

Quinn v Whitehal Props., II, LLC

2008 NY Slip Op 30990(U)

March 28, 2008

Supreme Court, Nassau County

Docket Number: 4828-03/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

THOMAS QUINN,
Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

- against -

Action No. 1

WHITEHALL PROPERTIES, II, LLC,
OUTBACK STEAKHOUSE, SF 700 SIXTH
AVENUE, LLC SHINY CONSTRUCTION, INC.,
60 WEST 23rd STREET CORPORATION and
PAN-AM EQUITIES, INC.,

Index No. 14828/03

Motion Sequence No. 003, 004,
005

Defendants.

WHITEHALL PROPERTIES, II, LLC, and
PAN-AM EQUITIES, INC.,

Third Party Plaintiff,

- against -

SING-LI CONSTRUCTION INC., and EXPERT
SPRINKLER MAINTENANCE CO., INC.,

Third Party Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3</u>
Answering Affidavits	<u>4</u>
Replying Affidavits	<u>5, 6, 7, 8, 9</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. move for summary judgment pursuant to CPLR 3212 dismissing the complaint and cross claims. The defendant Outback Steakhouse cross moves for summary judgment pursuant to CPLR 3212. The defendant SHINY Construction, Inc. moves for summary judgment pursuant to CPLR 3212. The plaintiff opposes the motion by the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc., the cross motion by the defendant Outback Steakhouse, and the motion by the defendant SHINY Construction, Inc. The defendant SHINY Construction, Inc. partially opposes that portion of the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. motion for common law indemnification against the defendant SHINY Construction, Inc. and dismissal of the cross claims, but supports the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. motion which seeks to dismiss the complaint. The defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. reply in further support for summary judgment, and point out the plaintiff has not opposed their motion for summary judgement seeking to dismiss the plaintiff's Labor Law and common law negligence claims, so the only claim the plaintiff seeks to assert against them is with respect to Industrial Code § 23-1.7 (e) (2), but the evidence does not support that claim. The defendant SHINY Construction, Inc. replies in further support for summary judgment, and points out the plaintiff has not opposed that portion of the defendant

SHINY Construction, Inc.'s motion to dismiss the Labor Law § 240 claim, and this defendant contends the plaintiff's Labor Law § 200 claim should also be dismissed. The defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. also reply in further support for summary judgment, and in response to the defendant SHINY Construction, Inc. opposition to the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. motion for summary judgment pursuant to CPLR 3212 dismissing the complaint and cross claims.

The plaintiff, in the underlying action, seeks to recover compensatory damages for bodily injuries sustained in a construction site accident on November 5, 2002, at 670 West 23rd Street, New York, New York which is managed by Pan-Am Equities, Inc., as an agent for the owner, Whitehall Properties, II, LLC . The plaintiff alleged he was injured when he descended and dismounted an "A" frame ladder while performing steam fitting work for the build out of what was to be an Outback Steakhouse restaurant, a franchisee. SHINY Construction, Inc. was the general contractor hired by SF 700 Sixth Avenue, LLC, the tenant in possession of the premises under construction, to perform work as part of the project. Outback Steak of Florida, Inc., purportedly sued here as Outback Steakhouse was the franchiser who, prior to the accident and commencement of any work, awarded SF 700 Sixth Avenue, LLC the Outback Steakhouse restaurant franchise.

The attorney for the defendants and third party plaintiffs Whitehall Properties, II,

LLC and Pan-Am Equities, Inc. states, in supporting affirmation dated September 6, 2007, the plaintiff alleges he was injured, while descending from the bottom rung of the ladder when he stepped onto a piece of debris, lost his balance and fell. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. states, in detail, there is no basis for any labor law nor negligence claims against the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. because the deposition testimony is devoid of any proof these defendants had any presence on the job site, or any duty whatsoever with regard to the direction and supervision fo the construction and work being performed by the plaintiff. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. points out the deposition testimony by the president of the general contractor shows the general contractor was responsible for removal of debris on the floor of the work site, and hired laborers were to clean and sweep the work site.

The attorney for the defendant Outback Steak of Florida, Inc. states, in a supporting affirmation dated October 15, 2007, the only claims asserted against this defendant are claims for common law indemnification and contribution and contractual indemnification asserted by Whitehall Properties, II, LLC, and all other claims against the defendant Outback Steak of Florida, Inc. have been voluntarily discontinued. The attorney for the defendant Outback Steak of Florida, Inc. argues, in detail, the remaining claims should be dismissed, as a matter of law because the defendant Outback Steak of

Florida, Inc. was not a party to any construction contract nor lease for the premises at the time of this accident, and did not agree to contractually indemnify Whitehall Properties, II, LLC nor any other party in this matter. The attorney for the defendant Outback Steak of Florida, Inc. contends Outback Steak of Florida, Inc., with respect to the claims for common law indemnification and contribution had no role in the construction work, was not negligent in the happening of the accident, so it cannot be liable on these common law theories.

The attorney for the defendant SHINY Construction, Inc. states, in a supporting affirmation dated October 12, 2007, the plaintiff was employed by TM & M Mechanical Corp. which was install fire sprinklers at the subject premises. The attorney for the defendant SHINY Construction, Inc. points out the plaintiff testified he stepped in debris, lost his balance after stepping off the ladder, and described the debris as a piece of rock, or did not know what it was. The attorney for the defendant SHINY Construction, Inc. also notes the plaintiff conceded he and his partner moved the debris in the work area to make room for themselves, and he actually saw the debris prior to stepping into it. The attorney for the defendant SHINY Construction, Inc. asserts the facts alleged by the plaintiff demonstrate the alleged condition causing the injury was open and obvious, so negating a Labor Law § 200 claim. The attorney for the defendant SHINY Construction, Inc. points to the affidavit dated October 12, 2007 of Lian Fan Chen, the president of SHINY Construction, Inc. which shows SHINY Construction, Inc. did not contract nor

subcontract with TM & M Mechanical Corp., but engaged the third party defendant Expert Sprinkler Maintenance Co., Inc. for the installation of the sprinkler system, and was unaware of TM & M Mechanical Corp. was on the work site. The attorney for the defendant SHINY Construction, Inc. asserts TM & M Mechanical Corp. is charged with supervising the plaintiff's work, and SHINY Construction, Inc. neither supervised nor controlled the plaintiff's work. The attorney for the defendant SHINY Construction, Inc. notes this defendant was not obligated to either supervise nor control the plaintiff's work pursuant to its agreement with Outback Steak of Florida, Inc. The attorney for the defendant SHINY Construction, Inc. claims this defendant had no notice of the alleged dangerous condition. The attorney for the defendant SHINY Construction, Inc. avers the Labor Law § 240 claim deals with special hazards associated with elevation related activities, but here the injury occurred not because of a height differential, but from a separate unrelated hazard, to wit an alleged stone on the ground floor, so a Labor Law § 240 claim does not lie here. The attorney for the defendant SHINY Construction, Inc. maintains the plaintiff's Labor Law § 241 claim should also be dismissed because the none of the specific Department of Labor regulations cited by the plaintiff are inapplicable here, to wit the plaintiff does not allege a slippery condition, the plaintiff was not working in a passageway at the time of the alleged incident, the debris was open and obvious which the plaintiff declined to remove from his work area because he testified there was no need, so it was not a proximate cause of the accident, and the plaintiff was

not injured on a stairway, ramp nor runway, nor a tiered construction. The attorney for the defendant SHINY Construction, Inc. contends it is impossible to ascertain if the debris the plaintiff tripped over was a by-product of the defendant's own work, inasmuch as the plaintiff cannot identify what he purportedly tripped over.

The plaintiff's attorney states, in an affirmation dated November 3, 2007, in response to the cross motion by the defendant Outback Steak of Florida, Inc., the plaintiff does not oppose the cross motion. The plaintiff's attorney states, in an opposing affirmation dated November 5, 2007, to the motion by Whitehall Properties, II, LLC and Pan-Am Equities, Inc., in detail, there are questions of fact as to whether these defendants are statutorily responsible to the plaintiff under Labor Law § 241 (6) as owner and project manager of the premises where the accident took place. The plaintiff's attorney states, in an opposing affirmation dated November 5, 2007, to the motion by SHINY Construction, Inc., in detail, there are questions of fact as to whether this defendant is statutorily responsible to the plaintiff under Labor Law §§ 200 and 241 (6) and the Industrial Code § 23-1.7 (e) (2) as the general contractor of the construction site. The plaintiff's attorney asserts the Court should not consider the affidavit submitted by Lian Fan Chen a/k/a Peter Chen because it is in violation of CPLR 2309, to wit the line for the notary public's signature was blank, and it lacked any information as to the name and commission of the notary public., so it is an unsworn statement of no evidentiary, not in admissible form. The plaintiff's attorney also argues the Chen affidavit sets forth bald, conclusory

allegations in contradiction with the deposition testimony.

