

Barretta v Casa Belvedere
2024 NY Slip Op 35556(U)
February 29, 2024
Supreme Court, Richmond County
Docket Number: Index No. 150548/2019
Judge: Wayne M. Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X PART 23
JOSEPH BARRETTA and ROBERT CARRAO,

Plaintiffs,

Present:

Hon. Wayne M. Ozzi, J.S.C.

-against-

DECISION AND ORDER

CASA BELVEDERE, THE ITALIAN CULTURAL
FOUNDATION, INC., SALVATORE CALCACINO
CONSTRUCTION INC., M&C MASONRY LLC and
JP STONEMART, INC.,

Index No. 150548/2019

Motion Seq. Nos. 004, 005, 006, 007
& 008

Defendants.

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The Court marked the following papers bearing NYSCEF Doc. #s 154-315 fully submitted on November 8, 2023 for consideration.

Defendants, JP Stonemart, Inc. ("Stonemart"), Casa Belvedere, the Italian Cultural Foundation, Inc., Friends of Casa Belvedere, Inc. ("Casa Belvedere"), M&C Masonry, LLC ("M&C") (collectively "the Defendants") each move for orders pursuant to CPLR§ 3212 granting each summary judgment and dismissing the Complaint as to each Defendant. The Plaintiffs, Joseph Barretta and Robert Carrao ("the Plaintiffs"), oppose each of the Defendants' motions for summary judgment.

M&C also filed cross claims against Casa Belvedere for common law and contractual indemnification, apportionment, and contribution. Casa Belvedere then filed cross claims against M&C and Stonemart for common law indemnity, contractual indemnity, contribution, and breach of contract/failure to procure insurance against M&C and Stonemart. Additionally, Stonemart filed cross claims against Casa Belvedere and M&C for contractual and common law indemnity, apportionment, and contribution.

M&C also moves for sanctions against Casa Belvedere for the spoliation of evidence or to grant its cross claim for common law indemnification against Casa Belvedere on the theory of spoiled evidence.

The Court denies each of the Defendants' motions for summary judgment and all cross claims filed. The Court also denies M&C's motion for sanctions against Casa Belvedere for the spoliation of evidence.

FACTS

The Plaintiffs allege that they were attending a private Super Bowl party at Casa Belvedere on February 3, 2019, located at 79 Howard Avenue, Staten Island, New York. The Plaintiffs were on the exterior patio during the party. Mr. Barretta was leaning against the railing when it collapsed, causing him to fall backwards to the ground, resulting in serious injuries to Mr. Barretta. Mr. Carrao alleges injuries as he was in the direct vicinity of the railing collapse and attempted to prevent Mr. Barretta from falling to the ground.

The railing system at Casa Belvedere had recently been demolished and replaced with a new railing system by contractor, M&C, pursuant to a proposal agreed upon between Casa Belvedere and M&C. The materials for the new railing system were provided by Stonemart, pursuant to a contract of sale between Casa Belvedere and Stonemart. Stonemart provided Casa Belvedere with limestone balustrades for the railing system to be installed by M&C.

The Plaintiff, Joseph Barretta, commenced this action by filing a Summons and Verified Complaint on March 11, 2019. The Plaintiff, Robert Carrao, filed his Complaint on May 21, 2019. By Order of this Court the two matters were consolidated on October 24, 2019.

M&C, filed its Answer on May 7, 2019, also asserting cross claims against Casa Belvedere for common law indemnification, contractual indemnification, apportionment, and contribution. Casa Belvedere filed its Answer on July 2, 2019, making cross claims against M&C and Stonemart for common law indemnity, contractual indemnity, contribution, and breach of contract. Last, Stonemart filed its Answer on July 10, 2019, also asserting cross claims against Casa Belvedere and M&C for contractual and common law indemnity, apportionment, and contribution.

An additional Defendant, Salvatore Calcacino Construction, Inc., was dismissed from this action by Stipulation of Discontinuance without prejudice filed on June 2, 2020.

The Plaintiffs previously moved for summary judgment but pursuant to this Court's Order on December 9, 2021, that motion was denied.

The Defendants now each move for an order pursuant to CPLR§ 3212, granting summary judgment, dismissing the Plaintiffs' Complaint. The Plaintiffs oppose the Defendants' summary judgment motions.

The Defendants also have interposed cross claims against each other for common law indemnification, contractual indemnification, apportionment, and contribution.

DISCUSSION

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues'" *Bonaventura v. Galpin*, 119 AD3d 625 (2d Dept 2014) *quoting Andre v. Pomeroy*, 35 NY2d 361, 364 (1974). "In determining a motion for summary judgment, the evidence must

be viewed in the light most favorable to the nonmoving party” *Boulos v. Lerner-Harrington*, 124 AD3d 709 (2d Dept 2015).

A party moving for summary judgment must make a *prima facie* showing of entitlement to a judgment as a matter of law by tendering sufficient evidence to eliminate any material issue of fact. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986). Mere conclusions and unsubstantiated allegations or assertions are insufficient evidence to eliminate any material issue of fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The summary judgment motion will be denied if the moving party fails to make a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985).

The party opposing the summary judgment motion has the burden to produce evidence in admissible form sufficient to require a trial on the material issues of fact. *Zuckerman*, 49 NY2d at 562.

I. PREMISES LIABILITY – CASA BELVEDERE

“A defendant property owner has a duty to maintain its premises in a ‘reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk’” *Dudnik v. 1055 Hylan Offices, LLC*, 164 AD3d 870, 871 (2d Dept 2018) quoting *Basso v. Milller*, 40 NY2d 233, 241 (1976).

“A defendant property owner who moves for summary judgment in a personal injury action arising from an alleged hazardous or defective condition on his or her property has the burden of establishing that he or she did not create the hazardous or defective condition or have actual or constructive notice of its existence” *Hayden v. 334*

Dune Road, LLC, 196 AD3d 634, 635 (2d Dept 2021) quoting *Schnell v. Fitzgerald*, 95 AD3d 1295 (2d Dept 2012). Further, “in a premises liability case, a defendant property owner who moves from summary judgment has the initial burden of making a *prima facie* showing that it neither created the defective condition nor had actual or constructive notice of its existence” *Friedman v. 1753 Realty Co.*, 117 AD3d 781, 783 (2d Dept 2014).

“A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected” *Hayden*, 196 AD3d at 635 quoting *Nicoletti v. Iacone*, 122 AD3d 811, 812 (2d Dept 2014). “When the defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed” *Hayden*, 196 AD3d at 635 quoting *Schnell*, 95 AD3d at 1295.

Casa Belvedere asserts that it did not have notice of the deficiencies in the railing system because Casa Belvedere did not create the allegedly faulty railing system, nor did it have experience in the construction industry. Casa Belvedere claims it simply hired professionals to install the railing system (M&C) and to provide the materials for the railing system (Stonemart).

Casa Belvedere also states that it did not have actual, nor constructive notice of the defective railing system as the defect was not visible or apparent to it. Even if the defect was visible, the deficiency did not exist for a sufficient time period before the incident that would have permitted Casa Belvedere to discover and remedy the defect.

In this case, the evidence submitted by Casa Belvedere has failed to establish a *prima facie* entitlement to judgment as a matter of law. Questions of fact exists as to whether Casa Belvedere had actual and/or constructive notice of the defective railing

system. The Plaintiffs and other Defendants have submitted testimony that Mr. Paone (the Director of Operations for Casa Belvedere) instructed M&C not to install support posts every eight feet because the railing system would not look like it had in photographs from approximately one hundred years ago, which was the desired appearance to be accomplished (although Casa Belvedere denies this contention). There is also testimony from M&C (Mr. Molfino) that he told Casa Belvedere (Mr. Paone) that the railing system would be compromised unless it was constructed with support posts. The existence of at least one triable issue of fact (here, whether Casa Belvedere had actual or constructive notice) is sufficient to defeat summary judgment *Corona v. MRS Realty LLC*, 4 Misc. 3d 1009(A). Thus, Casa Belvedere's summary judgment motion is denied.

II. PREMISES LIABILITY – M&C AND STONEMART

Typically, there is a well-established general rule that “that the breach of a contractor’s contractual obligation does not give rise to tort liability to others not in privity with the contractor, as the duty flows between only the parties to the contract” *Santos v. Deanco Services, Inc.*, 142 AD3d 137, 140 (2d Dept 2016) *see Espinal v. Melville Snow Contractors*, 98 NY2d 136, 138-139 (2002).

However, “the Court of Appeals has defined three narrow exceptions under which a contractor may be liable in negligence to a plaintiff with whom there is no contractual privity, for circumstances related to its contractual obligation” *Santos*, 142 AD3d at 140. These exceptions are now known as the “*Espinal* exceptions” *Id.* at 141.

“The first exception is where the contracting party, in failing to exercise reasonable care in the performance of contractual duties, launches a force or instrument of harm” *Santos*, 142 AD3d at 140 *see Espinal*, 98 NY2d at 140. “A contractor who ‘creates or

exacerbates' a harmful condition may generally be said to have 'launched' it" *Haracz v. Cee Jay, Inc.*, 74 AD3d 1145, 1146 (2d Dept 2010) quoting *McCord v. Olympia & York Maiden Lane Co.*, 8 AD3d 634, 636 (2d Dept 2004).

"The second exception is where the plaintiff detrimentally relies on the continuing performance of the contractor's duty" *Santos*, 142 AD3d at 140 see *Espinal*, 98 NY2d at 140.

"The third exception is where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely" *Santos*, 142 AD3d at 140 see *Espinal*, 98 NY2d at 140.

M&C contends that none of the *Espinal* exceptions apply to it and, thus, there is no liability as to M&C. M&C asserts that it did not launch a force of harm because M&C did not cause the accident to occur due to the fact that there were no deficiencies in M&C's work. M&C alleges that there is no evidence that it caused the railing to fail, and that M&C wanted to use support posts in the railing system but that was rejected by Casa Belvedere. M&C also states that the cause of the railing system's collapse was that Stonemart's products were not fit for use.

Stonemart asserts that it should be dismissed from the case because it had no duty to the Plaintiffs. Stonemart claims that none of the *Espinal* exceptions apply to it as Stonemart did not launch an instrument of harm when it provided the materials to Casa Belvedere for the new railing system. Stonemart states that there is no evidence that its actions meet the criteria of the creation or exacerbation of a dangerous condition by Stonemart merely supplying the limestone balustrades for the railing project. Last, Stonemart argues that the collapse of the railing system was the result of improper

installation by M&C because M&C did not use any architectural plans and M&C did not use rebar to add support to the railing system as M&C was advised to by Stonemart.

This Court finds that M&C and Stonemart have failed to establish their *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. The Plaintiffs have also raised a triable issue of fact as to whether M&C (through their construction of the railing system) and Stonemart (through its supplying of the limestone balustrades used to construct the railing system) created or exacerbated a dangerous condition and thus, launched a force or instrument of harm. There is testimony that Casa Belvedere, through Mr. Paone, did not instruct M&C to construct the railing system in any specific way or to not use support posts every eight feet. As such, there is an issue of fact as to whether Mr. Paone (Casa Belvedere) ordered M&C not use the support posts. There is also a question of fact as to whether M&C used rebar in the construction of the railing system as the Plaintiffs' expert opined that dowels were used instead of rebar.

As to Stonemart, there is an issue of fact as to whether the limestone balustrades that were provided pursuant to the contract between Casa Belvedere and Stonemart, were defective and caused the railing system to fail when the Plaintiffs leaned against it. There are contradicting expert reports in the record conclusively establishing whether or not the limestone provided by Stonemart was fit for its intended use in construction of the railing system. The issue of the credibility of these experts' opinions are inappropriate for the Court to determine, and best left for the jury to resolve *Vasiu v. Berg*, 192 AD 3d 1060 (2d Dept.).

III. SPOILATION OF EVIDENCE

“A party seeking sanctions for spoliation of evidence must show that the party having control over that evidence had an obligation to preserve it at the time of its destruction, and that the evidence was destroyed with a culpable state of mind” *Barravecchia v. Grandquist*, 74 Misc3d 1218(A), *3 (Supreme Court, Richmond County March 4, 2022) *see Golan v. North Shore-Long Island Jewish Health System, Inc.*, 147 AD3d 1031, 1032 (2d Dept 2017). “‘Culpable state of mind’ may include negligence” *Barravecchia*, 74 Misc3d at *3 *quoting Delmur, Inc. v. School Construction Authority*, 174 AD3d 784, 786 (2d Dept 2019).

Any decision regarding spoliation sanctions is within the broad discretion of the court. *Barravecchia*, 74 Misc3d at *2. It follows that “[t]he harsh remedy of striking a pleading is generally unwarranted unless a spoliator’s conduct evinces willfulness” *Barravecchia*, 74 Misc3d at *3.

M&C has moved for an order granting its cross claim for common law indemnification against Casa Belvedere on the theory of spoliated evidence or for an order sanctioning Casa Belvedere pursuant to CPLR§ 3126, based on Casa Belvedere’s spoliation of evidence.

M&C argues that after the railing system collapsed, Casa Belvedere dismantled the remaining portions of the railing. But M&C alleges that video of that process has not been produced, even though there is video evidence of the actual railing system collapse and of the dismantling of the part of the railing system that collapsed. M&C asserts that it has been prejudiced by Casa Belvedere’s failure to preserve the video showing the deconstruction of the remaining portions of the railing system.

Here, M&C has not been prejudiced by the lack of video showing the deconstruction of the remaining portions of the railing system. As noted by Casa Belvedere, there have been three site inspections by M&C and the railing sections have been stored on Casa Belvedere's property since the collapse and the deconstruction. Casa Belvedere also states that the railing debris has been made available to all parties and that M&C never offered to take possession of the railing debris. Thus, this Court finds that M&C has not been prejudiced because there is no evidence that Casa Belvedere, with a culpable state of mind, did not preserve the evidence. As such, this Court denies M&C's cross claim for common law indemnification and the Court will not sanction Casa Belvedere based on any speculation of spoliation of evidence.

The various cross claims for common law and contractual indemnification, contribution, and apportionment cannot be resolved at this point until a determination is made as to each Defendants' negligence, if any. *See Lopez v. New York Life Insurance Co.*, 90 A.D.3d 446, 448 (1st Dept 2011).

The Court has reviewed the parties' remaining arguments and finds them to be unavailing.

Accordingly, it is hereby:

ORDERED, that the Stonemart's motion for an order pursuant to CPLR§ 3212 granting summary judgment and dismissing the claims against Stonemart and all cross claims against Stonemart is denied; and it is further

ORDERED, that the Casa Belvedere's motion for an order pursuant to CPLR§ 3212 granting summary judgment and dismissing the claims against Casa Belvedere and all cross claims against Casa Belvedere is denied; and it is further

ORDERED, that M&C's motion for an order pursuant to CPLR§ 3212 granting summary judgment and dismissing the claims against M&C and all cross claims against M&C is denied; and it is further

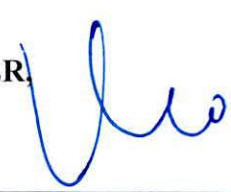
ORDERED, that M&C's cross claim for common law indemnification against Casa Belvedere on the theory of spoliated evidence or for an order sanctioning Casa Belvedere pursuant to CPLR§ 3126 based on the spoliation of evidence is denied.

The foregoing constitutes the Decision and Order of this Court.

DATED:

2/29/24

ENTER



Hon. Wayne M. Ozzi, J.S.C.