

Velez v 111 Chelsea Commerce, LP

2010 NY Slip Op 30420(U)

March 2, 2010

Supreme Court, New York County

Docket Number: 115908/06

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Mitter

PART 11

Index Number : 115908/2006
VELEZ, ANGEL
 vs.
111 CHELSEA COMMERCE, L.P.
 SEQUENCE NUMBER : 005
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 7/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the ~~motion~~ ^{and case} memorandum Decision + Order. ~~franklin~~
~~memorandum~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
 MAR 04 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: March 2, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ANGEL VELEZ,

Index No.: 115908/06

Plaintiff,

-against-

111 CHELSEA COMMERCE, LP, LEHR CONSTRUCTION
CORP. and TACONIC MANAGEMENT COMPANY, LLC,

Defendants.
-----X

111 CHELSEA COMMERCE, LP and TACONIC
MANAGEMENT COMPANY, LLC,

Third-Party Index No.:
590492/07

Third-Party Plaintiffs,

-against-

ALL BUILDING CONTRACTING CORP.,

Third-Party Defendant.
-----X

111 CHELSEA COMMERCE, LP and TACONIC
MANAGEMENT COMPANY, LLC,

Second Third-Party Index
No.: 591000/08

Second Third-Party Plaintiffs,

-against-

CITI CORP. and FOREST ELECTRIC CORP.,

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Second Third-Party Defendants.
-----X

Joan A. Madden, J.:

In this action arising out of a workplace accident, second third-party defendant Forest Electric Corporation (Forest) moves, pursuant to CPLR 3212, for summary judgment dismissing

the second third-party complaint as against it (motion seq. 005), and defendant/third-party plaintiffs Chelsea Commerce, LP ("Chelsea") and Taconic Management Company, LLC ("Taconic") oppose the motion. ¹ For the reasons below, the motion is granted and the second third-party complaint is dismissed against Forest.

BACKGROUND

This main action, which has been settled, sought to recover damages for personal injuries sustained by plaintiff when he allegedly fell from a scaffold at a construction site located at 111 Eighth Avenue, New York, New York ("the premises") on July 26, 2006. The premises was owned by Chelsea, and Taconic was the managing agent for the premises. Taconic entered into a contract with third-party defendant All Building Contracting Corporation (All Building)² to construct and install an egress stairwell and staircase from the fourth floor to the Eighth Avenue lobby (the job site) for the benefit of non-party Google, a tenant in the building. The stairwell had formerly been an elevator shaft. Plaintiff was part of a two-man team employed by All Building to perform clean-up work at the job site.

Pursuant to a purchase order, second third-party defendant Forest, an electrical contractor, was hired by All Building to install a fire alarm system and the lighting for the new staircase to be constructed at the premises. In the second-third party complaint, Chelsea and Taconic seek contribution and indemnity from Forest based on allegations that plaintiff's injuries were caused

¹Plaintiff Angel Velez also moved for partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) claims as against Chelsea and Taconic, as well as for an immediate trial on the issue of damages (motion seq. no 004). However, while the motion was pending, plaintiff settled his action against defendants so that plaintiff's motion is now moot.

²The third-party claims were discontinued pursuant to a stipulation of discontinuance dated October 1, 2008.

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by Forest's negligence and/or recklessness.³

Plaintiff testified that, during the evening on the day of the accident, he and his foreman, Alex Rivera (Rivera), were sweeping, taking pieces of sheet rock to the dumpster and generally removing the day's debris from the job site. Plaintiff maintained that Rivera instructed him to climb to the top planks of an approximately 20-to 25-foot-high scaffold, which was located in the fourth-floor stairwell landing, in order to clear debris from it.

After sweeping the debris from the scaffold into the garbage bag, plaintiff threw his shovel down to the ground and began to descend the scaffold with the broom and bag in one hand. According to plaintiff, he descended the scaffold with his stomach facing the scaffold and while holding on to a vertical piece of metal located at the top of it, as if he were descending a ladder. Plaintiff testified at his deposition that, as he was taking his first step down, the scaffold shifted sideways a couple of inches and it "moved like it was going to fall," causing him to miss his step and fall to the concrete landing and become injured (Plaintiff's Dep. at 55). Plaintiff also testified that he observed workers installing ceiling light fixtures from the scaffold from which he fell a few days prior to the incident.

Merrill Streltsoff (Streltsoff), the president of All Building, testified that All Building hired several subcontractors to install the staircase in the existing elevator shaft. These subcontractors, which included an electrician, a carpenter, a painter, and an ironworker, utilized their own equipment, including the type scaffold involved in the accident, but that he did not

³The other second third-party defendant CTI Corp., was a carpentry subcontractor on the site and failed to answer or otherwise respond to the second third-party complaint and is in default. A motion by Chelsea and Taconic for a default judgment against CIT Corp, was denied with prejudice to renewal by this court's decision and order dated May 12, 2009 based on the failure of Chelsea and Taconic to satisfy the requirements of CPLR 3215(f) which requires an affidavit of the facts constituting the claim by a person with knowledge.

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know which subcontractor brought that scaffold to the job site. Streltsoff asserted that All Building did not provide any scaffolding at the job site. Streltsoff also testified he had observed Forest doing work on the staircase at issue but that he did not know whether Forest utilized a scaffold.

Second third-party defendant Forest argues that it is entitled to summary judgment dismissing the second third-party complaint against it as there is no evidence connecting it to the scaffold causing plaintiff's injuries. In support of its motion, Forest submits the affidavit of Robert Hudak ("Hudak"), Forest's general foreman. Hudak states that as part of its work at the job site, Forest installed light fixtures on the ceilings of three floors, including the 4th floor ceiling between the landing of the 3rd and 4th floor staircase, where the accident occurred. Hudak states that Forest did not bring any scaffolds to the job site, and that its workers only utilized, ladders at the job site, and never a scaffold. Specifically, Hudak states that the fixtures that were installed on the ceiling of the 4th floor were installed by workers standing on 16 foot, A-frame wooden ladders owned by Forest.

In addition, Hudak states that, according to the daily time sheets that Forest maintains (and which Forest submits), Forest employees did not perform any work at the premises on the day of the accident. In fact, according to Hudak, before the date of the accident, the last time that Forest employees performed work at the job site was on July 21, 2006, which is five days prior to the accident.

Chelsea and Taconic oppose the motion, asserting that a question of fact exists as to whether Forest owned the subject scaffold. In support of this assertion, they point out that plaintiff testified that, on the day before the accident, he observed workers utilizing the scaffold to put in light fixtures. In addition, Chelsea and Taconic submit the transcripts of two

depositions taken of Hudak on behalf of Forest; the first which was taken when Forest was a non-party and the second after Forest was impleaded as a second third-party defendant. Defendants argue that inconsistencies between Hudak's testimony during his first and second depositions, call into question Hudak's credibility and raise issues of fact warranting the denial of summary judgment.

Specifically, defendants note that while Hudak testified at his first deposition that he did not believe Forest installed light fixtures on the ceiling between the 3rd and 4th floors, at his second deposition he testified that Forest did install light fixtures there. In addition, while Hudak testified at his first deposition that eight-foot ladders were the only equipment used by Forest to install light fixtures, at his next deposition he testified that Forest used two sixteen foot A-framed ladders so that the light fixtures could be installed in the landing between the 3rd and 4th floors where the distance from the floor to the ceiling was twenty-one feet.

“The proponent of a summary judgment motion 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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

Here, Forest has made a prima showing entitling it to summary judgment based on the statements in Hudak's affidavit that Forest did not utilize a scaffold at the job site, and that Forest did not perform any work for more than five days prior to the accident so that plaintiff

could not have observed Forest's workers on the scaffold.

Furthermore, defendants have not controverted this showing based on the inconsistencies in Hudak's testimony during the two depositions. Notably, at both depositions, Hudak testified that Forest did not use scaffolds at the job site, and that Forest had not been at the job site for more than five days before the accident. In addition, although Streltsoff testified that he observed Forest performing work, he did not know whether it used a scaffold or which subcontractor owned the scaffold involved in the accident. Furthermore, even assuming that plaintiff's deposition testimony that he observed workers fixing light fixtures is sufficient to raise an issue of fact as to whether Forest's workers used the scaffold, there is no evidence in the record that Forest owned the scaffold from which plaintiff fell or was otherwise responsible for its condition. Under these circumstances, there is no basis for finding any negligence or recklessness on the part of Forest lead to plaintiff's injuries.

Accordingly, it is

ORDERED that second third-party defendant Forest Electric Corporation's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint as against it is granted, and the second third-party complaint is severed and dismissed as against Forest; and it is further

ORDERED that any motion by defendants to renew their prior motion for a default judgment against second-third party defendant CTI Corp. shall be made on or before April 2, 2010, or the second third-party claims against CTI Corp. shall be dismissed as abandoned.

DATED: March 2, 2010

FILED

J.S.C.

MAR 04 2010

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