

Banegas v R S L Bowling Corp.
2021 NY Slip Op 31542(U)
May 6, 2021
Supreme Court, New York County
Docket Number: 161535/2015
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM **PART** **IAS MOTION 2**

Justice

-----X

DENNIS BANEGAS,

Plaintiff,

- v -

R S L BOWLING CORP., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CVS PHARMACY,
INC., HOWARD BEACH FITNESS CENTER,
INC., METROPCS NEW YORK, LLC,

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

C-TEE ELECTRIC CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 169, 186, 189, 190, 191, 192, 193

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 188, 194, 195

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents and after oral argument on March 18, 2021, it is

Ordered, Defendant CVS Pharmacy, Inc.'s ("CVS") motion (Seq. 4) for Summary

Judgment is granted and it is further,

Ordered, Third-Party Defendant C-Tee Electric Corp's ("C-Tee") motion for Summary Judgment is granted against Third-Party Plaintiff Con Edison Company of New York, Inc ("Con Ed").

Background

Plaintiff Dennis Banegas ("Banegas") is suing for injuries allegedly suffered on November 10, 2012 at a building at 157-05 Crossbay Boulevard, Howard Beach, NY (the "Building"), owned by Defendant RSL Bowling Corp. ("RSL"). The Building was damaged by Hurricane Sandy. Banegas was employed by 3rd Party Defendant C-Tee, which was hired to pump water out of the Building and to perform some electrical work. Banegas was allegedly electrocuted while clearing water from the basement of the Building.

CVS' Summary Judgment Motion

Defendant CVS moves for summary judgment under CPLR §3212, dismissing Banegas' complaint and any and all cross claims. Summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a *prima facie* showing that it is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish

the existence of material issues of fact (*Alvarez*, 68 NY2d at 324; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

In support of its motion, CVS submits the pleadings, the Court's July 9, 2018 Decision and Order, its lease and lease modification and the affidavit of Kristen Ferrante, an operations supervisor at CVS. CVS was a tenant at the Building with co-defendants Howard Beach Fitness Center, Inc. ("Howard Beach Fitness") and Metro PCS New York LLC ("Metro PCS"). CVS was a commercial tenant of the first floor of the Building, Howard Beach Fitness was a commercial tenant of the second floor and Metro PCS was a commercial tenant of the roof, where it installed a cellular antenna. In her affidavit, Ferrante states that on November 10, 2012, CVS did not own, lease, operate, maintain or control the basement of the Building where the electrical equipment was located. Ferrante also states that CVS did not hire C-Tee and did not have any involvement in the electrical work, including any control of or the ability or authority to control the flow of electricity to the building.

On February 14, 2017, Howard Beach Fitness filed a motion for summary judgment and on June 8, 2017, Metro PCS filed a motion for summary judgment. The Court granted these motions in a July 9, 2018 Decision and Order finding that Howard Beach Fitness and Metro PCS finding were not proper defendants under Labor Law §§200 and 241(6) because the statutes only address the duty owed by an owner and as lessees, they were not owners within the meaning of the Labor Law. The Court further found they were not negligent because they owed no duty to Banegas and as tenants of the Building, they had no duty or authority to reinstate power to the building. The Court found only Con Ed had the sole power and authority to reinstate electrical flow to the Building and that Howard Beach Fitness and Metro PCS also did not hire C-Tee or direct, supervise or control Banegas' activities.

Under the doctrine of law of the case, once an issue is judicially decided, that determination is the end of the matter for Judges and courts of coordinate jurisdiction, (*Martin v. City of Cohoes*, 37 NY2d 162[1975]). The doctrine only applies to legal determinations resolved on the merits in a prior determination (*Baldasano v. Bank of NY*, 199 AD2d 184 [1st Dept. 1993]) and to the same questions presented in the same case. (*RPG Consulting, Inc. v. Zormati* , 82 AD3d 739 [2d Dept. 2011]).

CVS is similarly situated as Howard Beach Fitness and Metro PCS. All were lessees of Defendant RSL at the Building. The Court's July 9, 2018 Order and Decision's findings that Howard Beach Fitness and Metro PCS were not proper labor law defendants because they were lessees and they were not negligent because they did not hire C-Tee and they had no authority or duty to reinstate power to the Building, also apply to CVS. Banegas submits his attorney's affirmation in opposition, arguing that CVS' motion is premature and CVS has not shown that it was not negligent. Banegas has not submitted any evidence to show CVS was any different from the other similarly-situated lessees granted summary judgment. Under the law of the case, the Court grants CVS' Summary Judgment motion.

C-Tee's Summary Judgment Motion

Third Party Defendant C-Tee moves for summary judgment against Third Party Defendant Con Ed. In its notice of motion and affirmation in support, C-Tee mistakenly seeks dismissal of the Plaintiff's Complaint and refers to itself as "Defendant." In its Memorandum of Law in Support, C-Tee correctly seeks the dismissal of Third Party Plaintiff Con Ed's claims against C-Tee. C-Tee's affidavit of service for the motion shows that it served Con Ed, as well as the other parties to the action. The Court finds that Con Ed had notice of this motion and that

there is no prejudice to the parties if the Court, under CPLR §2001, corrects C-Tee's Notice of Motion and Affirmation in Support to reflect the proper parties and relief.

Banegas submits opposition to the motion because the Notice of Motion erroneously seeks to dismiss his complaint. As discussed, this is an error and the Court deems this as a motion to dismiss Third-Party Plaintiff Con Ed's Third-Party Complaint. Since C-Tee does not seek to dismiss Banegas' complaint, his opposition is moot.

Under Worker's Compensation Law §11, an employer is not liable to a third party for contribution or indemnification for injuries sustained by an employee acting within the scope of his employment for the employer unless the employee suffers a "grave injury." Grave Injury is defined under the statute as

... death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

An employer may also be liable where they enter into a written contract to indemnify or provide contribution to a third party.

As discussed, the burden is upon the moving party to make a *prima facie* showing that it is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts. C-Tee submits, among other things, Con Ed's Third-Party Complaint, Plaintiff's Bill of Particulars and Plaintiff's medical records in support of its summary judgment motion. These submissions show that Banegas did not suffer a grave injury as defined by Workers Compensation Law §11 and there is no allegation that C-Tee entered into a written agreement to indemnify or provide contribution to Con Ed. The Court finds that C-Tee has met its *prima facie* burden to summary judgment and there is no need to

