

Sin Yi Cheung v Bay Ridge Billiards, Inc.

2021 NY Slip Op 31714(U)

May 21, 2021

Supreme Court, Kings County

Docket Number: 18512/2012

Judge: Lillian Wan

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
COUNTY OF KINGS: PART 17

Index No.: 18512/2012
Motion Date: 3/17/2021
Motion Seq.: 05, 06, 07

-----X
SIN YI CHEUNG,

Plaintiff,

- against -

DECISION AND ORDER

BAY RIDGE BILLIARDS, INC. d/b/a HALL OF
FAME BILLIARDS and SUNSTAR VENDING INC.,

Defendants.

-----X
BAY RIDGE BILLIARDS, INC. d/b/a HALL OF
FAME BILLIARDS,

Third-Party Plaintiff,

- against -

SUNSTAR VENDING INC.,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 05) 2-12 and 27-28; (Motion 06) 17-26, 29-30, and 42; and (Motion 07) 31-41 and 43-44 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, defendant/third-party plaintiff Bay Ridge Billiards, Inc. d/b/a Hall of Fame Billiards moves for an Order (Motion 05) granting summary judgment and dismissing all claims and cross claims against it. The plaintiff cross moves for an Order (Motion 06) amending the pleadings pursuant to CPLR § 3025(b) to conform with plaintiff’s deposition testimony. Defendant/third-party defendant Sunstar Vending Inc. (hereinafter Sunstar) also cross moves for an Order (Motion 07) granting summary judgment in its favor and dismissing plaintiff’s complaint and all cross claims as against it, and denying the plaintiff’s motion to amend the complaint. The Court heard oral argument on the motions on March 17, 2021. For the reasons set forth below, Motion 06 is denied, and Motions 05 and 07 are granted.

This action arose out of a slip-and-fall that allegedly occurred on or about June 16, 2012 when plaintiff slipped on a wet floor while trying to play an arcade game known as “Boxer” at Hall of Fame Billiards (hereinafter HOFB), which is located at 505 Ovington Avenue in Brooklyn, New York. “Boxer” is an arcade game in which players throw a punch at a punching bag that hangs inside the machine and above a metallic base; after the bag is struck, the game generates a score based on the power of the punch. The plaintiff stated in his deposition that while waiting to play this game he witnessed another person spill a soda onto the ground both on

and near the game. The plaintiff further testified that an HOFB employee was informed of the spill and that another employee mopped the spill a few minutes later. The plaintiff testified that the employee did not place a warning sign, nor did he verbally warn any of the patrons of any risk. The plaintiff then testified that he, thinking the area was safe, attempted to play the game but slipped on the wet floor and fractured his ankle. Significantly, the plaintiff does not allege in his most recent Amended Complaint that he slipped on a wet floor. Instead, the plaintiff claimed in that pleading that it was a failure to maintain the Boxer game that caused his injuries, and specifically using the word “trip” to describe his accident.

Plaintiff’s Motion to Amend the Complaint (Motion 06)

The Court will first address the plaintiff’s cross motion, in which the plaintiff seeks to amend his complaint to conform the pleadings to the plaintiff’s deposition testimony. The plaintiff’s original Complaint, which was filed on September 13, 2012, initially indicated that he sustained personal injuries upon tripping over a defective Boxer arcade game. The plaintiff also filed an Amended Complaint on December 8, 2014, still alleging that he tripped over the game. However, on November 11, 2018, the plaintiff testified that he slipped on a spilled soda that an employee of HOFB failed to clean properly, effectively changing the character of his case over six years after first filing it. The plaintiff now seeks to file an Amended Verified Complaint that conforms to his testimony. *See* NYSCEF Doc. No. 24.

HOFB opposes the motion, arguing that the plaintiff’s request to amend his pleading should not be granted because HOFB will be prejudiced in that the plaintiff seeks to amend his complaint eight years after it was first filed and nearly six years after it was first amended. HOFB further argues that the plaintiff’s motion for leave to amend should be denied, since this is the third amended complaint and the pleadings would be amended beyond the statute of limitations for a negligence suit. HOFB also asserts that this amendment completely changes HOFB’s defense and that, if the plaintiff’s motion is granted, HOFB should be allowed to re-depose the plaintiff to examine his testimony with respect to the alleged slippery condition on the floor where he fell and receive a new deadline to exchange experts. Sunstar also opposes the cross motion and adopts HOFB’s arguments.

