

Burton v CW Equities, LLC

2010 NY Slip Op 33871(U)

October 6, 2010

Sup Ct, Bronx County

Docket Number: 17566/2007

Judge: Robert E. Torres

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This opinion is uncorrected and not selected for official publication.

L.W.

PART 29

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

BURTON, JOHN

Index No. 0017566/2007

-against-

Hon. ROBERT E. TORRES

HOT POTATO LLC.

Justice.

The following papers numbered 1 to 18 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on March 05 2010 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4	
Answering Affidavit and Exhibits	5, 6, 7, 8	9, 10, 11, 12
Replying Affidavit and Exhibits	13, 14, 15	16, 17, 18
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion is granted on*

accordance with the attached decision.

RECEIVED
BRONX COUNTY CLERK'S OFFICE
OCT 15 2010

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: 10/15/2010

Hon. _____

[Signature]
ROBERT E. TORRES, J.S.C.

JUDGE ROBERT E. TORRES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 29
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

JOHN BURTON and JOSETTE BURTON,

INDEX NUMBER:17566/2007

Plaintiffs,

-against-

Present:

HON. ROBERT E. TORRES

CW EQUITIES, LLC and T.F.N. DEVELOPMENT
CORP. d/b/a EAST COAST CONSTRUCTION
CORP.,

Defendants.

T.F.N. DEVELOPMENT CORP. d/b/a EAST COAST
CONSTRUCTION GROUP s/h/a EAST COAST
CONSTRUCTION GROUP, INC.,

INDEX NUMBER:86180/2007

Third-Party Plaintiff,

-against-

GENERAL FENCE CORP.,

Third-Party Defendant.

T.F.N. DEVELOPMENT CORP. d/b/a EAST COAST
CONSTRUCTION GROUP,

INDEX NUMBER:84101/2009

Second Third-Party Plaintiff.

-against-

CAPITAL INTERIORS CONSTRUCTIONS CORP.,

Second Third-Party Defendant.

Plaintiffs move for an Order granting them summary judgment and against defendants CW EQUITIES, LLC (hereinafter "CW") and T.F.N. DEVELOPMENT CORP. d/b/a EAST COAST CONSTRUCTION GROUP (hereinafter "T.F.N."). Second Third Party Defendant CAPITAL INTERIORS CONSTRUCTIONS CORP. (hereinafter "Capital") cross-moves for an Order severing or dismissing the second third-party action filed by T.F.N. against them under Index No.:84101/2009

from this action or, alternatively, for an Order pursuant to CPLR § 3124 compelling all parties to serve responses to the demands served on behalf of CAPITAL, including but not limited to copies of all previously served pleadings, disclosure responses, motions and deposition transcripts by a date certain and also vacating the Note of Issue, pursuant to 22 NYCRR § 202.21, and setting this matter down for a conference to schedule depositions. Defendant CW moves this Court for summary judgment pursuant to CPLR § 3212 dismissing all claims and cross-claims against it; and/or an Order pursuant to CPLR § 3212 granting conditional summary judgment as against defendant TFN for common law and contractual indemnification. Third-party defendant GENERAL FENCE CORP. (hereinafter "General") moves for summary judgment pursuant to CPLR § 3212 dismissing the third-party complaint and all claims against it. For the purposes of this decision, said motions are consolidated.

The instant action was commenced by the filing of a summons and complaint on June 19, 2007 and issue was joined on behalf of defendant T.F.N. on or about August 21, 2007. On or about September 21, 2007, defendant T.F.N. served a Third Party Summons and Complaint, bringing in Third-Party defendant General and issue was joined on behalf of said defendant on or about November 16, 2007. On or about April 25, 2008, plaintiffs herein made a motion to amend the Complaint and the caption in order to correct the location of the accident as alleged in the Summons and Complaint and asserting a cause of action against defendant CW as owner of the property. By decision, dated June 2, 2008, said motion was granted and issue was joined on behalf of defendant CW on September 21, 2008. The depositions of all parties have been held and the Note of Issue was filed on or about October 14, 2009.

The within action arises from personal injuries sustained by plaintiff JOHN BURTON on May 15, 2007, while working at the premises/construction site located at 517 West 46th Street, in the County, City and State of New York, when he fell from an elevated work location/catwalk to a location some 15 feet below the catwalk. Said accident occurred at a construction site during the erection of a condominium complex. Defendant CW owned the property at the time of the accident. Plaintiff John Burton was employed by defendant General who was one of the subcontractors and were hired by defendant T.F.N., the General Contractor and Construction Manager. Defendant General was involved in the installation of various PVC and chain link fencing in the rear of the

construction project but not the rails along the perimeter of the wall around the vaulted area where the alleged accident occurred.

PLAINTIFFS

Plaintiff John Burton alleges that he fell from the elevated catwalk over the vaulted area down to the bottom of the vaulted area due to the lack of proper protection mandated by Labor Law § 240(1). As such, plaintiffs argue that no question of fact exist on the issue of liability since the defendants are strictly liable for the injuries sustained by plaintiffs under Labor Law § 240(1). Defendant T.F.N. opposes plaintiffs' motion arguing that summary judgment is inappropriate since there is a clear question of fact as to whether plaintiff was provided with the required safety equipment and/or whether that was the sole proximate cause of his accident. Defendant CW also opposes the plaintiffs' motion on the grounds that the permanent walkway/passageway that the plaintiff allegedly fell from does not fall within the ambit of the enumerated devices set forth in the Scaffold Law.

Under CPLR 3212(a), once issue has been joined, a party may move for summary judgment in any action. Valentine Transit v Kernizan, 191 A.D.2d 159 9(1st Dept. 1993). On motions for summary judgment, the court's function is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957); Rose v. DaEcib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept., 1999). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Sillman v. Twentieth Century Fox Film Corp., *supra*.

Labor Law § 240(1) states in pertinent part that "all contractors and owners . . . *except owners of one and two-family dwellings but do not direct or control the work*, in the erection, demolition, repair, altering of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. (Emphasis added).

Plaintiffs' motion for summary judgment is hereby denied on the grounds that questions of fact exist warranting said denial. Moreover, upon a review of the facts herein, this Court finds that plaintiffs' reliance on Labor Law § 240(1) is misplaced.

CAPITAL

Second Third Party Defendant CAPITAL cross-moves for an Order severing or dismissing the second third-party action filed by T.F.N. against them under Index No.:84101/2009 from this action or, alternatively, for an Order pursuant to CPLR § 3124 compelling all parties to serve responses to the demands served on behalf of CAPITAL, including but not limited to copies of all previously served pleadings, disclosure responses, motions and deposition transcripts by a date certain and also vacating the Note of Issue, pursuant to 22 NYCRR § 202.21, and setting this matter down for a conference to schedule depositions. Defendant T.F.N. oppose the instant motion on the ground there does not exist good cause for this Court to sever said action from plaintiffs' main action as Second Third Party defendant CAPITAL will not suffer severe prejudice from a denial thereof. Plaintiffs partially oppose the instant cross-motion to the extent that it supports Second Third-Party Defendant Capital's request to sever the Second Third Party Action from the remainder of the case. However, if said relief is not granted, the plaintiffs oppose further discovery on the ground that they have complied with said party's requests. On the other hand, Third-Party Defendant General partially opposes the branch of the motion seeking severance of the Second Third Party action. Third-Party Defendant General argues that the claims against Capital involve the same factual and legal issues present in the main action and has failed to demonstrate sufficient prejudice to justify such severance.

On motions seeking severance of third-party actions, Courts have held that, in the interest of judicial economy, it is appropriate to conduct a single trial where the facts and legal questions in the main action and the third party action are similar. See, Rothstein v. Milleridge Inn, Inc., 251 A.D.2d 154 (1st Dept. 1998). However, when a movant demonstrates sufficient prejudice, Courts will grant a severance motion. See, C.P.L.R. § 603.

Second Third Party Defendant CAPITAL INTERIORS CONSTRUCTIONS CORP.'s cross-motion is hereby denied in its entirety. The Court finds that the facts and legal questions in the main action and the third party action herein are interwoven where a single trial is appropriate. Notwithstanding, the movant herein has failed to demonstrate sufficient prejudice warranting such remedy. Finally, the Court is satisfied that the Order[s] concerning discovery have and are being

complied with.

CW

Defendant CW moves this Court for summary judgment pursuant to CPLR § 3212 dismissing all claims and cross-claims against it; and/or an Order pursuant to CPLR § 3212 granting conditional summary judgment as against defendant TFN for common law and contractual indemnification. Plaintiffs and Second Third Party defendant CAPITAL oppose the instant motion.

The moving party on motions for summary judgment, must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

This court finds that the movant herein has failed to establish its entitlement to judgment as a matter of law. As such, said motion is denied in its entirety.

GENERAL

Third-party defendant GENERAL moves for summary judgment pursuant to CPLR § 3212 dismissing the third-party complaint and all claims against it. Defendant T.F.N. opposes movant's motion for summary judgment pursuant to CPLR § 3212 dismissing the third-party complaint and all claims against it on the grounds that question of fact exist regarding said movant's negligence in its exercise and/or supervision of the subject project and the work-site activities of the plaintiffs herein. However, defendant T.F.N. discontinue and common law indemnification claims against said movant. Second Third Party defendant CAPITAL opposes the instant motion on the ground that, at a minimum, there exist facts warranting its denial.

Third-party defendant GENERAL's motion for summary judgment is hereby denied on the grounds that triable issue of fact exist warranting said denial. Sillman v. Twentieth Century Fox Film Corp., *supra*.

Accordingly, it is

ORDERED that plaintiffs motion for summary judgment is denied. It is further

ORDERED that Second Third Party Defendant CAPITAL's cross-motion for severance and/or discovery hereby denied. It is further,

ORDERED that Defendant CW's motion for summary judgment is denied. It is further,

ORDERED that third-party defendant GENERAL's motion for summary judgment is denied. It is further

ORDERED that plaintiffs shall serve a copy of this order with Notice of Entry within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

Dated: October 6, 2010



Hon. Robert E. Torres

