Sells v Stonhard, Inc.

2024 NY Slip Op 35147(U)

August 20, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 600339/2019

Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 600339/2019
CAL. No. 202301687OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 1/31/24 (008)
MOTION DATE 3/21/24 (009)
ADJ. DATE 5/22/24
Mot. Seq. # 008 MG
Mot. Seq. # 009 MG; CASEDISP

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LISA SELLS,

Plaintiff,

- against -

STONHARD, INC., MAJESTIC FLOORING SOLUTIONS CORPORATION and LIBERTY MOVING & STORAGE CO., INC.,

Defendants.

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Upon the following papers read on these motions to renew/summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant Majestic Flooring Solutions Corporation, dated December 18, 2023; Notice of Motion and supporting papers by defendant Liberty Moving & Storage Co., Inc., dated February 29, 2024; Answering Affidavits and supporting papers by Liberty Moving & Storage Co., Inc., dated February 21, 2024; Answering Affidavits and supporting papers by plaintiff, dated March 22, 2024 and May 16, 2024; Replying Affidavits and supporting papers by defendant Majestic Flooring Solutions Corporation, dated May 20, 2024; Replying Affidavits and supporting papers by defendant Liberty Moving & Storage Co., Inc., dated May 21, 2024; Other Memoranda of Law; it is

ORDERED that the motion of defendant Majestic Flooring Solutions Corporation and the motion of defendant Liberty Moving & Storage Co., Inc. are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant Majestic Flooring Solutions Corporation for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and the cross claims against it, is granted, and it is further

ORDERED that the motion of defendant Liberty Moving & Storage Co., Inc. for leave to renew its prior motion for summary judgment, which was denied without prejudice by order of this Court dated August 6, 2022, is granted; and it is further

ORDERED that, upon renewal, the motion of defendant Liberty Moving & Storage Co., Inc. for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and the cross claims against it, is granted.

Plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained on August 12, 2016 as a result of falling off a ladder in the basement of Irving Hall, a building located on the campus of Stony Brook University. At the time of the alleged incident, plaintiff was using the ladder to attempt to climb through a window at the subject premises in order to access a carpentry shop, during the course of her employment as a maintenance supervisor for the university. She commenced the instant action against the defendant contractors that were allegedly performing work at the subject premises on the date of the incident, alleging claims for negligence and violations of the Labor Law.

Defendant Majestic Flooring Solutions Corporation ("Majestic") moves for summary judgment dismissing plaintiff's claims and the cross claim asserted against it. Defendant Liberty Moving & Storage Co., Inc. ("Liberty") moves for leave to renew its prior motion for summary judgment, and upon renewal, for an order dismissing plaintiff's claims and the cross claims against it. In support of the motions, Majestic and Liberty each have submitted, inter alia, the parties' deposition testimony in this matter. Majestic also submits an affidavit by Aaron Poelker.

Plaintiff testified that, on the date of the accident, she was employed by Stony Brook University as a maintenance supervisor. She stated that the accident occurred at Irving Hall, a dormitory building located on the Stony Brook University campus, which also contained offices and a carpentry shop in the basement. The carpentry shop housed the office of another supervisor, and a coffee room. Plaintiff testified that renovations of Irving Hall were being performed on the date of the accident, including the application of epoxy flooring to certain areas in the basement. She stated that the renovations were performed by outside contractors, and that the Stony Brook University maintenance department was not involved in the renovations. Plaintiff stated that Majestic was performing the application of the epoxy flooring to a vestibule area, the laundry room, and a hallway in the basement of Irving Hall, but not to the floor within the carpentry shop. She further testified that Liberty is a moving company which was hired by the university to move dormitory furniture at the premises. Plaintiff stated that she did not have any discussions with anyone from Majestic or Liberty regarding their work at the premises.

Plaintiff testified that, on the day prior to her accident, her supervisor told her that the epoxy flooring work was being performed in the basement of Irving Hall, and to make sure that none of the

maintenance employees walked on the floor. She stated that the entrances leading to the basement of the premises were blocked with caution tape on the day of her accident and the day prior, but she did not know who placed the caution tape at the entrances. Plaintiff further stated that her supervisor told her that they should go through the window in the coffee room to access the carpentry shop. The casement window had been removed, and A-frame ladders had been placed inside and outside of the window to allow access to the carpentry shop. The ladder which was placed inside the window was leaning against the wall in a folded position. Plaintiff testified that she utilized the ladders to go through the window into the coffee room on the day prior to her accident, when she and a co-worker cut and sanded pieces of wood in the carpentry shop. At approximately 4:00 p.m. on the day of the accident, plaintiff again attempted to access the carpentry shop using the ladders to go through the window. She stated that, when she stepped onto the inside ladder after climbing through the window, it slid from the wall and she fell, sustaining injuries.