Pursuant to CPLR § 3025(b), “a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court.” Furthermore, pursuant to CPLR § 3025(c), “the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.” Although leave to amend a pleading is to be freely given in the absence of surprise or prejudice, “the determination whether to grant such leave is within the court’s discretion, and the exercise of that discretion will not be lightly disturbed.” *Voyticky v Duffy*, 19 AD3d 685, 685 (2d Dept 2005) (motion for leave to amend the complaint was denied because the defendants were prejudiced by plaintiffs’ extended delay in moving for leave to amend and their failure to establish a reasonable excuse for the delay); *see also Wells Fargo Bank, N.A. v Morgan*, 139 AD3d 1046 (2d Dept 2016) (defendant’s motion to amend its answer should have been denied when the plaintiff established that it would suffer undue prejudice as the result of the defendant’s unexplained delay of almost six years in seeking

to amend, because the amendments introduced a multitude of new issues into the case and the delay deprived the plaintiff of opportunities to investigate the defenses); *Santorelli v New York City Tr. Auth.*, 121 AD2d 527 (2d Dept 1986) (plaintiff's motion to amend was properly denied when it did not move for leave to amend the pleadings to allege a cause of action for wrongful death until more than a year and a half after the decedent's death and five days before the case was scheduled for trial).

Here, the plaintiff has not established an entitlement to further amend the complaint, and the defendants have shown that they would be unduly prejudiced by such an amendment. The plaintiff seeks to amend the complaint approximately eight years after the initial complaint was filed and two years after his deposition was taken, at which he stated that he did not trip over the Boxer game as originally alleged, instead testifying that he slipped on a wet floor near the game. The note of issue certifying readiness for trial was also filed just over two years prior to the motion, asserting that testimony of all witnesses, including experts, had been completed by that time. In addition, the plaintiff failed to provide a reasonable excuse for the extended delay in moving to amend its pleadings. *See Voyticky* at 685. When asked why it took the plaintiff two years from the date of the deposition to file the motion to amend, plaintiff's counsel stated that he did not have an explanation. Following his deposition, the plaintiff now offers what is essentially a completely new theory of liability, which further serves to unfairly prejudice the defendants and prevent them from promptly investigating potential defenses and hinders them in locating or reproducing certain witnesses. *See Wells Fargo Bank* at 1048. In light of the foregoing, the plaintiff's cross motion to amend the pleadings is denied.

Defendants' Motions for Summary Judgment (Motions 05 and 07)

In support of its motion for summary judgment, HOFB attaches the pleadings, the bill of particulars, the expert witness exchange, and the deposition transcript of the plaintiff. HOFB argues that it is entitled to summary judgment on the ground that plaintiff cannot prove the allegations set forth in his complaint because he testified that the cause of his fall was not related to an inadequate or defective condition of the arcade game, and that the plaintiff's bill of particulars and expert witness conclusions contradict his testimony. HOFB further argues that the plaintiff observed the area being cleaned while waiting to play the game, thus rendering the condition open and obvious, and that it has no duty to warn against the open and obvious condition.

In opposition to HOFB's motion, the plaintiff argues that an employee of HOFB failed to clean the spill properly, and that this was a proximate cause of plaintiff's fall, in part because the employee cleaning the spill used a wet mop and failed to adhere to his employer's protocol of following up with dry towels. Plaintiff argues that HOFB is liable because its employee permitted the plaintiff to enter the machine immediately rather than allowing a sufficient period of time to pass for the remaining liquid to dry.

Sunstar also cross moves for summary judgment and argues that it had no duty to maintain the area in which the plaintiff fell. Sunstar states that it was merely involved in the placement of the Boxer game, and argues that because the plaintiff now states he slipped on a

wet condition rather than tripped over the allegedly negligently-placed game, Sunstar is entitled to summary judgment. Sunstar further asserts that the plaintiff testified that the placement or condition of the Boxer game did not contribute to the happening of the accident, and that as a result Sunstar bears no responsibility for it.

Plaintiff opposes Sunstar's cross motion. Plaintiff asserts that Sunstar is liable for the accident on account of its failure to ensure that the machine was properly lit, which contributed to the happening of the accident. Plaintiff's counsel also notes that plaintiff's testimony was being interpreted by a Mandarin translator, and that plaintiff fell as he was attempting to throw a punch and play the game. Plaintiff also states that the expert in this matter was retained by prior counsel, which could explain shortcomings in his findings, and that plaintiff testified that the lighting of the game was inadequate. Plaintiff further argues that the testimony of Sunstar vice president Gordon James Lee raises an issue of fact with regard to the possible negligent maintenance of the game.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman* at 562.

Here, both defendants have established their entitlement to summary judgment, particularly in light of the plaintiff's testimony, in which he asserted that he did not trip over the Boxer game, as he alleged in his complaint, but that he slipped on a wet condition. There is no testimony about a defect in the Boxer game. Furthermore, even if the plaintiff had been granted leave to amend his complaint, Sunstar would still be entitled to judgment as a matter of law. The plaintiff concedes that Sunstar does not have any responsibility to clean the floor of HOFB, and the plaintiff does not offer a reasonable theory as to how any alleged defect with the Boxer game contributed to the accident. In light of the foregoing, the defendants' motions for summary judgment are granted in their entirety.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's cross motion to amend the pleadings (Motion 06) is DENIED; and it is further

ORDERED, that Hall of Fame Billiards' motion (Motion 05) and Sunstar's cross motion for summary judgment (Motion 07) are GRANTED.

This constitutes the decision and order of the Court.

DATED: May 21, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.