The attorney for the defendant SHINY Construction, Inc. states, in another affirmation dated November 7, 2007, in partial opposition to that portion of the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. motion for common law indemnification against SHINY Construction, Inc. and to dismiss the cross claims, but in support of that portion of their motion which seeks to dismiss the complaint, Whitehall Properties, II, LLC and Pan-Am Equities, Inc. have not shown, as a matter of law, that SHINY Construction, Inc. was negligent or exclusively controlled the work site. The attorney for the defendant SHINY Construction, Inc. states there are triable issues of fact as to the alleged negligence of the parties, and neither Whitehall Properties, II, LLC nor Pan-Am Equities, Inc. have demonstrated, as a matter of law, they were not negligent in the happening. The attorney for the defendant SHINY Construction, Inc. points out SHINY Construction, Inc. did not contract nor subcontract with TM & M Mechanical Corp., but engaged the third party defendant Expert Sprinkler Maintenance Co., Inc. for the installation of the sprinkler system. The attorney for the defendant SHINY Construction, Inc. states the sprinkler contractor was apparently selected or approved by Whitehall Properties, II, LLC and Pan-Am Equities, Inc. as evidenced by the governing lease. The attorney for the defendant SHINY Construction, Inc. asserts, as set forth in the lease specifically Article 44.01 (b and (e), Whitehall Properties, II, LLC and Pan-Am Equities, Inc. had the contractual right to supervise and

control the work site, and pursuant to the lease they selected or approved the contractors for the fire safety systems. The attorney for the defendant SHINY Construction, Inc. states SHINY Construction, Inc. did not exclusively control nor supervise the work site since contractors were at the work site not hired by SHINY Construction, Inc., and Whitehall Properties, II, LLC and Pan-Am Equities, Inc. had the authority to inspect the work site pursuant to the lease. The attorney for the defendant SHINY Construction, Inc. notes Whitehall Properties, II, LLC and Pan-Am Equities, Inc. rely upon an unsigned deposition by SHINY Construction, Inc. The attorney for the defendant SHINY Construction, Inc. avers SHINY Construction, Inc. was not responsible for the supervision and control of the plaintiff's employer which was not a subcontractor of SHINY Construction, Inc. The attorney for the defendant SHINY Construction, Inc. argues SHINY Construction, Inc. is not liable for open and obvious defects, such as the alleged debris near the ladder which the plaintiff observed, and took steps to correct. The attorney for the defendant SHINY Construction, Inc. asserts the motion for indemnification should be denied since there are numerous triable issues of fact as to the right of indemnification.

The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. states, in an affirmation dated November 9, 2007, in further support of their motion, the plaintiff has not opposed that motion with respect to Labor Law § 240 (1), so Whitehall Properties, II, LLC and Pan-Am Equities, Inc. are

entitled to summary judgment dismissing the plaintiff's complaint with respect to Labor Law § 240 (1). The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. states the plaintiff has not opposed their motion as to Labor Law § 200 and common law negligence, and Labor Law § 241 (6) with regard to New York State Industrial Code Part 23-1.7 (b), (d), (e) (1), (f), 23-2.4 (b) and 23-2.7 (e), so Whitehall Properties, II, LLC and Pan-Am Equities, Inc. are entitled to summary judgment dismissing the plaintiff's complaint with respect to these claims. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. asserts the only potentially viable claim sought by the plaintiff with respect to Whitehall Properties, II, LLC and Pan-Am Equities, Inc. is New York State Industrial Code 23-1.7 (e) (2), however that section does not support the plaintiff's Labor Law § 241 (6) claim. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. reiterates, in detail, the plaintiff alone created the condition which caused the accident, and another company, Sing-Li, owned by the president of SHINY Construction, Inc. was responsible for debris removal and hired laborers to clean and sweep the work site and supervised their work. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. points out the motion by SHINY Construction, Inc. is supported by Chen affidavit which is neither signed nor notarized, but purports to be in opposition to the motion by Whitehall Properties, II, LLC and Pan-Am Equities, Inc., so that unsworn

statement should be rejected by the Court under CPLR 2309. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. avers SHINY Construction, Inc. never produced any contract with Outback Steak of Florida, Inc. to support the claim SHINY Construction, Inc. was not obligated to supervise or control the plaintiff's work. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. notes that unsworn statement by Chen claims a building representative periodically inspected the premises, coordinated access, and ensure only union employees were on the work site, yet these representatives are unidentified despite the fact the purported affiant acknowledged at his deposition he was at the work site once or twice a week to check work progress, as well as the floor condition and safety. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. maintains SHINY Construction, Inc. hired the third party defendant Expert Sprinkler Maintenance Co., Inc., which in turn hired TM & M Mechanical Corp. to perform work in the space. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. points to Chen's testimony where he found out Expert Sprinkler Maintenance Co., Inc. was not using union works, and the union stopped the work by Expert Sprinkler Maintenance Co., Inc., but they later solved the problem. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. points to the affidavit dated August 22, 2007, by Scott Solomon, the

president of Pan-Am Equities, Inc. where Solomon denies Pan-Am Equities, Inc. hired SHINY Construction, Inc. or any of the subcontractors, and nothing rebuts that sworn statement., but the documentary evidence and sworn deposition testimony is SF 700 Sixth Avenue, LLC or another subcontractor, to wit Expert Sprinkler Maintenance Co., Inc. hired TM & M Mechanical Corp. to perform work in the space. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. notes the deposition testimony provided by SHINY Construction, Inc. make clear SHINY Construction, Inc. had control over the work site and the work performed there, to wit Chen's testimony shows SHINY Construction, Inc. hired electrical, carpentry, air conditioning and sprinkler work contractors to perform the interior design, including the partitions, ceiling, and the construction, including the project manager, who daily managed the work, and was in charge of the construction site. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. reports Chen had a union foreman on the site, an employee of SHINY Construction, Inc. and Sing-Li Construction, Inc., a third party defendant, and responsible for monitoring the contractors. The attorney for the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. maintains neither Whitehall Properties, II, LLC nor Pan-Am Equities, Inc. selected the general contractor nor any subcontractors for constructing the Outback restaurant, and SHINY Construction, Inc. has failed to offer any admissible evidence either Whitehall Properties, II, LLC or Pan-Am

Equities, Inc. exercised any supervision or control over the work performed within the work site.

The attorney for the defendant SHINY Construction, Inc. states, in a reply affirmation dated November 12, 2007, in further support of SHINY Construction, Inc.'s motion for summary judgment. The attorney for the defendant SHINY Construction, Inc. states the plaintiff was not opposed to that portion of this defendant's motion to dismiss the Labor Law § 240, so that claim should be dismissed, as well as Labor Law § 200. The attorney for the defendant SHINY Construction, Inc. states the plaintiff's employer was not a subcontractor of SHINY Construction, Inc., rather the plaintiff's employer was apparently hired by Expert Sprinkler Maintenance Co., Inc. , and as such charged with supervising plaintiff's work. The attorney for the defendant SHINY Construction, Inc. argues SHINY Construction, Inc. is not a general contractor for the plaintiff's employer, so the case law cited by the plaintiff is inapplicable under Labor Law § 200. The attorney for the defendant SHINY Construction, Inc. maintains the plaintiff cannot rely upon the unsigned deposition testimony of Chen to raise issues of fact. The attorney for the defendant SHINY Construction, Inc. asserts the plaintiff's Labor Law § 241 (6) is also untenable because the plaintiff has not shown the alleged violation of the Industrial Code §23-1.7 (e) (2) was the proximate cause of the plaintiff's injuries.

This Court has carefully reviewed and considered all of the papers submitted by all of the parties. Under CPLR 3212(b), a motion for summary judgment "shall show that

there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). This Court finds Whitehall Properties, II, LLC and


Pan-Am Equities, Inc. and Outback Steak of Florida, Inc. have shown their entitlement to summary judgment as a matter of law. The plaintiff and the other parties in opposition have not met their burdens with respect to the denial of summary judgment. This Court also finds Whitehall Properties, II, LLC and Pan-Am Equities, Inc. have met their burden with respect to the issue of indemnification. The defendant SHINY Construction, Inc. has not shown its entitlement to summary judgment as a matter of law, and there are issues of fact as to this defendant only.

Accordingly, the motion by the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc. is granted to dismiss the complaint and cross claims as to the defendants and third party plaintiffs Whitehall Properties, II, LLC and Pan-Am Equities, Inc., cross motion by the defendant Outback Steak of Florida, Inc. for summary judgment is granted as to the defendant Outback Steak of Florida, Inc., the motion by defendant SHINY Construction, Inc. is dismissed in all respects.

So ordered.

Dated: **March 28, 2008**

ENTER:



HON. ANTONIO I. BRANDVEEN
 J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED
APR 02 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE