Luu v Consolidated Edison, Inc.
2020 NY Slip Op 33698(U)
November 6, 2020
Supreme Court, New York County
Docket Number: 402355/2008
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

----------X

JENNIFER LUU, SHOSHANA KHALISH, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (THIRD-PARTY PLAINTIFF),

Plaintiffs,

- v -

CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC, THE CITY OF NEW YORK, TEAM INDUSTRIAL SERVICES INC.,

Defendants.

----------X

INDEX NO. 402355/2008

MOTION DATE _____

MOTION SEQ. NO. 003

SUPPLEMENTAL DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 65, 66, 67, 68, 69, 73, 74, 79

were read on this motion to/for summary judgment.

By notice of motion dated July 28, 2016, defendant Team Industrial Services (Team) moves pursuant to CPLR 3212 for an order granting it a summary dismissal of plaintiff Khalish's claims against it and of the third-party complaint and cross claims of defendant Consolidated Edison, Inc. Plaintiff opposes; Con Ed does not.

On July 7. 2020, a decision and order dated November 28, 2019 was e-filed, reflecting that the instant motion was deemed withdrawn as the action had settled against Team. (NYSCEF 95). However, as the parties gave notice that Khalish was seeking to withdraw her alleged settlement, the motion is deemed restored as to Khalish only; plaintiff Luu fully settled her claims.

I. PERTINENT BACKGROUND

On July 18, 2007, a steam pipe exploded at 41st Street and Lexington Avenue. Prior thereto, Team, hired by Con Ed, had performed temporary leak sealing services on the steam system. (NYSCEF 25). By summons and complaint dated February 27, 2008, plaintiff alleges that as she walked on 41st Street from Park Avenue toward Lexington Avenue, she witnessed the explosion. (NYSCEF 27). She advances a claim for personal injuries due to defendants' negligence. (*Id.*).

On or about November 13, 2008, plaintiffs filed a verified bill of particulars, wherein Khalish alleged that she was emotionally injured as a result of witnessing the explosion, having suffered excessive anxiety, fear, worry, recurrent thoughts which impair her functioning, post traumatic stress syndrome, and difficulty sleeping. (NYSCEF 39).

On November 30, 2010, Khalish served a first supplemental bill of particulars, alleging that she also sustained post traumatic stress disorder. (NYSCEF 40).

Plaintiff filed her note of issue on September 10, 2015. (NYSCEF 45).

In a supplemental verified bill of particulars and annexed medical report dated February 12, 2016, plaintiff alleged for the first time that she had inhaled smoke emanating from the explosion which resulted in shortness of breath. (NYSCEF 41).

At depositions on February 22, 2016 and July 1, 2016, plaintiff testified about her physical and emotional injuries. (NYSCEF 42, 44). She described having been "engulfed by dust or . . . white powder (NYSCEF 42 at 126-27) . . . and [inhaling] a burning material, which might have been rubber. It was very acrid . . ., got into her throat . . ., [and she] couldn't breathe" (NYSCEF 44 at 219). She stated that she feared "some bomb going off near . . . or in the back of [her], or another bomb, and . . . didn't know where it would fall" (*id.* at 297).

Following the explosion, plaintiff walked to a hospital. The medical report from the visit reflects that she told medical staff that she was suffering "'smoke inhalation'" from a "[building] explosion, 'nearby'" and that she "felt anxious after [the] incident and 'wanted to get checked out.'" (NYSCEF 41). The physician noted on the report, "no fire, no smoke" and that "after reassurance, [patient] felt improved / resolution of symptoms." (*Id.*).

In the days following the explosion, plaintiff allegedly had "trouble . . . breathing (NYSCEF 42 at 75), [felt] incredibly stressed, [and] very anxious . . . " (NYSCEF 44 at 231). From the time she arrived at home after the explosion to when she next saw a doctor, she experienced emotional problems because she "was thinking there [were] going to be more terrorist attacks." (NYSCEF 42 at 148). She acknowledged that the anxiety she felt was the only anxiety she experienced at that time. (*Id.* at 153). She related her breathing problems "to the years . . . of terrorist activity which intensified . . . at the steam pipe explosion . . ." because it "brought home what Bin Laden said . . . he would make 9/11 look small." (*Id.* at 151). Her fears allegedly made her so anxious that she could not function "because [she doesn't] know if it's going to blow up next door to [her]." (*Id.*). She testified that she "get[s] very distraught, [doesn't] go out of the house, [and] can't function . . . [or] sleep." (*Id.* at 75).

