

Hussain v Try 3 Building Services, Inc.

2002 NY Slip Op 30086(U)

July 17, 2002

Supreme Court, New York County

Docket Number: 103637196

Judge: Faviola Soto

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. FAVIOLA SOTO
Justice

PART 52

CHAUDHARY HUSSAIN

INDEX NO. 103637/96

- v -

TRY 3 BUILDING SERVICES INC

MOTION DATE _____

MOTION SEQ. NO. 011

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	a13
Replying Affidavits _____	4

Cross-Motion: Yes No

SCANNED

Upon the foregoing papers, it is ordered that this motion

AUG 01 2002

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

JUL 17 2002

Dated: _____

FAVIOLA SOTO
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52**

-----X

CHAUDHARY HUSSAIN, SHAMAH RIAZ and
IFRAN MOHAMMAD,

Plaintiffs,

Index No.: 103637196

-against-

TRY 3 BUILDING SERVICES, INC., MARTIN
FINE, 402 WEST 38TH STREET CORP. and THE
CITY OF NEW YORK, COLGATE SCAFFOLDING
CORPORATION, GOLDHAMMER, WITTENSTEIN
GOOD, ROBERT D. RELIEN, P.E. and
SWINGSTAGING, INC.,

DECISION AND ORDER

Defendants.

-----X

TRY 3 BUILDING SERVICES, INC.,
Third-party Plaintiff,

Index No. 591002196

-against-

MANSOOR JAVED RAJA d/b/a PROFESSIONAL
CONTRACTING COMPANY, et al.,
Defendants

-----X

GURMIT SINGH, as Administrator of
The Estate of NARINDER SINGH,
Plaintiff,

Index No. 107160196

-against-

402 WEST 38TH STREET CORP.,
et al.,
Defendants

-----X

HONORABLE FAVIOLA A. SOTO, J.:

Defendant Goldhammer Wittenstein Good (“GWG”) moves for summary judgment dismissing plaintiffs’ complaints and all cross-claims against it. Plaintiffs Chaudhary Hussain (“Hussain”), Shamah Riaz (“Riaz”) and Ifran Mohammad (“Mohammad”) (collectively “Action No. 1 plaintiffs”) oppose; defendants and cross-claimants 402 West 38th Street Corp. (“Owner”) and Martin Fine, its President (“Fine”), also oppose.

The Claims

Plaintiffs Hussain and Mohammad (Riaz asserts a derivative claim) in Action No. 1 allege that they sustained serious personal injuries when the building located at 402 West 38th Street collapsed during demolition. In Action No. 3, plaintiff Gurmit Singh, as administrator of the Estate of Narinder Singh (“Singh”), asserts the claims on behalf the decedent Singh and the estate, Mr. Singh having sustained fatal injuries.

Hussain, Mohammad and Singh were employees of the demolition subcontractor Professional Contracting Company; defendant/third-party plaintiff Try 3 Building Services, Inc. (“Try 3”) was the construction manager. GWG, an architectural firm, performed certain services; the parties assert different allegations with respect to GWC’s obligations under the applicable contract, the action-or failure to act-of GWC, and GWC’s duty, if any, to the plaintiffs and the cross-claimants.

In both actions, plaintiffs allege that GWC violated Labor Law Sections 240, 241(6) and 200. Plaintiffs also assert negligence claims against GWC.

The Owner and Fine assert cross-claims for common law and contractual indemnification and contribution against GWC. The other defendants assert common law indemnification and

contribution claims. In Action No. 2, third-party plaintiff Try 3 asserts claims for indemnification and contribution against GWC.

The Motion

GWC asserts that it is entitled to summary judgment because it was not obligated to, nor did it, direct, supervise or control the demolition work that was ongoing at the time of the accident. Specifically, GWC asserts that plaintiffs did not work for it; that it had no supervision of or control over the demolition or the plaintiffs; and, that its obligation to and agreement with the owner pertained only to the filing of the demolition plans with the New York City Department of Buildings. In its reply, GWC further argues that as plaintiff in Action No. 3 and cross-claimants other than the Owner and Fine failed to submit opposition papers, GWC's motion must automatically be granted.

Plaintiffs in Action No. 1 argue that questions of fact exist, and that, contrary to GWC's assertion, its role and duty were greater than that of merely filing papers. Plaintiffs point as support to: portions of the contract with the Owner (which plaintiffs claim was not produced previously and not fully produced with the motion); deposition testimony of GWC's principal regarding his meeting as representative of the Owner with HPD where the nature, manner and method of the building demolition was discussed and altered, and admissions he made regarding what he viewed as the dangerous manner of those altered plans; GWC's being the "named architect" on various documents; and certain language in invoices to the owner, to wit: an engineer site visit reflected on an invoice dated June 1, 1995, and "engineering services-site visit and consultation re: demolition" dated January 3, 1995.

Similarly, the Owner and Fine also argue that summary judgment on their cross claims is

not appropriate as questions of fact exist as to GWC's contractual and other obligations to them and plaintiffs. They point to certain portions of the contract(s), letters, and GWC's principal's deposition, particularly as it relates to the meeting with HPD and Housing Conservation Coordinators ("HCC") to support their claim that GWC, by its action and its failure to warn and act, breached its duty.

Summary Judgment

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". Winegrad v. New York University Med. Center, 64 N.Y.2d 851. Once the proponent has made the showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prosnect Hosnital, 68 N.Y.2d 320,324. Moreover, '[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law...[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided. Andre v. Pomeroy, 35 N.Y.2d 361. Mere conjecture, surmise, speculation and conclusory assertions will not stave off summary judgment.

On a summary judgment motion, however, the court searches the record. The court's function in a summary judgment motion is issue finding, not issue resolution. Cruz v. American Export Lines, 67 N.Y.2d 1, 13; Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404. Summary judgment is a drastic remedy, and should not be granted where there is any doubt as to a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d. 223. All inferences drawn from the underlying facts must be viewed in a light most favorable to the non-moving party.

The Labor Law Claims

The court grants that part of the motion seeking dismissal of plaintiffs' labor law claims, and the cross-claims to the extent that seek indemnification or contribution on such claims. **As** to Labor Law Sections 200,240 and 241, GWC has shown, and the opponents have failed to defeat the showing, that: GWC did not control, direct or supervise the injury producing work; GHC did not have the power to hire or fire subcontractors; GHC was not an agent of the owner or general contractor as that term is utilized within these statutes. Nor can the duty to provide a safe place to work be otherwise imposed upon GWC under these statutes, as GWC was not the party charged with the responsibility to control the activity so as to avoid and correct an unsafe condition.

Contrary to the position taken by the opponents of the motion, the court does not read the contract as supporting an issue of fact to the contrary on these claims. Similarly, the relied upon portions of invoices, letters or deposition testimony are insufficient to create a genuine issue of fact as to liability under Labor Law.

Negligence

The court denies summary judgment, however, on the negligence claims and the related cross-claims for indemnification and contribution.

As a preliminary matter, the court notes that contrary to GWC's argument, it is not automatically entitled to summary judgment as to the non-opposing plaintiff in Action No. 3 and non-opposing cross-claimants. On a summary judgment motion, the court searches the record, and the granting of summary judgment is appropriate only where that record supports it.

In denying the motion, the court has examined the following and finds that collectively

they present a question(s) of fact as to GWC's role and duties, and whether the duty was breached, in these actions arising out of a demolition; while an examination of the factors do not rise to the level necessary to create an issue of fact as to liability under the Labor Law claims, the court finds that they do give rise to issue(s) of fact as to the negligence claims so that the court can not grant judgment on this pre-trial motion as a matter of law.

For example, paragraph **4.2.2** of the contract between GWC and the Owner is broader than that found in the cases cited by GWC wherein courts found that the architect cannot be found liable as a matter of law. Here, the provision reads:

The Architect [GWC] will visit the site at intervals appropriate to the stage of construction to become familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

GWC's role, by appearing as a representative of the Owner with communications with and meeting(s) with HPD and HCC, and its actions or failure to act or warn, also supports a showing of an issue of fact as to its duty and alleged breach. The court cannot rule now that, as a matter of law, GWC had no duty or fulfilled its duty under a theory of negligence.

Accordingly, it is

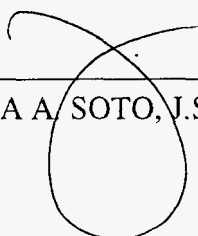
ORDERED that the motion is denied in part and granted in part; it is further

ORDERED that those causes of action in the complaints and cross-claims that are based on Labor Law as against defendant Goldhammer, Wittenstein & Good are severed and dismissed (including but not limited to the third, fourth, fifth, that portion of the sixth to the extent it is based on Labor Law, tenth, eleventh and twelve causes of action in Action No. 1, and the second cause of action and the third cause of action to the extent it is based on Labor Law, in Action No. 3); and it is further

ORDERED that the remainder of these actions shall continue; and it is further

ORDERED that movant shall serve a copy of this decision and order with Notice of Entry upon the County Clerk and upon the Clerk, Trial Support Office.

Dated: New York, New York
July 17, 2002



FAVIOLA A. SOTO, J.S.C.

Copies mailed