Aaron Poelker, president of Majestic, testified that he was the project manager for the work which Majestic performed at Stony Brook University in August 2016. Poelker stated that Majestic was hired by the university to remove certain floors and to replace them with a new epoxy coating system. Poelker testified that Majestic's work did not include clearing out the areas where they would be working prior to performing the flooring work. He also stated that Majestic does not work near other trades while applying the epoxy flooring, and that it was not responsible for preventing people from entering the areas where the work was performed. According to the affidavit by Poelker, which was submitted in support of Majestic's motion, the flooring work performed in Irving Hall was limited to a hallway in the basement of the building.

Joseph Biancaniello testified on behalf of Liberty in this matter. Biancaniello stated that he is an account manager for Liberty, and oversees the moving services provided to Stony Brook University. He further testified that, during the summer of 2016, Liberty was moving furniture from student dormitories and offices in the Mendelsohn Quad to storage containers located in the Kelly lower parking lot, and then back into the residence buildings after renovations were performed by the university. Biancaniello testified that Liberty was not otherwise involved in any of the renovations performed on the campus. He stated that the moving services that Liberty provided at Irving Hall in August 2016 consisted of moving furniture back into student dorm rooms on the first and second floors of the building. Biancaniello testified that the furniture was transported in and out of the building on dollies, and that trucks were used to transport it between the storage containers and the buildings. Biancaniello stated that the furniture was never left in the hallways or stairways overnight. He also stated that Liberty did not put any caution tape on exterior doors while moving furniture from Irving Hall in August 2016.

The branch of Liberty's motion for leave to renew its prior motion for summary judgment is granted. In support of its prior motion, Liberty submitted an affidavit by plaintiff and an affidavit by Suely Vera, the director of loss prevention for Liberty. By order dated August 6, 2022 (Reilly, J.), Liberty's motion was denied without prejudice, based on issues of fact regarding the location and the scope of the work that Liberty was performing on the date of the accident. A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination," and "shall contain a reasonable justification for the failure to present such facts on the

prior motion" (CPLR 2221 [e][2], [3]; *see* ***Shacknow v Fischman***, 170 AD3d 771, 93 NYS3d 604 [2d Dept 2019]; ***McHale v Metropolitan Life Ins. Co.***, 165 AD3d 914, 86 NYS3d 600 [2d Dept 2018]; ***Candlewood Holdings, Inc. v Valle***, 134 AD3d 872, 23 NYS3d 266 [2d Dept 2015]). Here, Liberty's renewal motion is based on discovery which had not yet been conducted at the time of its prior motion, including the depositions of plaintiff and Liberty. Although Liberty's prior motion was based on affidavits by plaintiff and an employee of Liberty, the deposition testimony of plaintiff and Biancaniello clarifies certain aspects of those affidavits and provides additional detail regarding the subject accident and the scope of Liberty's work at the premises. As the depositions had not yet been conducted at the time of the prior motion, and additional facts discovered during the depositions were previously unknown to Liberty, the court finds that Liberty has set forth a reasonable justification for the failure to submit those facts on the prior motion, and that the renewal of Liberty's motion is appropriate.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 937 NYS2d 157 [2011]).

The branch of Liberty's motion for summary judgment dismissing plaintiff's claims, and the cross claims against it, is granted. Initially, the Court notes that plaintiff has not opposed the branches of Liberty's motion for summary judgment dismissing her claims under Labor Labor §§ 240 (1) and 241 (6), and is deemed to have abandoned those causes of action (*see* ***Rodriguez v Dormitory Auth. of the State of New York***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). In addition, Liberty's submissions demonstrate that it is not subject to liability under those statutes, as it was not an owner or general contractor with regard to the work being performed at Stony Brook University on the date of the accident (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Kilmetis v Creative Pool & Spa, Inc.***, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; ***Aversano v JWH Contr., LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]; ***Temperino v DRA, Inc.***, 75 AD3d 543, 904 NYS2d 767 [2d Dept 2010]).

Liberty's submissions also establish prima facie entitlement to summary judgment dismissing plaintiff's claims against it pursuant to Labor Law § 200. Labor Law § 200 codifies the common-law duty of owners, contractors, or their agents to provide employees with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168). As discussed above, the evidence submitted in support of Liberty's motion establishes that it was not an owner or general contractor with

regard to any work which allegedly caused plaintiff's injury, and had no responsibility or authority to supervise plaintiff's work, or the area where plaintiff was injured. Accordingly, Liberty is not subject to liability under the Labor Law for the alleged accident (*see* ***Russin v Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]).

Liberty has also established prima facie entitlement to summary judgment with respect to plaintiff's claims under common law negligence. "To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Orlando v New York Homes By J & J Corp.***, 128 AD3d 784, 785, 11 NYS3d 76 [2d Dept 2015], quoting ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43 [2011]). A contractual obligation alone "will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 138, 746 NYS2d 120 [2002]; *see* ***Cioffi v Raritan Bldg. Servs. Corp.***, 131 AD3d 437, 13 NYS3d 901 [2d Dept 2015]; ***Wilson v Hyatt Corp.***, 72 AD3d 939, 900 NYS2d 325 [2d Dept 2010]). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, *supra* at 140 [internal quotation marks and citations omitted]; *see* ***Wilson v Hyatt Corp.***, 72 AD3d 939, 900 NYS2d 325).

With respect to plaintiff's claim under common law negligence, Liberty's submissions establish that it did not owe her a duty (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120). In this regard, the deposition testimony of the parties demonstrates that Liberty did not create any dangerous condition, thereby "launching a force of harm" which proximately caused the accident, or otherwise owe a duty of care to plaintiff (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489). Despite plaintiff's claim that Liberty blocked the stairwells and fire exits of the subject premises with furniture, her deposition testimony was clear that she did not attempt to access the carpentry shop in any manner other than through the window to the coffee room. In addition, plaintiff testified that she accessed the carpentry shop through the window at the direction of her Stony Brook University supervisor, as a method of avoiding the hallway in the basement where epoxy flooring had been applied. Thus, plaintiff's contention that Liberty "launched an instrumentality of harm" by blocking doors leading to the basement is unavailing. As plaintiff failed to submit any evidence refuting Liberty's prima facie showing that it did not have authority to supervise or control the work which allegedly gave rise to the accident, and that it did not create a dangerous condition which caused the accident, the claims against Liberty pursuant to Labor Law § 200 and common law negligence are dismissed (*see* ***Zuckerman v City of New York***, *supra*; ***Uhl v D'Onofrio Gen Contrs., Corp.***, 197 AD3d 770, 153 NYS3d 168 [2d Dept 2021]; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489; ***Torres v CTE Engineers, Inc.***, 13 AD3d 359, 786 NYS2d 101 [2d Dept 2004]). Accordingly, Liberty's motion for summary judgment is granted.

Majestic's motion for summary judgment dismissing plaintiff's claims, and the cross claims against it, is also granted. Notably, plaintiff has not opposed the branches of Majestic's motion for summary judgment dismissing her claims under Labor Labor §§ 200, 240 (1) and 241 (6), and is deemed to have abandoned those causes of action (*see* ***Rodriguez v Dormitory Auth. of the State of New York***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). In addition, Majestic's submissions establish, prima facie, that it is not subject to liability under those statutes, as it was not an owner or general contractor with regard to the work being performed at Stony Brook University on the date of the accident, and it did not have authority over any work being performed in the area where plaintiff was injured (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489).

Majestic has also established prima facie entitlement to summary judgment with respect to plaintiff's negligence claims, as its submissions demonstrate that it was an independent contractor which did not owe a duty to plaintiff, and that its conduct did not fall within any exception extending tort liability to an independent contractor, as set forth in ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120. As discussed above, Aaron Poelker testified that Majestic was hired by Stony Brook University to perform flooring work in certain areas of the subject premises, that it did not have any responsibility for keeping people from accessing the areas where it performed its work, and that it was not performing any work in the area where plaintiff's accident occurred. Plaintiff testified that she did not see any workers from Majestic on the date of the accident, that she did not speak with anyone from Majestic regarding the work, and that she attempted to access the carpentry shop through the window at the direction of her Stony Brook University supervisor. Majestic's submissions establish that it did not create a dangerous condition, or otherwise "launch a force of harm" which caused the accident, and similarly demonstrate that the other exceptions outlined in ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120, are inapplicable here (*see* ***Lopez v Limpiex Cleaning Servs., Inc.***, 199 AD3d 418, 153 NYS3d 849 [1st Dept 2021]; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489; ***Wilson v Hyatt Corp.***, 72 AD3d 939, 900 NYS2d 325; ***Troise v New Water St. Corp.***, 11 AD3d 529, 782 NYS2d 853 [2d Dept 2004]).

In opposition to Majestic's prima facie showing, plaintiff failed to raise a triable issue of fact (*see* ***Lopez v Limpiex Cleaning Servs., Inc.***, 199 AD3d 418, 153 NYS3d 849; ***Wilson v Hyatt Corp.***, 72 AD3d 939, 900 NYS2d 325; ***Shang Sook Min v ABM, Inc.***, 47 AD3d 699, 848 NYS2d 881 [2d Dept 2008]). Accordingly, the motion by Majestic for summary judgment is granted.

Dated: August 20, 2024

David T. Reilly, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION