Vazquez v A & I Realty Corp.
2023 NY Slip Op 35054(U)
June 14, 2023
Supreme Court, Queens County
Docket Number: Index No. 709073/2015
Judge: Robert I. Caloras
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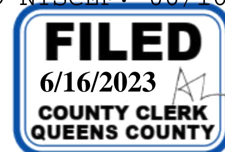

SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS **PART 36 MOTIONS**

Justice

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ORLANDO VAZQUEZ,

Plaintiff,

- v -

A & I REALTY CORP., MARJAM SUPPLY CO., INC.

Defendant.

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INDEX NO. 709073/2015

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, under the motion and cross motion as: 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110; and the CD video Defendant submitted marked as "1" were read on the motion filed by Defendants for an order granting Defendants summary judgment dismissing the Complaint; and Plaintiff's cross motion for an order granting Plaintiff leave to Amend the Bill of Particulars to add an allegation alleging Defendants violated Labor Law 200.

Upon the foregoing documents, it is ordered that Defendants' motion and Plaintiff's cross motion are denied for the following reasons:

According to the Complaint, on September 13, 2012 Plaintiff was injured at the premises located 20 Rewe Street, Kings County, owned by Defendant A & I Realty Corp. (A & I), and leased by Defendant Marjam Supply Co., Inc. (Marjam).

Defendants now move for summary judgment dismissing the Complaint. Defendants submitted, among other things, the following: Bill of Particulars and Supplemental Bill of Particulars; Plaintiff's deposition transcript; Harrinarine Gobinrajlo's (Gobinrajlo) deposition transcript; Defendants' Supplemental Response to Plaintiff 's Notice for Discovery and Inspection, along with Defendants' lease for the premises; and a CD surveillance video. According to the lease Defendants submitted, at the time of the alleged accident, A & I was the owner of the premises and Marjam was a tenant.

Plaintiff testified as follows: on the day of the accident, Plaintiff was employed by Flushing Supply as a driver and warehouse foreman. He drove a flatbed truck to Marjam to pick up insulation for his employer. When Plaintiff arrived at Marjam, he checked in at the front desk, picked up a slip, and then drove the flatbed truck to the pickup area. A Marjam employee used a Marjam forklift to load four square bundles of insulation, approximately six to eight feet high, on top of a skid/pallet onto Plaintiff's truck. Before Marjam's employee loaded the bundles onto Plaintiff's truck, Plaintiff told the employee that the bundles were too high. Marjam's employee "blew [Plaintiff] off" and loaded the bundles onto the truck. After Marjam's employee dropped off the pallet with the four bundles, he drove the forklift away to get more bundles. Plaintiff had intended to tie down the

bundles after Marjam's employee secured the insulation and loaded it onto the truck. However, Marjam's employee did not secure the bundles before loading them onto the truck. The bundles were loose, not strapped down, "landing sideways", and "tilting [over] to the driver's side towards the left". According to Plaintiff, some companies put shrink wrap or a band around the insulation to secure it. After the first bundle was loaded onto his truck, Plaintiff climbed onto his truck because the bundles were tilting, and he wanted to redistribute the bundles because they were too high. He tried to get help from a Marjam employee, but a Marjam employee "just blew me away and kept driving". Before Marjam's employee returned with the additional bundles, Plaintiff's accident occurred. Plaintiff had climbed onto the cab to bring down one of the bundles. He stepped on the insulation he was moving, and fell off the side of the truck, landing on the ground. Plaintiff also identified a video which purportedly depicts the accident.

Gobinrajlo testified as follows: at the time of the accident, he was employed by Marjam as a loader, and was responsible for loading customer's truck or van with materials. He loaded Plaintiff's flatbed. He first learned of the accident when he watched the video (marked and identified at Plaintiff's deposition) of the accident. He did not recall any details from the date of the accident other than those on reflected on the video. If a driver complains that a load that was placed by a hi-low machine was stacked too high on the truck, then it was Marjam's responsibility to address the situation and/or make the load lower with the hi-low machine. It would have been Gobinrajlo or another loader or a supervisor who corrects the load. If a driver complains that the load was improperly stacked, then Marjam's policy was to immediately address the issue, and not wait until after another pallet is placed onto the truck. Materials must be loaded straight and/or be loaded in a straight stack, and not tiled. If the materials are not straight then a Marjam employee would ". . . take it down and wrap it up or whatever or strap it or something".

Based upon the foregoing, Defendants argue that A & I is entitled to summary judgment, because A & I did not exercise any control over Plaintiff's vehicle. Further A & I, the owner of the of the premises, did not create a defective condition or set loose an "instrumentality of harm, nor did A & I have actual or constructive knowledge of the alleged condition. Defendants also argue that Plaintiff's accident did not occur due to any negligence on their behalf, nor did any of Defendants' actions cause and/or contribute to Plaintiff's accident.

