

**DaSilva v Haks Engineers**

2013 NY Slip Op 30217(U)

January 29, 2013

Sup Ct, New York County

Docket Number: 109258/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

PAULO DA SILVA,

Plaintiff,

-v-

HAKS ENGINEERS, et al.,

Defendants.

**FILED**  
FEB 01 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. 109258/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits 3-5

Replying Affidavits 6, 7

CROSS-MOTION: YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/29/13

Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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PAULO DA SILVA,

Plaintiff,

- against -

HAKS ENGINEERS, ARCHITECTS AND LAND  
SURVEYORS, P.C., EARTH TECH  
NORTHEAST, INC. and HAKS ET JOINT  
VENTURE and HAIDER ENGINEERING, P.C.,

Defendants.

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HAKS ET JOINT VENTURE ,

Third-Party Plaintiff,

- against -

HAIDER ENGINEERING, P.C.,

Third-Party Defendant.

INDEX NO.  
109258/11

DECISION/ORDER

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE

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DONNA M. MILLS, J.:

This is a personal injury claim by plaintiff Paulo Da Silva, an employee of Yonkers Contracting, Inc., who on August 5, 2009, fell about six to seven feet from a scaffold while working at the project involving construction at the Croton Falls Dam (the "Project").

Plaintiff alleges that defendants were negligent and violated Labor Law sections 200, 240(1) and 241(6) and applicable provisions of the Industrial Code Rule 23 of the state of New York and New York City Building Code. Specifically, the plaintiff claims that the defendants failed to provide plaintiff with a safe place to work, and a safe and proper work platform; provided unsuitable, inadequate and defective work platform; caused the platform to fall from a height and be injured.

Haider Engineering, P.C., ("Haider") contracted with Haks Engineers and Land

Surveyors, P.C. and Earth Tech Northeast, Inc. Joint Venture (the "Joint Venture"), to provide resident engineering inspection services in connection with the reconstruction of the Project pursuant to the agreement between Haider and the Joint Venture, dated July 11, 2007.

The Joint Venture acted as the Project's Construction Manager, and Haider was retained as the Joint Venture's subconsultant. Haider's duties with respect to resident engineering inspection were to safeguard the City against defects and deficiencies in the work and that it would use reasonable care and reasonable power of observation and detection in determining that the work conformed to the Construction Contract Documents.

Haider was first brought into this litigation by way of the Third-Party Complaint which asserted causes of action sounding in contractual and common law indemnity and breach of contract for failing to obtain insurance. Plaintiff then asserted direct claims against Haider.

Haider now seeks summary judgment dismissing the Complaint, the Third-Party Complaint and all cross-claims against it on the grounds that it did not supervise, direct or control the plaintiff's work when he fell from a scaffold while working at the Project.

#### Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie

showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

In support of its motion for summary judgment, Haider submits an affidavit from Francis Okechukwu who states that he was the only employee of Haider that worked on the Project, and claims that Haider neither installed nor inspected the scaffold at issue; nor had responsibility to install or inspect the scaffold; nor were they responsible for safety at the Project. Mr. Okechukwu's affidavit is supported by the Agreement between Haider and the Joint Venture, which established that Haider had no authority to supervise, direct or control the contractor's means and methods or the safety precautions.

The evidence submitted by Haider unequivocally demonstrates that it did not direct, supervise or control the work giving rise to the plaintiff's injury or have the authority to do so. As such, Haider has established that it is not liable under Labor Law §§ 200 and 240. Nor may liability be imposed under these circumstances pursuant to Labor Law §241(6)(see, Russin v. Louis N. Picciano & Son, 54 NY2d 311 [1981]). In opposition, the plaintiff and co-defendant's have failed to defeat summary judgment by raising a triable issue of fact as to Haider's supervision and control of the activity which resulted in plaintiff's

injury. In opposition to the motion for summary judgment, plaintiff and co-defendants' claim that summary judgment would be premature at this time because discovery has not been completed. The plaintiff and co-defendants' "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (Woodard v Thomas, 77 AD3d 738, 740 [2010]). The plaintiff and co-defendants "failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the Haider defendant (Boorstein v 1261 48<sup>th</sup> St. Condominium, 96 AD3d 703, 704 [2012]; see CPLR 3212 [f]).

Accordingly, it is

ORDERED that the defendant/third-party defendant's motion for summary judgment is granted and the claims, third-party claims and cross-claims against Haider Engineering, P.C. are dismissed as against said party, with costs and disbursements to said party as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of said party; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 1/29/13

ENTER:  
*DM*

J.S.C.

DONNA M. MILLS, J.S.C.

**FILED**

FEB 01 2013

NEW YORK  
COUNTY CLERK'S OFFICE