Pomilla v Bangiyev
2017 NY Slip Op 32091(U)
June 8, 2017
Supreme Court, Queens County
Docket Number: 1590/2015
Judge: Thomas D. Raffaele

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13
Justice

JOSEPH POMILLA, x

Plaintiff,

- against-

Index Number: 1590/2015

ARKADIY BANGIYEV, D & B BROTHERS, CONSTRUCTION INC., GERALD CALIENDO, and GERALD CALIENDO ARCHITECT, P.C.,

Motion Date: 6/8/ 2017

Motion Seq. No. 10

Defendants.
x

ARKADIY BANGIYEV,

Third Party Plaintiff,

- against-

ORION PLUMBING & HEATING, CORP.,

Third Party Defendants.
x

ARKADIY BANGIYEV,

Second Third- Party Plaintiff,

-against-

J BAYOT HOME DESIGN and ARNULFO BAYOT, Individually,

Second Third- Partd Defendants.
x

The following papers numbered 1 to 34 read on this (1) motion by Arkadiy Bangiyev for summary judgment in his favor, dismissing all claims and cross claims against him, pursuant to CPLR 3212; (2) motion by Orion Plumbing & Heating Corp. ("Orion"), for summary judgment in its favor dismissing the third-party complaint; and (3) cross motion by Bangiyev for leave to file a late cross motion and for summary judgment in his favor on his claims for common-law indemnification and contribution as against Orion, pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1 - 7
Notice of Cross Motion - Affidavits - Exhibits	8 - 17
Answering Affidavits - Exhibits	18-26
Reply Affidavits	27-34

Upon the foregoing papers it is ordered that the motions and cross are combined herein for disposition, and determined as follows:

Plaintiff commenced this action alleging a cause of action sounding in common-law negligence and a cause of action predicated upon General Municipal Law § 205-a. Plaintiff firefighter was injured in the line of duty, when he fell as he ascended steps in route to combat a fire at 112-44 68th Avenue, in Forest Hills, New York ("premises"). The premises was undergoing a complete renovation and, therefore, was vacant at the time of the fire and not occupied by the owner. Defendant had retained J. Bayot Home Design to act as the general contractor on the premises; and he also retained Orion to act as the plumber on the project. Plaintiff contends that the premises was in violation of several codes including violations of Administrative Code of the City of New York §§28-301.1, 29-107.5, New York City Fire Code §1027.4.6 and New York City Health Code §1153.19, which all contributed to his accident. Thus, plaintiff alleges the foregoing violations as predicate for his General Municipal Law section 205-a claim.

Defendant Arkadiy Bangiyev, the owner of the house where the fire occurred, moves for summary judgment in his favor on the ground that the Code sections cited by plaintiff in support of his General Municipal Law section 205-a cause of action, are inapplicable to the facts at hand. Orion moves for summary judgment in its favor on the ground that there were

no company employees on the premises and no plumbing work being when the fire started and, therefore, Orion was not responsible for the subject fire. Bangiyev also cross moves for leave to file a late cross motion and, upon granting of the same, for summary judgment in his favor on his claims for common-law indemnification and contribution as against Orion. The motions and cross motion are opposed by the respective parties.

Facts

Plaintiff Joseph Pomilla, a former New York City firefighter, was injured on June 3, 2012, when he fell while ascending stairs at 112-44 68th Avenue, Forest Hills, New York (premises). At the time of his fall, plaintiff was performing his firefighting duties in the course of his employment as a firefighter. The premises are owned by defendant, Arkadiy Bangiyev, but was not occupied by defendant at the time of the subject fire. At the time of the fire, the premises was under complete construction/renovation and defendant Bangiyev and his family were residing elsewhere.

Defendant had retained second-third party defendant, J. Bayot, to act as the general contractor for the renovation. He also retained third-party defendant, Orion, to act as the plumber on the project. It is undisputed that Bangiyev did not direct or control the means and methods of the work being performed. Further, he did not retain responsibility for inspecting or cleaning the premises.

On June 3, 2012, plaintiff was called to a fire at the premises. Plaintiff testified that he was injured as he approached the staircase leading to the second floor. He stated that as he went to place his right foot on the first step, his left foot slipped on something that he could not identify, "paper debris . . . I don't know what it was . . . insulation." As he slipped, his right foot hit a small cardboard box on the first step. Plaintiff stated that, as a result of these two factors, he was caused to fall backwards and to the right, and sustained personal injury.