II. CONTENTIONS

A. Team ((NYSCEF 26)

Team contends that plaintiff's negligent infliction of emotional distress (NIED) claim fails absent a direct duty owed to her and not to society in general, and that even if it owed her a specific duty, it denies that she suffered "unreasonable endangerment to her physical safety," which is a prerequisite for recovery in the absence of physical injury. Moreover, as plaintiff was a block from the explosion, and as she had walked to a hospital where she eschewed treatment

from on-site emergency personnel, Team denies that she was unreasonably endangered, and asserts that any mental injury she sustained was not a direct result of the explosion, but was a consequence of her ongoing fear of terrorism following the September 11th attacks on the World Trade Center. In any event, Team argues that plaintiff's allegations fall short of the extreme and outrageous conduct required for a NIED claim.

B. Plaintiff (NYSCEF 55)

Plaintiff asserts that Team owed a duty of care to those like her who suffered personal injury due to the explosion, and that she alleges physical injuries in her supplemental bill of particulars, her summons and complaint, and at her depositions. She also maintains that her emotional injuries are sufficient to maintain a NIED claim, both because they resulted from a physical impact and because she showed physical symptoms of distress following the "impact injury" of being engulfed in a plume of dust and debris which made it difficult for her to breath and was serious enough for her to seek medical treatment.

Alternatively, plaintiff contends that she feared for her physical safety due to having witnessed and been struck by the approaching plume and having inhaling its contents. She thought the explosion was an act of terrorism which revived the anxiety she suffered following the September 11 attacks.

C. Team's reply (NYSCEF 72)

Team again denies owing plaintiff a duty to protect her from emotional injury, both because she was a bystander and because Team was neither a landowner nor general contractor, but an independent vendor retained to provide leak repair services. Absent any allegation of physical injury in the bills of particulars plaintiff served within the first three years following the explosion, and given her delay in amending them almost five months after she filed her note of

issue and without leave of the court, Team urges that the new and additional allegations of physical injury be barred.

Team also claims that plaintiff's alleged injury appears only in the hospital record from the date of the incident, and that she was released that day with "improved/resolution of symptoms." Moreover, as there was only a release of steam and no fire, Team argues that plaintiff could not have suffered smoke inhalation and observes that she did not report the injury to the first physician she saw following the day of the incident. The alleged physical complaint was thus resolved, and plaintiff did not sustain physical injury from the explosion.

Team reiterates its contentions about plaintiff's alleged mental injury.

III. ANALYSIS

A. Physical injury

As Khalish first asserted having sustained a physical injury in a supplemental bill of particulars filed months after she had filed her note of issue, the bill of particulars was improperly filed and served without leave of the court and is thus a nullity. Consequently, her new allegation of injury is disregarded. (CPLR 3403[b] [party may serve supplemental bill of particulars without leave of court at any time "(p)rovided however that no new cause of action may be alleged or new injury claimed"]; *Jeannette S. v Williot*, 179 AD3d 1479 [4th Dept 2020], *rearg denied* 185 AD3d 1480 [2020] [as plaintiff alleged new injury in "supplemental" bill of particulars, bill actually an amended bill of particulars, and thus a nullity as served after note of issue filed and without leave of court]; *Terepka v City of New York*, 126 AD3d 643 [1st Dept 2015] [dismissing Labor Law claim based on Industrial Code provision alleged for first time in supplemental bill of particulars served without leave of court and six months after note of issue filed]; *cf Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 798 [2d Dept 2008]

["Where, as here, the plaintiff seeks to allege continuing consequences of the injuries suffered and described in a previous bill of particulars, rather than new and unrelated injuries, the bill is supplemental, and leave of the court is not required"]).

B. Negligence

"Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 289 [2001]). A tortfeasor owes a duty to those who have suffered personal injury due to its negligence, thus "afford[ing] a principled basis for reasonably apportioning liability." (*Id.* at 292; *see also Roundabout Theatre Co., Inc. v Tishman Realty & Const. Co., Inc.*, 302 AD2d 272, 272 [1st Dept 2003] ["[D]efendants' duty of care extended only to those who, as a result of this construction disaster, suffered personal injury or property damage."]). The question of duty is a legal matter for the court to resolve. (*Waters v NY City Hous. Auth.*, 69 NY2d 225, 229 [1987]).

Here, plaintiff alleges that she suffered direct personal injuries and that she feared for her physical safety. As a matter of law, Team owed her a duty to refrain from causing both types of harm. (*See Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004] ["A cause of action for [NEID] . . . generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety."]).

A breach of duty resulting in direct emotional harm may be compensable even in the absence of physical injury. (*Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]). A plaintiff may recover without physical injury where the claim "possesses 'some guarantee of genuineness'" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008], quoting

Ferrara v Galluchio, 5 NY2d 16, 21 [1958]), which requires a showing that defendant's breach of duty "unreasonably endangered [plaintiff's] physical safety or caused her to fear for her safety" (*Bour v 259 Bleecker LLC*, 104 AD3d 454, 455 [1st Dept 2013]), or where the emotional injury produces "residual physical manifestations" (*Johnson v State*, 37 NY2d 378, 381 [1975]).

Here, while plaintiff was near the explosion and witnessed it, her claims of emotional harm do not possess a guarantee of genuineness as she was not so close to the explosion as to be at risk of being injured by it. Thus, her physical safety was not unreasonably endangered nor was she placed in fear for her safety by Team's alleged failure to maintain the steam system. (*See eg Bour v 259 Bleecker LLC*, 104 AD3d 454 [1st Dept 2013] [landlord's failure to maintain property in reasonably safe condition, causing plaintiff to suffer bedbug infestation, did not support NIED claim]).

Moreover, "even as to a [plaintiff] to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential, result of the breach." (*Kennedy* at 506). Thus, the plaintiffs in *Allstate Ins. Co. v Burger King Corp*. could not recover after a fire displaced them from their homes because the alleged emotional injuries resulted from the displacement and not from the fire itself. (25 AD3d 472 [1st Dept 2006]). Nor could a plaintiff recover from a corrections facility when an unknown third party accessed her cell phone, which she alleged the facility had improperly stored, and disseminated intimate photographs and videos of her and her boyfriend (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]), or from a school when its alleged negligent supervision resulted in the infant plaintiff discovering the body of a person who had committed suicide in the dugout of a softball field (*McDonagh v Carmel Cent. School Dist.*, 170 AD3d 1161 [2d Dept 2019]). The emotional harms suffered were consequences, rather than direct results of the defendants' negligent conduct.

Here, plaintiff testified that the source of her anxiety after the explosion was a fear that there would be additional terrorist attacks. (NYSCEF 42 at 153). Emotional injury resulting from a fear of future events, when based on speculation, is not sufficient for recovery on a NIED claim. (*See Mees v Buiter*, 2019 NY Slip Op 32792[U], *18 [Sup Ct, New York County 2019] [plaintiff failed to state NIED claim where "distress [was] merely based on the fear, and arguably speculation, of a criminal actor potentially hacking into defendant's cloud or handheld device at some point in the future"]).

Moreover, witnessing an event, however distressing, is not sufficient for recovery on a NIED claim absent the observation of an injury to an immediate family member while within the zone-of-danger, which is not present here. (*See generally Bovsun v Sanperi*, 61 NY2d 219, 230-32 [1984]; *Jorgenson v B.F. Yenney Constr. Co., Inc.*, 255 AD2d 1008 [4th Dept 1998] [no NIED claim where plaintiff witnessed explosion across street from her office which killed and injured people, as those people were not her immediate family members]).

While Team may have been negligent, its negligence in failing to maintain properly the steam system does not constitute extreme and outrageous conduct sufficient to support a NIED claim, and plaintiff does not show otherwise. (*See Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119 [1st Dept 2003] [landlord's failure to make required repairs not outrageous and extreme conduct]).

Thus, Team establishes, *prima facie*, that it may not be held liable for plaintiff's alleged emotional injury, and plaintiff fails to raise a triable issue in opposition.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment is granted, and the complaint of

plaintiff Shoshana Khalish against defendant Team Industrial Services is dismissed; it is further

ORDERED, that any cross claims or third-party claims against defendant Team Industrial Services are dismissed; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

11/6/2020						
DATE				BARBARA JAFFE, J.S.C.		
CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
	X	GRANTED		DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE