

Bruno v Alpine Refrig. Co.

2025 NY Slip Op 31873(U)

May 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 516463/2020

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 20th day of May 2025

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

JOHN BRUNO,

Plaintiff(s).

-against-

ALPINE REFRIGERATION CO. and MGPC CORP.,

Defendant(s).

DECISION & ORDER

Index No.: 516463/2020

Calendar No.: 10

Motion Seq.: 004

Recitation of the following papers as required by CPLR 2219(a):

**Papers
Numbered**

Notice of Motion, Affirmation,	
Memorandum of Law and Exhibits (NYSCEF 100-102)	1, 2
Affirmations in Opposition (NYSCEF 107-108)	
Reply Affirmation (NYSCEF 110)	4

Upon the foregoing papers and after oral argument, MGPC CORP.'s motion to reargue is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff in the course of his employment with non-party, SCI Funeral Services (SCI). Plaintiff alleges that he was injured while moving a heavy body from a refrigeration unit to a hearse via a temporary ramp installed by defendant Alpine Refrigeration Co. (Alpine) during renovations of the Funeral Home. The plaintiff alleges that the ramp was negligently constructed in that it was too steep and not sufficiently supported, thereby causing his leg to flex and causing injury to his lower back and hip. SCI contracted with MGPC CORP. (MGPC) for the renovation project (NYSCEF 74) who, in turn, subcontracted with Alpine, an independent contractor (NYSCEF 76). Alpine

obtained the work permit for the renovations from the New York City Department of Buildings (NYSCEF 76), and constructed the ramp (NYSCEF 59, p.52).

Under the contract between SCI and MGPC, MGPC was solely responsible for and had control over the work and would be liable to SCI for the acts and omissions by employees of MGPC or the subcontractors (NYSCEF 74, ¶1.2 and ¶1.7).

Defendants each moved for summary judgment. The motions were denied by a Decision and Order dated 10/28/2024 (MS 002 & 003; NYSCEF 103-104). In denying MGPC's motion, the Court held that,

In opposition to MGPC's motion, plaintiff raised the factual issue of whether the ramp, had been improperly constructed, and "launched an instrument of harm," an exception to the privity of contract requirement and creating a duty of care to the plaintiff (*Nesbitt v. Advanced Service Solutions* 224 AD3d 841 [2d Dept. 2024], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136). Accordingly, MGPC's motion for summary judgment is denied.

MGPC has now moved to reargue on multiple grounds. Most notably, MGPC asserts that the *Espinal* exception was not pled by plaintiff and under the facts of this case, the *Espinal* exception does not apply.

In opposition to the motion to reargue, plaintiff argues the Court's reliance on *Nesbitt v. Advanced Services Solutionas*, demonstrates that it reviewed the pleadings and determined that plaintiff pled the *Espinal* exception (NYSCEF 108, p.7, ¶13). Further, per the contract between SCI and MGPC, MGPC was solely responsible for the supervising the work (NYSCEF 108, p.6, ¶11). Therefore, Alpine argues that even if *Espinal* did not apply, a question of fact exists whether MGPC was negligent in supervising the premises while under construction.

The Court grants MGPC's motion to reargue and, upon re-argument, adheres to original determination.

It is well established a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended matters of fact or the law, or for some reason mistakenly arrived at its earlier decision (see CPLR §2221 [d] [2]; *JPMorgan Chase Bank, N.A. v Novis*, 157 AD3d 776, 778 [2d Dept. 2018]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept. 2015]). Such a motion “shall not include any matters of fact not offered on the prior motion” (*Williams v Abiomed, Inc.*, 173 AD3d 1115, 1116 [2d Dept. 2019] [internal citations omitted]; CPLR § 2221 [d] [2]). Such a motion is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (*Williams v Abiomed, Inc.*, 173 AD3d 1116).

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of third persons unless a party enters into a contract for services and may have assumed a duty of care, creating potential liability to third persons (*Nesbitt v Advanced Serv. Solutions*, 224 AD3d 841, 842 [2d Dept. 2024]). Liability will be imposed under certain exceptions “where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely” (*id.*).

“Where the pleadings do not allege facts that would establish the applicability of any of the *Espinal* exceptions, a defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to establish its *prima facie* entitlement to judgment as a matter of law” (see *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781-782 [2d Dept. 2023]). Once defendant establishes a *prima facie* entitlement to summary judgment, the burden shifts to plaintiff to demonstrate that one or more of the *Espinal* exceptions apply (*cf. id.* at 782).

If plaintiff has pled any of the *Espinal* exceptions in the complaint or the bill of particulars, a defendant is must demonstrate that “those pleaded exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law” (*Nesbitt v Advanced Serv. Solutions*, 224 AD3d 843). The Court must view the pleadings liberally and in the light most favorable to the plaintiff to determine whether, at a minimum, any of the *Espinal* exceptions have been pled (*id.*).

In adhering to its initial determination, the Court liberally construes in the light most favorable to plaintiff, that the complaints and verified bill of particulars plead the exceptions as set forth on the 10/28/24 order (*id.*). Therefore, in opposition to MGPC’s motion, plaintiff has demonstrated that questions of fact exists whether 1) the ramp was negligently constructed and 2) MGPC by failing to perform its supervision of Alpine’s engineering plans and the design, construction and installation of the ramp pursuant to the subcontract launched an instrument of harm (*id.*). Although the subcontract does not specifically provide for the construction of ramp (NYSCEF 75), it was incidental to the work being performed.

While MGPC is not vicariously responsible for Alpine’s work, MGPC contractually assumed the supervisory responsibility to oversee Alpine’s work and ensure that the work was performed in safe manner during the daily operation of SCI’s business. A jury must determine whether MGPC failed to the inspect the ramp to determine whether it was safe for use and fit for its intended purpose. This is the instrument of harm allegedly launched by MGPC by allegedly “failing to exercise reasonable care in the performance of its [contractual] duties” (*Nesbitt v Advanced Serv. Solutions*, 224 AD3d 843).

The Court has considered the parties remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that defendant MGPC CORP.'S motion to reargue this Court's Order dated 10/28/2024 is granted and upon re-argument, the Court adheres to its original determination.

This constitutes the decision and order of the Court.

ENTER:



Hon. Anne J. Swern, J.S.C.

Dated: 5/20/2025

<p>For Clerks use only:</p> <p>MG _____</p> <p>MD _____</p> <p>Motion seq. # _____</p>
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