Estevez v SLG 100 Park LLC
2021 NY Slip Op 33903(U)
September 15, 2021
Supreme Court, Bronx County
Docket Number: Index No. 302303/2014
Judge: Lucindo Suarez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 8, 9

VICTOR ESTEVEZ,

Index No.: 302303/2014

Plaintiff,

- against -

SLG 100 PARK LLC, L&K PARTNERS, INC., and P.S. MARCATO ELEVATOR CO., INC.,

Defendants.

DECISION and ORDER

SLG 100 PARK LLC,

Third-Party Plaintiff,

- against -

KLEINKNECHT ELECTRIC COMPANY, INC. and P.S. MARCATO ELEVATOR CO., INC.,

Third-Party Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant/Third-Party Plaintiff SLG 100 PARK LLC, ("SLG") summary judgment motion, L&K Partners Inc.'s ("L&K") cross-motion for summary judgment, and Third-Party Defendant P.S. Marcato Elevator Co., Inc.'s ("Marcato") summary judgment motion is whether they are entitled to a dismissal of Plaintiff's complaint and all cross-claims asserted against them. In addition, the issue raised in Plaintiff's cross-motion is whether he should be given leave to amend the caption to add SL Green Management Corp. and SL Green Management LLC as direct defendants post the expiration of the statute of limitations via the relation-back doctrine.

This court holds SLG, L&K, and Marcato demonstrated their entitlement to a dismissal of Plaintiff's complaint and that Plaintiff failed to raise any triable issues of fact to preclude same.[1] Moreover, this court holds that Plaintiff failed to establish all of the elements of the relation-back doctrine in order to enable this court to grant him leave to add SL Green Management Corp. and SL Green Management LLC as direct defendants post the expiration of the statute of limitations.

According to Plaintiff, on the day of his accident he was employed by Third-Party Defendant Kleinknecht Electric Company, Inc. ("KEC") as a journeyman electrician. He testified that he was assigned to disconnect the electrical power supply to the subject premises in order to allow for the demolition and renovation of the jobsite. Plaintiff alleges that his injuries occurred as he, his foreman, Joseph Healy, and his coworker, Jeremy Corenzwit, were on the seventh floor of the subject premises and waiting for the freight elevator to arrive. He claims that when the freight elevator arrived and opened its doors that his foreman and coworker entered the freight elevator before him. He testified that before he could fully enter into the freight elevator, the freight elevator's operator manually closed the elevator's doors, thereby, striking his right shoulder rendering him injured.

I. Labor Law §241(6)

Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a

[1] In light of the dismissal of Plaintiff's complaint, all third-party claims for contractual indemnity, common law indemnity, and breach of contract are now rendered moot, therefore, said claims will not be addressed herein.

plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

In support of Plaintiff's Labor Law §241(6) claim he asserts the following predicates: Industrial Code 12 NYCRR §23-7.3 and Building Code §30-3010.1. Therefore, Plaintiff abandoned all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.,* 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC,* 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

A. 12 NYCRR §23-7.3

Plaintiff alleges that Defendants violated 12 NYCRR §23-7.3. Industrial Code 12 NYCRR 23-7.3, titled "Temporary use of permanent elevators" provides, in pertinent part: Passenger or freight elevators being installed in buildings or other structures for permanent use may be used before completion of the building or other structure during construction to carry persons or material, or both, provided that the elevator operators shall be competent, trained, and a designated persons.

SLG and L&K contend that the instant Industrial Code is neither specific enough to serve as a Labor Law §241(6) predicate and it is not applicable to the facts at bar. In oppostion, Plaintiff argues that Defendants violated this Industrial Code in that the elevator operator who allowed the freight elevator's doors to strike him was not sufficiently trained or

competent to operate said elevator.

This court finds that the instant Industrial Code is too general to establish a duty under Labor Law §241(6). *See Kanarvogel v. Tops Appliance City, Inc.*, 271 A.D.2d 409, 705 N.Y.S.2d 644 (2d Dep't 2000); *see also Bruno v. Mall 1-Bay Plaza, LLC*, 2019 N.Y. Slip. Op. 33486[U] (Sup. Ct. N.Y. County 2019).

B. New York City Building Code §30-3010.1

Plaintiff alleges that Defendants violated New York City Building Code §30-3010., which provides in pertinent part provides: … "every passenger and freight elevator with a rise of more than one story shall be in the charge of a designated competent operator, who shall be at least 18 years old and selected with consideration of his or her abilities to perform his or her duties in a careful and competent manner. Such designated competent operator shall be instructed in the safe and proper operation of the equipment."

This court finds that after searching the record that New York City Building Code §30-3010 is insufficiently specific enough to serve as a predicate to support his Labor Law §241(6) claim. The language in this Building Code is almost identical to the language in Industrial Code 12 NYCRR 23-7.3, which has already been found to be an insufficient predicate to sustain a Labor Law §241(6) claim. Therefore, Plaintiff's Labor Law §241(6) claim must be dismissed.

II. Labor Law §200

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC,* 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches

if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control. *Makarius v. Port Auth. of NY & New Jersey,* 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

SLG, L&K, and Marcato all argue that Plaintiff's Labor Law §200 claim must be dismissed. They all contend that they did not create the condition that led to Plaintiff's injuries nor did they have actual or constructive notice of same. Moreover, they posit that they did not exercise supervision and/or control over the elevator operator or Plaintiff's injury-producing work. In addition, Marcato argues that Plaintiff's injuries did not result from a malfunction with the freight elevator's door but rather his injuries occurred due to the inattentiveness of the freight elevator's operator.

In oppostion, Plaintiff argues that liability under Labor Law §200 should be imposed upon SLG and L&K because they had control over the freight elevator's operator and were on notice of the freight elevator operator's inattentiveness, which led to Plaintiff's injuries.

This court finds that Plaintiff's Labor Law §200 claim must be dismissed. SLG, L&K, and Marcato all established their *prima facie* burden that they did not create the conditions that led to Plaintiff's injuries nor did they have actual or constructive notice of same. In addition, SLG, L&K, and Marcato demonstrated that they did not exercise any supervision and/or control over the freight elevator's operator or Plaintiff's work. Plaintiff's argument that SLG, L&K, and Marcato were on notice of the freight elevator's operator's inattentiveness is speculative and fails to raise triable issues of fact.

III. Common Law Negligence

To state a claim for negligence, a plaintiff must sufficiently allege: (1) a duty; (2) a breach of that duty; (3) causation; and (4) actual injury. *Aetna Life Ins. Co. v. Appalachian Asset Mgt. Corp.,* 110 A.D.3d 32, (1st Dep't 2013).

SLG, L&K, and Marcato argue they are entitled to a dismissal of Plaintiff's common law negligence claims because they established their *prima facie* burden in that, they did not breach their duty of care owed to Plaintiff nor did they create a hazardous condition. Moreover, they contend Plaintiff's own actions were the proximate cause of his injuries.

In opposition, Plaintiff argues that Defendants should be held liable under common law negligence as the freight elevator's operator launched a force of harm, which was a substantial proximate cause to his accident. Finally, he posits that Defendants cannot establish their *prima facie* burden due to the doctrine of *res ispa loquitor* because Plaintiff's accident could not have happened absent Defendants' negligence.

This court finds SLG, L&K, and Marcato demonstrated their *prima facie* burden that they owed no duty of care to Plaintiff. Plaintiff's argument that they should be held liable because it "launched a force or instrument of harm" is unavailing as it did not create or exacerbate the condition of the elevator, and therefore did not launch a force or instrument of harm. *See Ileiwat v. PS Marcato El. Co., Inc.,* 178 A.D.3d 517, 115 N.Y.S.3d 269 (1st Dep't 2019). Further, this court finds Plaintiff's argument with respect to *res ipsa loquitur* unavailing. To rely on that doctrine, a plaintiff must show that: (1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the instrumentality that caused the injury is within the defendants' exclusive control; and (3) the injury is not the result of any voluntary action by the plaintiff. *See Tora v. GVP AG*, 31 A.D.3d 341, 819 N.Y.S.2d 730 (1st Dep't 2006).

Here, Plaintiff failed to satisfy the second and third elements of the *res ipsa loquitur* doctrine. He did not establish that Defendants had exclusive control over the freight elevator's operator and that the accident and any resulting injuries was not the result of his voluntary action or contribution. *See Giantomaso v. T. Weiss Realty Corp.,* 142 A.D.3d 950, 37 N.Y.S.3d 313 (2d Dep't 2016).

IV. Relation-Back Doctrine

CPLR §203(f) is a codification of the relation-back doctrine and pertinent part provides: "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading." *Ramirez v. Elias-Tejada,* 168 A.D.3d 401, 92 N.Y.S.3d 188 (1st Dep't 2019). Application of the relation back doctrine allows a plaintiff to "correct a pleading error by adding either a new claim or a new party after the statutory limitations period has expired." *Id.*

Where a plaintiff seeks to add new defendants, the following three conditions must be met before claims against one defendant may relate back to claims against another: "(1) both claims arose out of same conduct, transaction or occurrence; (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Id.*

Plaintiff seeks leave to amend the caption to add SL Green Management Corp. and SL

Green Management LLC as direct defendants post the expiration of the statute of limitations by way of the relation-back doctrine. He argues that SLG admitted via its Property Manager, John Flaherty's, affidavit that SLG only owned the premises but that SL Green Management LLC was the Plaintiff's actual employer. In addition, he contends that the SLG, SL Green Management Corp. and SL Green Management LLC have significant overlap as they share the same corporate headquarters, are directed by common management, share one human resources department, they share common liability insurance, and have the same agent for service of process. Moreover, Plaintiff posits that by reason of the relationship between SLG, SL Green Management Corp., and SL Green Management LLC that the latter two entities could be charged with such notice of this action.

In oppostion, SLG contends that Plaintiff failed to meet all the required elements in order for the relation-back doctrine to be applicable. SLG argues that Plaintiff failed to demonstrate that SLG, SL Green Management Corp., and SL Green Management LLC were sufficiently united in interest. SLG claims that because it cannot be held vicariously liable for the negligent acts or omission of SL Green Management Corp., and SL Green Management LLC and that all the entities do not share common defenses that the relation-back doctrine is inapplicable.

This court finds that Plaintiff established the first and third prongs of the relation-back doctrine and that SLG did not contest same. However, this court finds that Plaintiff failed to satisfy the second prong of the relation back doctrine. He did not demonstrate that the defenses among the three entities would be identical, and thus their interests will be united, or that SLG would be held vicariously liable for the acts of the other. *See Xavier v. RY Mgt. Co.,* Inc., 45 A.D.3d 677, 846 N.Y.S.2d 227 (2d Dep't 2007). Further, Plaintiff did not show

that the subject entities had more than just a common interest in the outcome, and the fact that the entities may share resources such as office space and employees is not dispositive. *Id.* Therefore, Plaintiff's application seeking leave to amend the caption to add SL Green Management Corp., and SL Green Management LLC as direct Defendants is denied.

Accordingly, it is

ORDERED, that SLG's summary judgment motion (Mtn. Seq. # 8) seeking the dismissal of Plaintiff's complaint, *inter alia*, is granted only to the extent that Plaintiff's complaint, cross-claims, and counterclaims asserted against it are dismissed; and it is further

ORDERED, that KEC's cross-motion (Mtn. Seq. # 8) seeking the dismissal of all third-party claims asserted against it is granted; and it is further

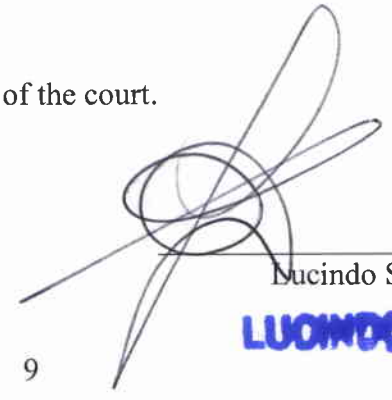
ORDERED, that L&K's cross-motion for summary judgment (Mtn. Seq. # 8) seeking to dismiss Plaintiff's complaint, *inter alia*, is granted only to the extent that Plaintiff's complaint and cross-claims asserted against it are dismissed; and it is further

ORDERED, that Plaintiff's cross-motion (Mtn. Seq. # 8) seeking leave to amend the caption to add SL Green Management Corp. and SL Green Management LLC as direct Defendants post the expiration of the statute of limitations via the relation-back doctrine is denied; and it is further

ORDERED, that Marcato's summary judgment motion (Mtn. Seq. # 9) seeking to dismiss Plaintiff's complaint, all cross-claims, and third-party claims asserted against it is granted.

This constitutes the decision and order of the court.

Dated: September 15, 2021



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.

9