After this initial fall occurred, plaintiff proceeded up the stairs to the second floor. As he crawled to the second story floor, his knees/legs became caught in a hole or holes where fire had burned through the flooring. Plaintiff specifically and repeatedly denied that he further injured his back at that point.

Plaintiff asserts causes of action pursuant to General Municipal Law §205-a and common law negligence. Plaintiff's Bill of Particulars indicate four code sections upon which he predicates his General Municipal Law §205-a cause of action: Administrative Code of the City of New York §§28-301.1, 29-107.5, New York City Fire Code §1027.4.6 and New York City Health Code §1153.19.

The third-party complaint commenced by defendant asserts a single cause of action for contribution against third-party defendant Orion. The third-party complaint alleges, in pertinent part, that if the allegations in the complaint are true and Bangiyev is found liable to plaintiff, then Orion is liable to Bangiyev.

Subsequent to the fire, the New York City Fire Department Bureau of Fire Investigation performed an investigation to ascertain the cause of the fire. On page three of the investigation report, the cause of the fire is listed as, "torch-legal use of".

Also subsequent to the fire, an action was commenced by defendant's insurance company, Harleysville, to recover the cost of repairing the damage to the house. William Harvey, the principal of Orion, signed and notarized his signature in the settlement document entitled "Affirmation in support of consent motion for summary judgment". He also signed and had notarized a document entitled "Assignment of Rights Agreement."

In June 2012, an investigation was undertaken to ascertain the cause of the fire. Harleysville Insurance Company ("Harleysville"), the insurer for defendant, retained John F. Goetz, a certified fire investigator to ascertain the cause and origin of the fire. U.S. Liability Insurance Group ("USLI"), the insurer for Orion, also retained an investigator agreed that the cause of the fire was Orion's use of a torch in the second floor bathroom. Goetz averred that he inspected the site of the fire on multiple occasions, including on June 21, 2012 with the inspector for USLI. He ascertained that the cause of the fire was as follows:

> "The plumber who had been working on site was installing copper tubing in the bathroom. Based upon a reasonable degree of Fire Inspection certainty, the fire was started by the embers from a soddering device and or torch used to install the copper tubing, by the plumber doing work on the premises."

In the 2012 lawsuit commenced by Harleysville, as subrogor of Bangiyev, plaintiff sought compensation for the payout made by Harleysville in repairing the fire damage. In that action, Orion, by its principal William Harvey, signed an "Assignment of Rights Agreement, with notarization, stating as follows:

> "On September 11, 2012, Harleysville filed a Summons and Complaint and instituted the lawsuit against Orion. In the lawsuit, Harleysville alleged that Orion had caused the occurrence by, among other things, negligently utilizing a torch to perform plumbing inside the building. These allegations are consistent with the findings of the Bureau of Fire Investigations, Fire Department of New York, which determined that:

> (1) the fire originated in the second floor bathroom where Orion had been working with a torch; and (2) the fire was caused by a torch."

Harvey also signed and had notarized an affirmation that the confession and consent to judgment, based upon the above allegations was authorized. Thus, it is undisputed that the Fire Department of the City of New York and certified fire inspectors all concurred that the cause of the fire was Orion Plumbing and the improper usage of a torch.

Discussion

In the first instance, the branches of the motion which are to dismiss plaintiff's claims based upon defendant's alleged violation of NYC Fire Code 1027.4.6, and NYC Health Code section 153.19, are granted. Plaintiff has not raised the dismissal of these causes of action in his opposition papers. Thus, the Court deems these claims as abandoned (*see, Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

In any event, the fire code cited pertains to duties of owners with respect to the exterior of their premises; and the health code violation deals with the placement of furnishing and decoration and the storage of combustible materials in building hallways in group "R-2" buildings, which is comprised of, by definition in the Code, buildings such as apartment houses, apartment hotels and adult homes. Single family residences, such as the type in the case at bar, are included within group "R-3" and not included within the purview of NYC Health Code section 1027.4.6

