

Carbellano v A/Z Corp.
2024 NY Slip Op 35155(U)
October 2, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615077/2018
Judge: Vincent J. Martorana
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SHORT FORM ORDER

INDEX No. 615077/2018
CAL. No. 202301405OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 12/14/23 (005)
MOTION DATE 2/15/24 (006)
ADJ. DATE 4/25/24
Mot. Seq. # 005 MotD
Mot. Seq. # 006 MD

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MARIO CARBELLANO, JR.,
Plaintiff,

EDELMAN KRASIN & JAYE, PLLC
Attorney for Plaintiff
7001 Brush Hollow Road, Suite 100
Westbury, New York 11590

- against -

LAW OFFICES OF JOHN J. BELLO, JR., ESQ.
Attorney for Defendant A/Z Corporation
100 William Street, 9th Floor
New York, New York 10038

A/Z CORPORATION, PRIMUS SOLUTIONS,
LLC, ASRC FEDERAL FIELD SERVICES,
LLC and ASRC FEDERAL HOLDING
COMPANY, LLC,
Defendants.

KENNEDYS CMK LLP
Attorney for Defendants Primus Solutions, LLC,
ASRC Federal Field Services, LLC and ASRC
Federal Holding Company, LLC
570 Lexington Avenue, 8th Floor
New York, New York 10022

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Upon the following papers read on this e-filed motion for summary judgment: (1) Notice of Motion/Order to Show Cause and supporting papers by defendants Primus Solutions, LLC, ASRC Federal Field Services, LLC, and ASRC Federal Holding Company, LLC, filed November 16, 2023; (2) Answering Affidavits and supporting papers by plaintiff, filed April 11, 2024; (3) Answering Affidavits and supporting papers by defendant A/Z Corporation, filed April 18, 2024; (4) Replying Affidavits and supporting papers by defendants Primus Solutions, LLC, ASRC Federal Field Services, LLC, and ASRC Federal Holding Company, LLC, filed April 23, 2024; (5) Notice of Motion/Order to Show Cause and supporting papers by defendant A/Z Corporation, filed December 19, 2023; (6) Answering Affidavits and supporting papers by defendants Primus Solutions, LLC, ASRC Federal Field Services, LLC, and ASRC Federal Holding Company, LLC, filed April 11, 2024; (7) Answering Affidavits and supporting papers by plaintiff, filed April 11, 2024; (8) Replying Affidavits and supporting papers by defendant A/Z Corporation, filed April 22, 2024; it is

ORDERED that these motions are consolidated for the purposes of this determination; and it is

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ORDERED that the motion by defendants Primus Solutions, LLC, ASRC Federal Field Services, LLC, and ASRC Federal Holding Company, LLC for summary judgment dismissing the complaint and all cross-claims against them is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the motion by defendant A/Z Corporation for summary judgment dismissing the complaint against it is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained when he fell from a defective chair on February 21, 2018, while employed as a security guard by nonparty Linxx Global Solutions (Linxx). Plaintiff alleged that the chair was located on the premises owned and operated by defendants, and that defendants retained contractors to perform work thereat. Plaintiff's accident occurred at the premises designated "Building 111," which was located on Plum Island in Orient, New York. A/Z Corporation (A/Z) is a contractor hired by the United States government to construct Building 111. Primus Solutions, LLC (Primus) is a contractor who was responsible for operations at Building 101, which was adjacent to Building 111. ASRC Federal Field Services, LLC (ASRC) was contracted to take over Primus' work in April 2018. Both Primus and ASRC are subsidiaries of ASRC Federal Holding Company, LLC (AFHC).

Primus, ASRC, and AFHC now move for summary judgment dismissing the complaint and all cross-claims against them, arguing, among other things, that they did not owe a duty to plaintiff. In support of the motion, they submit, among other things, the affidavit of Greg Resutek. Plaintiff opposes the motion, arguing, in part, that defendants failed to demonstrate that they did not own or control the subject chair. In opposition, plaintiff submits, among other things, an expert affidavit. A/Z also opposes the motion, arguing that there are triable issues of fact regarding Primus' access to the premises.

A/Z also moves for summary judgment dismissing the complaint, arguing, among other things, that it owed no duty to plaintiff. A/Z's submissions in support of its motion include deposition transcripts and an incident report regarding plaintiff's accident. Plaintiff opposes the motion, arguing, among other things, that A/Z failed to establish that it did not owe a duty to plaintiff. In opposition, plaintiff submits an expert affidavit. ASRC, AFHC, and Primus oppose A/Z's motion, arguing, among other things, that A/Z supplied the chair that caused plaintiff's accident.

Plaintiff testified that on February 21, 2018, he was employed by Linxx as a security guard, and was stationed at a guard post on Plum Island. The post was located inside of a building that was under construction. He testified that, while at his post, he sat upon a black leather office chair, which was similar to other chairs he had seen around Plum Island. He testified that he was unsure who provided the chair, or who had placed the chair at the guard post. He described the chair as "beat up," and testified that he sat in it for approximately 50 minutes. At that point, he "leaned" in order to put his cell phone into his pocket, and as he did so, he fell, hit his head, and lost consciousness. He testified that after the accident, he was informed by a fellow security officer that the chair had "snapped" in half at the time of his fall.

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Charles McGinnis LaCour testified on behalf of defendants Primus, ASRC, and AFHC. He testified that he was employed as project manager of Plum Island by ASRC, having been previously employed by Primus, and that Primus and ASRC were both subsidiaries of AFHC. He testified that Primus contracted with the Department of Homeland Security to provide maintenance services on Plum Island, which housed a federal animal disease research center. He confirmed that plaintiff's accident occurred in a building known as Building 111, in a hallway near room 203 of that building. He testified that Building 111 was under construction by A/Z in February 2018, and that prior to such construction room 203 was part of Building 101. He testified that Primus had operational control over Building 101, which was adjacent to Building 111, but that the two buildings were separated by a "biological barrier" at the time of the accident. Primus did not maintain employees in Building 111, and it did not provide services for that building. He stated that Primus ordered furniture for its own employees, that Primus never ordered any furniture for Building 111, and that the furniture in Building 101 was ordered "primarily" by the United States government. He testified that he believed Primus employees may have had access to some of the security control areas within Building 111 prior to February 2018 for training or orientation purposes. LaCour testified that he believed he had been inside room 203 prior to the incident. When shown a photograph of the chair alleged to have caused plaintiff's accident, he testified that he was unsure if Primus had ever ordered that model of chair for use by its employees. LaCour further testified that in February 2018 ASRC was not under contract to perform services on Plum Island, and that it did not maintain any employees thereat. He testified that ASRC was not contracted to begin work on Plum Island until April 1, 2018.

Garry Bressani testified on behalf of defendant A/Z. He testified that he had been employed by A/Z since 2016, and that in February 2018 he worked at the construction project at Building 111 on Plum Island. He testified that Building 111 was annexed to Building 101, but that at the time that he worked on the project there was no access between the two buildings. When shown a video of plaintiff's alleged accident, he confirmed that the area where the accident occurred was within Building 111. He testified that he did not know where the chair that caused plaintiff's accident came from.

"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]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (*Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). "The existence of one or more of these elements is sufficient to give rise to a duty of care . . . [h]owever, liability can also be imposed upon a party that creates a defective condition" (*id.*).

A defendant who contracts with a landowner to provide services on the premises may be liable to third parties injured thereupon in certain circumstances (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Abney v Meridian Props., LLC*, 222 AD3d 921, 201 NYS3d 661 [2d Dept 2023]). Generally, a contractual obligation, standing alone, will not give rise to tort liability to an injured third party (*see id.*). However, an exception to the general rule applies "where the contracting

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party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm” or “creates or exacerbates a dangerous condition” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120 [internal quotation marks omitted]; see *Cohen v City of New York*, 209 AD3d 830, 176 NYS3d 303 [2d Dept 2022]).

Here, ASRC and AFHC demonstrated their prima facie entitlement to summary judgment dismissing the complaint and the cross-claims against them (see *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 97 NYS3d 278; *Abney v Meridian Props., LLC*, 222 AD3d 921, 201 NYS3d 661). Their submissions demonstrated that ASRC and AFHC did not own, occupy, control, or make special use of the premises where plaintiff was injured prior to the accident (see *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 97 NYS3d 278). Further, they demonstrated that, at the time of plaintiff’s accident, neither entity maintained employees on the island, and they did not provide the chair that allegedly caused the accident, or otherwise contribute to the alleged dangerous or defective condition (see *Abney v Meridian Props., LLC*, 222 AD3d 921, 201 NYS3d 661). Greg Resutek, Chief Financial Officer for AFHC, avers that AFHC never owned or controlled Building 111 or the chair that allegedly caused plaintiff’s injuries. He further avers that AFHC did not enter into any contract with the United States government to perform work on Plum Island, and that in February 2018 it did not maintain any contractors to perform work thereat. Further, LaCour testified that pursuant to a contract with the United States, ASRC was not scheduled to begin any work on Plum Island until April 2018, and that at the time of plaintiff’s accident it did not maintain any employees thereat.

In response, plaintiff and A/Z failed to raise triable issues of fact (see *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 97 NYS3d 278; *Abney v Meridian Props., LLC*, 222 AD3d 921, 201 NYS3d 661). Plaintiff contends that Resutek’s affidavit is insufficient to demonstrate that AFHC did not own the subject chair, but offers no testimony or other evidence to refute the claims made therein. Plaintiff further contends that LaCour’s testimony is insufficient to show that ASRC employees were not present on Plum Island at the time of the accident, but again offers no testimony or evidence to refute LaCour’s assertions. Accordingly, the branch of the motion seeking dismissal of the complaint and all cross-claims against ASRC and AFHC is granted.

Primus, however, failed to demonstrate its entitlement to summary judgment dismissing the complaint, as it failed to demonstrate, as a matter of law, that it did not owe a duty to plaintiff (see *Amparo v Christopher One Corp.*, 225 AD3d 652, 653, 207 NYS3d 133 [2d Dept 2024]). Primus contends that because A/Z occupied and controlled the area where plaintiff was injured at the time of the accident, it is not liable to plaintiff. However, Primus’s submissions demonstrate that the area where plaintiff was injured was in fact a part of Building 101, which was under Primus’s operational control, at some time prior to February 2018. It therefore failed to eliminate all triable issues of fact as to its control over the premises (see *id.*). Primus’s submissions also failed to eliminate all triable issues of fact as to whether it supplied the allegedly defective chair that caused plaintiff’s accident (see *Camelio v Shady Glen Owners’ Corp.*, 219 AD3d 453, 194 NYS3d 98 [2d Dept 2023]). LaCour testified that he was unsure if Primus had ever purchased the model of chair that allegedly injured plaintiff for use on Plum Island, and testimony demonstrates that other chairs of the same or similar make were seen in nearby facilities. LaCour’s testimony demonstrated that Primus employees had access to the area where

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plaintiff's accident occurred prior to the time A/Z began construction on Building 111, and that he had seen chairs moved between different rooms on occasion on Plum Island. Finally, Primus failed to demonstrate that it lacked constructive notice of the allegedly defective chair (*see Salvania v University of Rochester*, 137 AD3d 1607, 27 NYS3d 768 [4th Dept 2016]; *McGough v Cryan, Inc.*, 111 AD3d 900, 976 NYS2d 135 [2d Dept 2013]; *Colon v Bet Torah, Inc.*, 66 AD3d 731, 887 NYS2d 611 [2d Dept 2009]). To meet its initial burden on the issue of constructive notice, Primus needed to demonstrate when it last inspected the chair prior to the plaintiff's accident, which it failed to do (*see id.*). Accordingly, Primus's motion for summary judgment dismissing the complaint and A/Z's cross-claims against it is denied.

The court finally turns to A/Z's motion for summary judgment dismissing the complaint against it. A/Z failed to demonstrate, *prima facie*, its entitlement to summary judgment as there are triable issues of fact as to whether it owned or provided the subject chair (*see Camelio v Shady Glen Owners' Corp.*, 219 AD3d 453, 194 NYS3d 98). The incident report submitted by A/Z alone is enough to raise a triable issue of fact, as the report states that it provided the subject chair. Further, the deposition testimony submitted by A/Z does not conclusively establish that it did not purchase or otherwise provide the chair. A/Z therefore failed to demonstrate that it had no duty to plaintiff (*see id.*), and failed to demonstrate that it did not create the alleged dangerous condition, i.e., the defective chair (*see Etminan v Esposito*, 126 AD3d 854, 6 NYS3d 103 [2d Dept 2015]). Lastly, A/Z contends that it lacked notice of the chair's allegedly defective condition, but it failed meet its initial burden on this issue, as it failed to show when the chair was last inspected (*see Salvania v University of Rochester*, 137 AD3d 1607, 27 NYS3d 768; *McGough v Cryan, Inc.*, 111 AD3d 900, 976 NYS2d 135; *Colon v Bet Torah, Inc.*, 66 AD3d 731, 887 NYS2d 611). Accordingly, A/Z's motion for summary judgment dismissing the complaint is denied.

Dated: October 2, 2024
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION