

Leone v R&J Realty Co. LLC
2023 NY Slip Op 35053(U)
June 26, 2023
Supreme Court, Queens County
Docket Number: Index No. 708523/2017
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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MARIELLE LEONE and BRIAN CIVITA,

Plaintiff(s),

Index
Number:708523/2017

-against-

Motion Date:
May 30, 2023

R&J REALTY COMPANY LLC, STEELCRAFT
HOLDING CORP., STEELCRAFT ROLLING
DOORS, INC., STEELCRAFT FOLDING
GATE CORP., MASPETH WELDING, INC.,
JEFFREY ANSCHLOWAR and JEFFREY
ANSCHLOWAR, as EXECUTOR Of The
ESTATE OF ROBERT ANSCHLOWAR,

Motion Seq. No.:014

Defendant(s).

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R&J REALTY COMPANY LLC, MASPETH
WELDING, INC., and JEFFREY ANSCHLOWAR,

Third-Party Plaintiffs,

-against-

JECG CORP.,

Third-Party Defendant.

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JEFFREY ANSCHLOWAR, as Executor of
The ESTATE OF ROBERT ANSCHLOWAR,

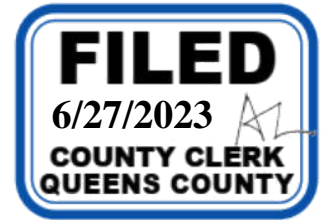
Second third-Party Plaintiff,

-against-

JECG CORP, RICHARD GETTINGER, STEELCRAFT
HOLDING CORP. and STEELCRAFT ROLLING
DOORS, INC.,

Second Third-Party Defendants.

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The following papers were read on this motion by defendant/third-party plaintiff Jeffrey Anschlowar for an order pursuant to CPLR § 3212(a) granting summary judgment and dismissal of the complaint insofar as asserts against that defendant; and cross-motion by defendant/second third-party plaintiff, Jeffrey Anschlowar as the Executor of the Estate of Robert Anschlowar for an order pursuant to CPLR § 3212(a) granting summary judgment and dismissal of the complaint insofar as asserted against that defendant; and cross-motion by plaintiffs for an order pursuant to CPLR §§ 3025(b) and (c), CPLR § 3042(b) granting plaintiffs leave to amend the Verified Bill of Particulars.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Affidavit, Memorandum of Law and Exhibits.....	E273-284
Notice of Cross-Motion, Affirmation, Affidavit and Memorandum of Law.....	E285 289
Notice of Cross-Motion, Affirmation, Affidavit.....	E310-317
Reply Affirmation.....	E326-327
Reply Affirmation.....	E329-330
Reply Affirmation.....	E331

Upon the foregoing papers it is ordered that this motion and cross-motions are determined as follows:

On October 28, 2016, the rolling gate at the premises known as 5890 55th Street, Maspeth, New York, which was owned by defendant Jeffrey Anschlowar and decedent Robert Anschlowar, and leased by third-party defendant JECG Corp., failed to open completely and was struck by a delivery truck. Plaintiff Marielle Leone, who was employed by third-party defendant JECG Corp., was struck by a piece of the rolling gate as a result of the accident, causing personal injuries.

The first branch of the motion by defendant Jeffrey Anschlowar in his individual capacity, and cross motion by defendant Jeffrey Anschlowar as Executor of the Estate of Robert Anschlowar, seeks summary judgment and dismissal of plaintiffs' causes of action asserting violations of Labor Law §§ 200, 240, and 241(6), on the ground plaintiff Marielle Leone's accident was not caused by construction related activities.

Plaintiffs, in opposition, concede the accident was not construction related.

As such, the first branch of the motion by defendant Jeffrey Anschlowar in his individual capacity, and cross motion by

defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar, seeking summary judgment and dismissal of plaintiffs' causes of action asserting violations of Labor Law §§ 200, 240, and 241(6), insofar as asserted against those defendants, is granted.

The second branch of the motion by defendant Jeffrey Anshlowar in his individual capacity, and cross motion by defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar, seeks summary judgment and dismissal of plaintiffs' common law negligence cause of action on the ground defendant Jeffrey Anshlowar was an out-of-possession landlord who had no obligation to repair the rolling gate involved in the accident.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (see Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has demonstrated entitlement to summary judgment, the party opposed to the motion must produce competent evidence in admissible form to establish the existence of a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The court's function is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp, 3 NY2d 395 [1957]; Pizzi by Pizzi v Bradlee's Div. Of Stop & Shop, 172 AD2d 504, 505 [2d Dept 1991]).

"Generally, an out-of-possession landlord is not liable for injuries that occur on leased premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (Straub v JM Prop. of Sayville, LLC, 215 AD3d 991, 992 [2d Dept 2023] [internal quotation marks omitted]). "When an out-of-possession landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing condition fell within the landlord's contractual responsibilities" (Patterson v H.E.H., LLC, 2023 NY Slip Op 03358 [2d Dept 2023]).

Defendant Jeffrey Anshlowar, in support, annexed the lease between defendant Jeffrey Anshlowar and third-party defendant JECG Corp., which states the tenant was obligated to maintain and repair the subject premises except for "structural maintenance," where the term "structural" was defined as "roof, load bearing walls and concrete slab." This proof demonstrated that defendant Jeffrey Anshlowar was an out-of-possession landlord who was not contractually obligated to make repairs to the rolling gate involved in plaintiffs' injuries (see Richer v JQ II Assocs., LLC,

166 AD3d 692, 694 [2d Dept. 2018]; Syrko v Jertom Inc., 140 AD3d 473, 473 [1st Dept 2016]).

Plaintiffs, in opposition, cite to the deposition testimony by Robert DiGiovanni, the owner of the company that installed the rolling gate, who attested the rolling gate was permanently affixed to the wall of the subject premises. This evidence fails to raise a question of fact since the definition of "structural" as provided in the lease did not include entryways or gates (see id.). Plaintiffs also relies on the deposition of Richard Gettinger, the owner of third-party defendant JECG Corp., who opined the landlord was responsible for maintaining and repairing the subject rolling gate. Gettinger's subjective interpretation of the lease, however, fails to raise an issue of fact, as "the subjective notions of parties to contracts do not determine the legal rights and duties created by a writing of the agreement" (Tarantola v Williams, 48 AD2d 552, 554 [2d Dept 1975]), and there was no evidence of a course of conduct by defendant Jeffrey Anshlowar in repairing the rolling gate that would have shifted the burden to maintain and repair the rolling gate to defendant Jeffrey Anshlowar.

As such, the second branch of the motion by defendant Jeffrey Anshlowar in his individual capacity, and cross motion by defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar, seeking summary judgment and dismissal of plaintiffs' common law negligence claim insofar as asserted against those defendants, is granted.

The cross motion by plaintiffs seeks to amend their bill of particulars to include an allegation that defendants violated New York City Administrative Code § 28-301.1. The amendment, however, is "palpably insufficient" (Wander v St. John's Univ., 163 AD3d 896, 896 [2d Dept 2018]), as "Administrative Code of the City of New York § 28-301.1 may not serve as a predicate to impose tort liability upon defendant[s]" (J-Line Inc. v Leggett Ave. & So. Blvd. Realty Corp., 134 AD3d 584, 585 [1st Dept 2015]; see Yuying Qiu v J & J Grocery & Deli Corp., 115 AD3d 627, 627 [1st Dept 2014]).

As such, the cross motion by plaintiffs seeking to amend the bill of particulars to include an allegation that defendants violated New York City Administrative Code § 28-301.1, is denied.

Accordingly, it is

ORDERED that the first branch of the motion by defendant Jeffrey Anshlowar seeking summary judgment and dismissal of plaintiffs' causes of action asserting violations of Labor Law §§

200, 240, and 241(6), insofar as asserted against that defendant, is GRANTED; and it is further

ORDERED that the second branch of the motion by defendant Jeffrey Anshlowar seeking summary judgment and dismissal of plaintiffs' common law negligence cause of action, insofar as asserted against that defendant, is GRANTED and the complaint hereby DISMISSED insofar as asserted against defendant Jeffrey Anshlowar; and it is further

ORDERED that the first branch of the cross motion by defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar seeking summary judgment and dismissal of plaintiffs' causes of action asserting violations of Labor Law §§ 200, 240, and 241(6), insofar as asserted against that defendant, is GRANTED; and it is further

ORDERED that the second branch of the motion by defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar seeking summary judgment and dismissal of plaintiffs' common law negligence cause of action, insofar as asserted against that defendant, is GRANTED and the complaint hereby DISMISSED insofar as asserted against defendant Jeffrey Anshlowar as Executor of the Estate of Robert Anshlowar; and it is further

ORDERED that the cross motion by defendant seeking to amend the bill of particulars to include an allegation that defendants violated New York City Administrative Code § 28-301.1, is DENIED.

This constitutes the Decision and Order of the court.

Dated: June 26, 2023



Denis J. Butler, J.S.C.