The branches of the motion which are to dismiss plaintiff's claims General Municipal Law § 205-a, claims based upon the remaining two Code violations, are also granted. General Municipal Law § 205-a, created a cause of action for firefighters who, while in the line of duty, are injured as a result of violations of statutes or regulations (see General Municipal Law § 205-a; L 1935, ch 800, § 2; L 1936, ch 251, § 1). "To establish a cause of action under General Municipal Law § 205–a, a firefighter plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" (*Kelly v City of New York*, 134 AD3d 676, 677 [2d Dept 2012]; *see Williams v City of New York*, 2 NY3d 352, 363 [2004]; *Giuffrida v Citibank Corp*., 100 NY2d 72, 79 [2003]). Plaintiff alleges that he slipped on debris on or near the stairs. He relies on two provisions of the Administrative Code of the City of New York as predicates for his section 205-a claim, namely, sections 28-301.1 and 29-107.5.

Section 28-301.1 of the Administrate Code provides, as follows:

> "All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices and safeguards that are required in a building by the provisions of this code, the 1968 Building Code or other applicable laws or rules, or that were required by law when the building was erected, altered or repaired, shall be maintained in good working condition. . . The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this Code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter."

Section 29-107.5 provides that "[t]he owner shall be responsible at all times for the safe maintenance of a building, structure and premises in accordance with this Code."

Liability cannot be imposed upon Bangiyev, the owner of the premises, based upon violations the New York City Administrative Code §§ 28-301.1 and 29-107.5. While these provisions generally impose a nondelegable duty upon an owner to safely maintain its premises (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]; *Worth Distr., Inc. v Latham*, 59 NY2d 231 [1983]), there was no specific structural or design defect on the premises which would give rise to liability under the Administrative Code (*D'Andrea v Bond*, 141 AD3d 682, 683 [2d Dept 2016]; *see, e.g., Guzman v Haven Plaza Housing Dev. Fund Co., supra ; Worth Distr., Inc. v. Latham, supra ; Blousman v Weil*, 275 App.Div. 384, 386, 89 N.Y.S.2d 627). Liability under General Municipal Law § 205–e pursuant to this administrative code section is limited to structural or design defects (*see Kelly v City of New York*, 134 AD3d at 678; *Taylor v Park Towers S. Co.*, 293 AD2d 668, 668 [2d Dept 2002]; *Beck v Woodward Affiliates*, 226 AD2d 328, 330 [2d Dept 1996]; *see also Cusumano v City of New York*, 15 NY3d 319, 327 [2010, Lippman, J., concurring]; *Marsillo v City of New York*, 17 Misc 3d 612 [Sup Ct, Richmond County 2007]). Since sections 205–a and 205–e "should be construed and applied in the same way" (*Desmond v City of New York*, 88 NY2d 455, 463 [1996]), it then follows that liability under General Municipal Law § 205–a pursuant to the alleged administrative code sections is limited to structural or design defects,, as well (*see Kelly v City of New York*, *supra*; *Taylor v Park Towers S. Co.*,*supra*; *Beck v Woodward Affiliates*, *supra*; *see also Cusumano v City of New York*, 15 NY3d at 327 [2010, Lippman, J., concurring]; *Marsillo v City of New York*, 17 Misc 3d 612 [Sup Ct, Richmond County 2007]). Here, defendant established, prima facie, that the alleged defect, to wit, debris on or near the staircase, was not a structural or design defect of any kind. Thus, the plaintiff failed to identify any statute or ordinance with which the defendant failed to comply, or facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm alleged in this case.

In addition, there is no basis to impose direct liability upon Bangiyev independent of the Administrative Code since there is no evidence that Bangiyev had actual or constructive notice of the defective condition which allegedly caused Pomilla to fall (*see, e.g., Blousman v Weil, supra*).

In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, the motion by Bangiyev for summary judgment in his favor is granted (*see D'Andrea v Bond*, 141 AD3d 682, 683 [2d Dept 2016]; *Link v City of New York*, 34 AD3d 757 [2d Dept 2006]; *see generally Alvarez v Prospect Hosp*., 68 NY2d 320 [1986]).

In light of the court's decision granting summary judgment to Bangiyev, the motion by Orion for summary judgment in its favor on the third-party claim by Bangiyev for contribution, is denied as moot.

Similarly, the cross motion by Bangiyev for leave to serve a late cross motion, and upon granting of the same, for summary judgment on its third-party claim for contribution is denied as moot.

Dated:

J.S.C.