[* 1]

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

----------X

ANTONIO PALACIOS,

Plaintiff,

INDEX NO. 111035/11

-against-

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., THE BIG APPLE CIRCUS, LTD., KARL'S EVENT RENTAL, INC., STAMFORD TENT & EQUIPMENT CO., MAIN ATTRACTIONS, LLC,

Defendants.

----------X

JOAN A. MADDEN, J.:

Defendant Stamford Tent & Event Services, Inc. ("Stamford Tent") (motion seq. no. 001) and defendant Main Attractions, LLC ("Main Attractions") (motion seq. no. 002) are each moving for summary judgment dismissing the complaint.[1] Plaintiff opposes both motions, and defendants Lincoln Center for the Performing Arts, Inc. ("Lincoln Center") and Main Attractions, LLC ("Main Attractions) oppose Stamford's motion.

Plaintiff alleges he was injured on October 18, 2010 when he fell from an unsecured ladder at Damrosch Park, Lincoln Center Plaza, while in the course of his employment with Labor Ready, Inc. Plaintiff alleges the accident was due to defendants' negligence and violations of Labor Law §§240(1), 241(6) and 200 at the job site. Plaintiff alleges he fell while setting up an event tent, as he was descending a ladder on a stage.

Defendant Stamford Tent argues it was mistakenly named as a defendant because it had no presence at the accident site nor involvement with the work performed at or around the time

[1]The motions are consolidated for disposition.

of the accident. Stamford Tent submits an affidavit of Biran Rieke, Director of Operations, that Stamford "had no involvement with any aspect of the work being performed on October 18, 2010," Specifically, Rieke states that Stamford Tent "had performed unrelated work at Lincoln Center plaza in March and June 2010 for separate, unrelated events which began and ended in March and June 2010 respectively," and in 2010 Stamford Tent "completed all of its work and removed all of its equipment, personnel materials, etc from Lincoln Plaza by June 2010." On information and belief, Rieke also states that co-defendant Karl's Event Rental Inc. was the entity that provided the tent and stage for the event in Damrosch Park in October 2010.

In opposition, defendants Lincoln Center and Main Attractions argue that summary judgment is premature as depositions have not been held and discovery has not been completed. Lincoln Center also argues that not all pleadings are attached to the motion, and that Stamford Tent's evidence fails to make out a prima facie case. Specifically, Lincoln Center argues that Stamford fails to provide the details concerning the other events in March and June 2010, including where they took place, the nature of such events, the parties involved, and the work it completed and the equipment, personnel and materials present. Plaintiff also argues that the motion is premature.

In its first reply, dated July 11, 2012, Stamford Tent asserts that it previously responded to plaintiff's notice for discovery and inspection seeking production of any contracts for the subject work between Stamford and Lincoln Center, and Stamford and entities called "Jenicar Builders Contractors Co" and "Astor Contracting." Stamford responded by indicating that it is not a party to and does not possess any such contracts. Stamford objects that plaintiff has not submitted an affidavit and offers no evidentiary support for his speculation that additional

discovery may demonstrate the existence of factual issues. In its second reply, dated August 17, 2012, Stamford asserts that its affidavit is not self-serving and conclusory, as co-defendants contend, because it sets forth specific facts. Stamford also argues that all defendants including Main Attractions and plaintiff are "obviously parties with knowledge of the pertinent facts as they were all present as the job site and all had some involvement or association with the property or work performed," so this is not a case where Stamford has "exclusive" knowledge of the pertinent facts. Stamford also argues that none of the opposing defendants has submitted an affidavit setting forth facts to create an issue of fact, and that a party opposing summary judgment as premature must submit affidavits showing that facts essential to justify opposition may exist but cannot be stated.

Main Attractions is moving for summary judgment on the grounds that at the time of the accident it was not performing any work and had no employees at the accident site. Specifically, Main Attractions asserts that its contract with Baron Capital provided that Main Attractions was not scheduled to be on the premises until October 21, 2010, which was three days after plaintiff's accident. Main Attractions submits an affidavit of Dean DiAlfonso, its Operations Manager, stating that Main Attractions was not present when plaintiff's accident occurred. Main Attractions also submits its contract with Baron Capital, which on page 6 specifically states: "October 21 @ 11:00 pm, trucks to arrive on site. Midnight, Unload, start construction."

In opposition, plaintiff argues summary judgment is premature, as discovery is outstanding, and that he and the other parties should be given an opportunity to depose DiAlfonso and examine the written contract. Plaintiff also objects that DiAlfonso's affidavit is self-serving and conclusory.

On a motion for summary judgment, the proponent "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." Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Based on the affidavits and supporting documents, defendants Stamford Tent and Main Attractions have each made a prima facie showing of entitlement to judgment as a matter of law. Neither plaintiff nor the opposing co-defendants have established the existence of a triable issue of material fact. The absence of discovery does not require denial of defendants' motions, as neither plaintiff nor the opposing co-defendants have shown that facts essential to oppose the motions are in the moving defendants' exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1st Dept 2009); Bank of America, N.A. v. Tatham, supra. Notably, at oral argument, co-defendant Karl's Event Rental, Inc., admitted that it had the contract to erect the tent in October 2010.

Accordingly, it is

ORDERED that the motion by defendant Stamford Tenant & Equipment Co. for summary judgment (motion seq. no. 001) is granted and the complaint is severed and dismissed as against Stamford Tenant & Equipment Co. and the Clerk is directed to enter judgment accordingly; and it

is further

ORDERED that motion by defendant Main Attractions, LLC for summary judgment (motion seq. no. 002) is granted and the complaint is severed and dismissed as against defendant Main Attractions, LLC, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of the action shall continue and the remaining parties are directed to appear for the status conference previously scheduled for July 25, 2013 at 9:30 a.m., in Part 11, in Room 351 at 60 Centre Street.

DATED: June 21, 2013

ENTER:

J.S.C.