In opposition, Plaintiff argues that Defendants' motion should be denied because issues of fact exist regarding whether Defendants were negligent, and if Defendants' negligence caused Plaintiff's accident. Plaintiff submitted, among other things, Mark Buller's (Buller), President of both Marjam and A & I, deposition transcript. At his deposition, Buller testified that A & I has an office at subject premises, and that as A & I's President he works out of that office daily. Based therein, Plaintiff argues that issues of facts exists regarding whether A & I was an in-possession or out-of-possession landlord, and whether by working at the location of the accident on a daily basis, whether Buller was acting solely on behalf of Marjam and not A & I.

As the movant on a motion to dismiss the Complaint pursuant to CPLR 3212, the burden is on the Defendant to establish its prima facie entitlement to summary judgment (*see* Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the non-moving parties to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such

a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* Winegrad v New York Univ. Med. Ctr., supra).

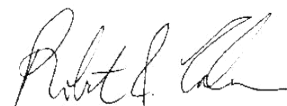
The elements of common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and such breach constituted a proximate cause of the injury (see Federico v Defoe Corp., 138 AD3d 682, 684 [2d Dept 2016], lv denied, 28 NY3d 912 [2017]; Ruiz v Griffin, 71 AD3d 1112, 1114 [2d Dept 2010]; Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). Since a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see Espinal v Melville Snow Contrs., 98 NY2d 136 [2002]). The scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived (see Sanchez v State of New York, 99 NY2d 247, 252 [2002]; Palsgraf v Long Is. R.R. Co., 248 NY 339, 344 [1928]; Ingrassia v Lividikos, supra at 724; Vetrone v Ha Di Corp., 22 AD3d 835, 837 [2d Dept 2005]). Foreseeability includes what a defendant actually knew or what it reasonably should have known (see Ruiz v Griffin, 71 AD3d at 1114-15). The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court (see Di Ponzio v Riordan, 89 NY2d 578, 583 [1997]; Merchants Mut. Ins. Co. v Quality Signs of Middletown, 110 AD3d 1042, 1043 [2d Dept 2013]; Lynfatt v Escobar, 71 AD3d 743, 744 [2d Dept 2010]).

Here, the Court finds that Defendants' submissions failed to establish their entitlement to summary judgment dismissing the Complaint as against Defendant Marjam. Plaintiff's and Gobinrajlo's (Marjam's employee) testimony, as well as the surveillance video, did resolve all issues of fact regarding whether Gobinrajlo secured the pallet bundles onto Plaintiff's flatbed, or loaded the bundles on a tilt causing Plaintiff to fall. As to Defendant A & I, the Court finds that issues of fact exist regarding whether A & I retained control of the subject premises.

"A property owner is not liable in negligence unless he or she created the allegedly dangerous condition or had actual or constructive notice of its existence (Rosas v 397 Broadway Corp., 19 AD3d 574 [2d Dept. 2005]). Plaintiff submitted Buller's deposition transcript, wherein Buller testified that he is the President of both Defendants, and that A & I primarily works out of the location of the accident. Consequently, A & I was not an out of possession landlord because it maintained an office at the subject premises. As such, issues of fact exist regarding whether A & I retained control over the subject premises, and had actual notice of the allegedly dangerous condition that caused the subject accident by virtue of Buller being President of both A & I and Marjan (Rosas v 397 Broadway Corp., 19 AD3d 574 [2d Dept. 2005] Defendants failed to establish lack of actual notice of the alleged defect, because the individual who was president of both the corporate landlord and the corporate tenant was the same person. . . . and was present at the site every day".]; Kolmel-Hayes v South Shore Cruise Lines, Inc., 23 AD3d 530 [2d Dept. 2005] [Plaintiff raised triable issues of fact by submitting " . . . evidence in admissible form that South Shore was not an out-of-possession landlord because it maintained an office on the premises, retained control over the premises, and had actual notice of the allegedly dangerous condition that caused the injuries"]). Accordingly, Defendants' motion is denied.

The Court also denies Plaintiff's cross motion seeking leave to serve an Amended Bill of Particulars alleging Defendants' violated Labor Law 200. Motions for leave to amend or supplement a bill of particulars are governed by the same standards applied to motions to amend pleadings (Scarangello v State of New York, 111 AD2d 798 [2d Dept 1985]). Generally, leave to amend a

pleading or bill of particulars "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (see Rodgers v New York City Tr. Auth., 109 AD3d 535 [2d Dept 2013]; Trystate Mech., Inc. v Macy's Retail Holdings, Inc., 94 AD3d 1095 [2d Dept 2012]; Daly-Caffrey v Licausi, 70 AD3d 884 [2d Dept 2010]). Here, Plaintiff's submissions merely establish that he was a customer of Defendants at the time of the accident, and not entitled to the Labor Law protections. As such, the Court finds that Plaintiff's request to amend the Bill of Particulars to add an allegation alleging that Defendants' violated Labor Law 200 is patently devoid of merit.



DATED: June 14, 2023

ROBERT I. CALORAS, J.S.C.