

Merchan v 609 Rte. 17 S. Corp.

2014 NY Slip Op 31792(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 152887/2012

Judge: Eileen A. Rakower

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

MARCELO MERCHAN,

Plaintiff,

- v -

609 ROUTE 17 SOUTH CORPORATION AND
FIFTH AVENUE MENSWEAR, INC.,

Defendants.

FIFTH AVENUE MENSWEAR, INC.,

Third Party Plaintiff,

-v-

EMERALD SIGNS INC., and FOUR SIGNS AND DESIGN,
INC.,

Third Party Defendants.

INDEX NO. 152887/2012

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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

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

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

Marcelo Merchan (“Plaintiff”) brings this action to recover for personal injuries he allegedly sustained on October 8, 2010, when he fell off a ladder at 609 Route 17 South, Paramus, New Jersey (“the Premises”).

At the time of the accident, Plaintiff, an employee of Emerald Signs, Inc. (“Emerald”), was on a ladder changing the lettering on a sign when the sign rotated and the shift caused him and the ladder to fall.

Fifth now moves to dismiss the Complaint and all cross-claims. Plaintiff opposes.¹

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. (*See, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*See, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*See, Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Fifth submits the attorney affirmation of Richard O'Connell, which annexes the pleadings, the License Agreement obtained by Fifth to set up a seasonal Halloween store, which allowed them to place temporary signs over the pre-existing sign, a copy of Plaintiff's deposition testimony, and the deposition testimony of Chris Francey, on behalf of Fifth.

O'Connell argues,

Our client is Fifth Avenue Menswear who was opening up a temporary Halloween, popup store at the location in question. The co-defendant owned the building in question and our client was going to have a temporary popup store at the building. The plaintiff was there to change the lettering on the existing sign to advertise the popup store which was to be known as Yankee Bill's Costume Superstore.

Under the license agreement, our client, the Licensee had no

¹ 609, the owner of the Premises, previously moved for an order dismissing the complaint for lack of in personam jurisdiction pursuant to CPLR §302(a)(3). 609's motion was granted by Order dated April 11, 2013.

responsibility or other obligation as to heating, plumbing, ventilation, electric, and/or air conditioning systems of or in the Licensed Area and shall have no responsibility or other obligations as to structural maintenance and/or repair of the Licensed Area. It is not a landlord - tenant situation and our client was just a licensee according to the License Agreement. According to Page 4 of the License Agreement, nothing contained herein shall be deemed to create a landlord - tenant relationship.

In opposition, Plaintiff submits the attorney affirmation of Mitchell G. Shapiro.

Plaintiff argues that Defendant has failed to make out a prima facie case for summary judgment as there are issues of fact concerning Fifth's duties, and specifically, whether Fifth acted as a general contractor, a licensee, and/or tenant with respect to the Premises and work being performed by Plaintiff.

Plaintiff argues that the "license agreement" attached to Fifth's motion is not signed by or on behalf of Fifth. Plaintiff further argues that Fifth "fails to annex or even mention, the 'contract' dated 9/30/10, made between Emerald (a/k/a 4 Signs & Designs, Inc.) and Yankee Bills Halloween Superstore" with respect to the purchase of the banner, which was being installed by Merchan at the time of the accident.

Plaintiff further contends that while Fifth's moving affirmation states that the Halloween store was not open at the time of the accident, Chris Francey's deposition testimony testified that one of Fifth's employees was at the store when the accident happened, and saw the ambulance arrive, and that Francey went to the store on the date of the accident after the accident happened.

In response, Fifth submits the reply attorney affirmation of Richard D. O'Connell, which states that Francey identified the license agreement at his deposition and states that his attorney handled such and likely signed the agreement.

Both parties cite to New Jersey law, as the accident took place in New Jersey. General contractors under New Jersey law have a duty to maintain a safe workplace. *Escobar v. Laumar Roofing Services, Inc.*, 2012 WL 6049120 (N.J.

Super. 2012).

Here, Fifth has failed to make a prima facie showing of entitlement to summary judgment that it has no liability as a matter of law. Fifth has failed to produce sufficient evidence in admissible form to eliminate any material issue of fact that it had a duty to maintain a safe workplace at the Premises where the accident occurred.

Wherefore, it is hereby

ORDERED that Defendant's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief is denied.

Dated: JULY 10, 2014



J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE