentional is unavailing under established precedent. As noted above, A plaintiff loses his right to sue his employer, even where he has been injured intentionally, by his choice to avail himself of and accept Workers' Compensation benefits(*see Werner*, 53 NY2d at 354; *O'Conner*, 55 NY2d at 540 - 541; *Mera*, 160 AD2d at 782). Consequently, plaintiff is unable to satisfy his burden herein.

Accordingly, the summary judgment motions by defendants Levoritz and The Levoritz Law Groups' are granted as plaintiff's claims are barred by the Workers' Compensation Law § 29(6). As a consequence of the award of summary judgment to these

defendants, the plaintiff's cross motion for summary judgment has been rendered moot and must also be denied.

RFR Defendants and 17 State's Motion for Summary Judgment (mot. seq. four)

That branch of the RFR defendants and 17 State's motion seeking summary judgment in favor of RFR Realty and 17 State is denied while that branch seeking similar relief in favor of RFR Corp. and RFR Holding is granted for the following reasons.

RFR Realty and 17 State

“A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated” (*Bonilla v Bangert's Flowers*, 132 AD3d 618, 619 [2d Dept 2015]). “A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]).

Generally, landowners, have a duty to exercise reasonable care to prevent harm to patrons on their property (*see Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 768 [2d Dept 2012]; *Guo Hua Wang v Lang*, 47 AD3d 766, 767 [2d Dept 2008]). However, an owner's duty to control the conduct of persons on its property only arises when it has the opportunity to control such conduct, and is reasonably aware of the need for such control (*see Hegarty v Tracy*, 125 AD3d 804, 805 [2d Dept 2015]). 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 its contractually obligated to repair or maintain the premises (*see*

Lowe-Barrett v City of New York, 28 AD3d 721, 722 [2d Dept 2006]). As it relates to a plaintiff, to establish a case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of the injuries (*see Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]).

Defendants RFR Realty and 17 State failed to show their prima facie entitlement to summary judgment. In support of their motion, two affidavits of property manager Deloy Stoll (Stoll) were submitted which raise issues rather than resolve them. Stoll's November 5, 2019 affidavit alleges that 17 State has a lease with nonparty ServCorp State Street, LLC (ServCorp) for the demised property. Stoll's January 13, 2020 affidavit alleges that ServCorp is the lessor of the entire 40th floor of the subject premises, subleasing portions of same to the defendants and other parties. According to Stoll, "ServCorp monitors the entire floor." Stoll also contends that RFR Realty has a contract with nonparty security company, Custom Protection Services (CPS). Defendants submit a log provided by CPS for the period of July 24, 2017 through August 25, 2017. A review of the log's August 24, 2017 entry does not contain any mention that the incident forming the basis for this matter even occurred, despite the fact the police responded. At this time, it is premature to find, as a matter of law, that the two aforementioned contractual relationships with two non-parties do not affect the plaintiff's claim. Since defendants did not submit copies of leases or service agreements, unresolved issues remain about the extent of 17 State's control for common areas and the extent and scope of CPS' contract with RFR Realty, the property manager. These facts and evidence are exclusively within the control of RFR Realty and 17 State and require further discovery to flesh out the arguments. Accordingly,

that branch of defendants' motion seeking summary judgment for RFR Realty and 17 State is denied as premature without prejudice to renewal at the conclusion of discovery (*see Bonilla v Bangert's Flowers*, 132 AD3d 618, 619 [2d Dept 2015]).

RFR Corp. And RFR LLC

RFR Corp. and RFR LLC have established their prima facie entitlement to summary judgment through the affidavit of Thomas Lanvin, an authorized signatory for RFR Corp. and RFR LLC. In his affidavit, Lanvin avers that neither of these two defendants have an ownership interest in the property, nor do they have management, or day to day responsibilities for same. Having made its prima facie burden, the burden now shifts to the plaintiff to produce evidentiary proof in admissible form establishing the existence of material issues of fact which require a trial of the action (*see Garnham & Han Real Estate Brokers*, 148 AD2d at 493). Plaintiff's affirmation in opposition does not oppose the defendants' argument. In fact, plaintiff's opposition fails to even address these allegations. Accordingly, that branch of the RFR defendants and 17 State's motion for summary judgment dismissing the complaint as against RFR Corp. and RFR LLC is granted as unopposed.

Conclusion

In light of the foregoing it is

ORDERED that Yonatan S. Levoritz, individually, and the Law Office of Yonatan S. Levoritz P.C. d/b/a The Levoritz Law Group the motions for summary judgment (mot. seqs one and two) are granted and the complaint as against these defendants, is dismissed; it is further

ORDERED that plaintiff’s motion for summary judgment on liability (mot. seq. three) as against Yonatan S. Levoritz, individually, and the Law Office of Yonatan S. Levoritz P.C. d/b/a The Levoritz Law Group is denied as moot; it is further

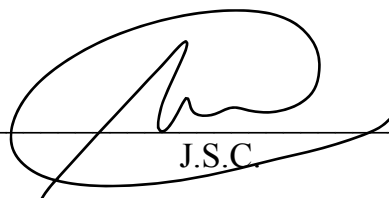
ORDERED that the branch of the RFR defendants and 17 State’s motion for summary judgment (mot. seq. four) in favor of RFR Realty and 17 State is denied as premature without prejudice to renewal at the conclusion of discovery; and, it is further

ORDERED that the branch of the RFR defendants and 17 State’s motion for summary judgment (mot. seq. four) in favor of RFR Corp. and RFR LLC is granted and the complaint as against these defendants is dismissed.

The court, having considered the parties’ remaining contentions finds all unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER



J.S.C.