

Enriquez v Bhumi Constr. Inc.

2013 NY Slip Op 32309(U)

September 24, 2013

Sup Ct, New York County

Docket Number: 103326/2010

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 103326/2010
ENRIQUEZ, REGULO
vs.
BHUMI CONSTRUCTION INCORP.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

FILED

SEP 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/24/13

 J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

REGULO ENRIQUEZ AND BILFREDO TRIUNFEL
LOPEZ, individually and on behalf of all other persons
similarly situated who were employed by BHUMI
CONSTRUCTION INCORPORATION, MILLENIUM
CENTURY CONTRACTING CORP., K.S. CONTRACTING
CORP., AND ANJAC ENTERPRISES INC.,

Plaintiffs,

INDEX NO. 103326/2010

- v -

MOTION DATE _____

BHUMI CONSTRUCTION INCORPORATION,
MILLENIUM CENTURY CONTRACTING CORP., K.S.
CONTRACTING CORP., ANJAC ENTERPRISES INC.,
INDIVIDUALLY AGAINST BIMAL PATEL AND
RADHAKRISHNA REDDI,

MOTION SEQ. NO. 5

Defendants.

FILED

MOTION CAL. NO. _____

SEP 30 2013

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

NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

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

1, 2, 3

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

The instant action was brought by Plaintiffs, who work as bricklayers, laborers, pointers, stone setters, and in construction-related trades, to recover overtime and prevailing wages and benefits from Defendants, for work that Plaintiffs performed on publicly financed projects ("Public Works Projects") that had been contracted with such government entities as the City of New York ("NYC"), the New York City Housing Authority ("NYCHA"), the New York City Department of Parks and Recreation ("NYCDPR"), and the State of New York ("NYS").

Defendant ANJAC Enterprises Inc. ("ANJAC") now brings this motion for summary judgment pursuant to CPLR §3212 on its First and Second Cross-Claims against defendant Bhumi Construction Incorporation ("Bhumi") in the amount of

\$100,000.00.

ANJAC's first cross-claim alleges that "to the extent that Bhumi has failed to pay Plaintiff prevailing wages, Bhumi is liable to ANJAC for breach of contract." The second cross-claim asserts that "to the extent ANJAC is found liable to Plaintiffs, ANJAC is entitled to indemnification from Bhumi." There is no opposition submitted to ANJAC's motion.

In support of its motion, ANJAC provides: the Affidavit of George Georgakis, President of ANJAC; the Agreement between ANJAC and Bhumi, dated January 24, 2009; the Bhumi's Certification under Labor Law 220 dated April 3, 2009; the Payroll & OSHA Certification dated May 11, 2009; a letter dated April 13, 2013 from ANJAC to Bhumi; the checks showing ANJAC's payments made to Virginia and Ambinder LLP; the summons and complaint; Bhumi's answer to the first amended complaint; and ANJAC's answer to the first amended complaint.

On January 24, 2009, ANJAC, as Contractor, and Bhumi, as subcontractor, entered into a subcontract Purchase Order ("the Agreement") for the performance of construction work at the Project known as Manhattan Community College, Exterior Renovation ("the Project").

The Agreement provides:

This is a Public works project. Labor Law §220 is in effect. Payment of Prevailing wages to the tradesman and payroll reporting is required.

In addition to the submission of certified payrolls, Bhumi also executed (1) a certification attesting to the fact that Bhumi would "agree to pay the applicable prevailing wages and to pay or provide the supplements specified herein", and (2) a Payroll & OSHA Certification attesting to the fact that "all laborers, workers and mechanics were paid wages and supplements recorded as earned on the attached payroll records."

As alleged in Georgakis's affidavit, Bhumi failed to pay prevailing wages as required under Labor Law. As a result and in settlement of this action, ANJAC

was required to pay to plaintiffs the sum of \$100,000¹. This payment was made by ANJAC based on the fact that ANJAC was statutorily liable for the non-payment of wages of its subcontractors. Bhumi has failed to reimburse ANJAC for this payment nor did Bhumi object to ANJAC's making this payment to settle the action.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970], *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

ANJAC's first cross-claim alleges that "to the extent that Bhumi has failed to pay Plaintiff prevailing wages, Bhumi is liable to ANJAC for breach of contract." The second cross-claim asserts that "to the extent ANJAC is found liable to Plaintiffs, ANJAC is entitled to indemnification from Bhumi."

Labor Law §223 provides that "whenever the 'evidence indicates a noncompliance or evasion on the part of a sub-contractor, the contractor shall be responsible for such noncompliance or evasion.'" (*Canarsie Plumbing & Heating Corp. v. Goldinm*, 151 A.D.2d 331, 333 [1st Dept 1989]). "The construction of this statute as permitting the imposition of civil penalties on a contractor, though not itself guilty of willfulness, for the willful violation of the mandates of the Labor Law by its subcontractor is certainly not inconsistent with the underlying statutory purpose of holding contractors responsible for the actions of their subcontractors." (*Canarsie Plumbing*, 151 A.D.2d at 333).

"[C]ommon-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries." *Structure Tone, Inc. v. Universal Servs. Group., Ltd.*, 87 A.D. 3d 909, 911 [1st

¹The sum of \$16,292.40 is currently being held in escrow by plaintiff's counsel until one of the settling plaintiffs is located.

