

Sheils v Dormitory Auth. of the State of N.Y.
2015 NY Slip Op 31687(U)
August 19, 2015
Supreme Court, Suffolk County
Docket Number: 61053/2013
Judge: Paul J. Baisley
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SHORT FORM ORDER

INDEX NO. 61053/2013 EFILED

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

MICHAEL SHEILS AND NANCY SHEILS,

Plaintiffs,

-against-

DORMITORY AUTHORITY OF THE STATE OF
 NEW YORK, DELRIC CONSTRUCTION CO.,
 INC., JACOBS PROJECT MANAGEMENT CO.,
 JACOBS FACILITIES, INC., A.G.
 CONSTRUCTION CORPORATION, CAPCO
 STEEL ERECTION COMPANY AND CAPCO
 STEEL LLC, FIDELITY & DEPOSIT COMPANY
 OF MARYLAND, TUTOR PERINI
 CORPORATION, JOBIN WATERPROOFING
 CORPORATION, ENTERPRISE ERECTORS, INC.,

Defendants.

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ORIG. RETURN DATE: November 19, 2014

FINAL RETURN DATE: January 16, 2015

MOT. SEQ. #: 002- MD

003- XMD

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Upon the following papers numbered 1 to 101 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; Notice of Cross Motion and supporting papers 70 - 73; Answering Affidavits and supporting papers 33 - 34; 35 - 48; 49 - 52; 53 - 60; 74 - 80; 81 - 85; 86 - 100; Replying Affidavits and supporting papers 61 - 69; 101; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (002) by defendant Tutor Perini Corporation for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is denied without prejudice; and it is further

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ORDERED that this cross motion (003) by defendant The Jobin Organization Inc. s/h/a Jobin Waterproofing Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is denied without prejudice; and it is further

ORDERED that the parties' attorneys shall appear on September 16, 2015 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York for a preliminary conference.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Michael Shiels on October 12, 2012 when he tripped and fell while ascending an unfinished interior steel staircase. The accident occurred at the new Staten Island Courthouse construction project at 26 Central Avenue, Staten Island, Richmond County, New York. At the time of the accident, plaintiff was employed as an operating engineer by nonparty Hirani Construction Management. The staircase leads from the garage/ground level of the project to the first floor. Tutor Perini Corporation ("Tutor Perini") was the completion, or replacement, contractor for exterior and interior curtain wall and metal panel work after the default of a subcontractor, Trainor Glass Company ("Trainor"). Tutor Perini contracted with a number of subcontractors, including The Jobin Organization Inc. s/h/a Jobin Waterproofing Corp. ("Jobin"), which was the air/vapor barrier and metal panel system installation subcontractor.

Plaintiffs allege common-law negligence as well as violations of Labor Law §§ 200 and 241 (6). They also allege violations of 12 NYCRR [Industrial Code] §§23-1.5, 23-1.7 (e), 23-1.30, 23-1.32, 23-2.1 (b) and 23-2.7, as well as the rules and regulations of the Occupational Safety and Health Administration (OSHA), specifically 29 CFR 1910 and 29 CFR 1926. By their bills of particulars, plaintiffs allege a dangerous and defective condition of an unfinished metal staircase blocked by a forklift and debris and other trap-like conditions. In addition, plaintiffs allege that defendants and/or their agents and employees were negligent in, among other things, failing to ensure that the staircase was substantially filled with concrete or with another permanent tread surfacing or that it had a properly fitted temporary wooden tread.

Defendant Tutor Perini now moves for summary judgment on the grounds that neither it nor any of its subcontractors had any involvement in the construction work or responsibility for said work on the subject staircase on the date of plaintiff's accident, and that there is no evidence that it owed any duty of care to plaintiff such that it cannot be held liable for common-law negligence or violation of Labor Law § 200. It asserts that the location of its curtain wall and metal panel work did not include areas of the building below the second floor in "stairway D" where the accident allegedly occurred. In addition, Tutor Perini asserts that as a replacement or completion contractor for the surety Fidelity and Deposit Company of Maryland ("Fidelity"), Tutor Perini was neither an owner, general contractor nor statutory agent to be liable under Labor Law § 241 (6). It further asserts that inasmuch as it cannot be held liable to plaintiffs, there is no basis for the cross claims asserted against it for contribution and indemnification. The submissions in support of the motion include a portion of plaintiff's General Municipal Law § 50-h hearing transcript and the affidavit of Paul A. Bordieri, Jr., P.E.

At his General Municipal Law § 50-h hearing on February 8, 2013, plaintiff testified that he was the hoist operator at the construction site, the hoist was located at the center of the building, and the

subject stairway was located to the left of the hoist. His accident occurred on the first floor. Plaintiff was coming from the parking garage area at street level and was headed toward the main office in the main lobby. He was wearing work boots. As plaintiff was ascending the staircase, his right foot allegedly got caught in a riser, though he is unsure which one. Plaintiff allegedly then he lifted his left foot, which also allegedly got caught, and he fell forward. Prior to his fall, plaintiff had been looking down at the staircase. There were no witnesses to the accident. Plaintiff had never used said staircase prior to the accident.

By his affidavit, Paul A. Bordieri, Jr. averred that he is a Senior Project Manager for Perini Management Services, Inc. ("Perini"), a wholly-owned subsidiary of Tutor Perini; that he was the main representative of Perini at the Courthouse project; and that Tutor Perini began its work in 2012 and completed it in July 2014. He attested that he was periodically present at the construction site from March 2012 through the accident date and has personal knowledge of the entire project and the contract limits for work by Tutor Perini and its various subcontractors. Mr. Bordieri explained that Tutor Perini was a completion or "replacement" contractor for exterior and interior curtain wall and metal panel work due to a default by subcontractor Trainor. He explained the owner of the project was the Dormitory Authority of the State of New York; the general contractor was Delric Construction Company, Inc.; and Jacobs Project Management Co. and/or Jacobs Facilities Inc. was hired by the Dormitory Authority as construction manager. Mr. Bordieri also explained that Capco Steel Erection Company and/or Capco Steel LLC was the metals subcontractor to Delric Construction Company, Inc., and that Jobin was the air/vapor barrier and metal panel system installation subcontractor to Perini and a subcontractor of Tutor Perini. He added that Fidelity and Deposit Company of Maryland ("Fidelity") was the completion surety for Trainor, and that Fidelity contracted with Perini and Tutor Perini, as completion contractor, to complete the curtain wall and metal panel work after Trainor's default. He further explained that Enterprise Architectural Sales, Inc. ("Enterprise") was a subcontractor of Tutor Perini that performed installation of the curtain wall work, and that Tutor Perini also subcontracted with other entities that began work on the project after the date of the subject accident. Mr. Bordieri attached copies of agreements, including the agreement between Trainor and Delric for curtain wall and metal panel work, the subcontract between Tutor Perini and Enterprise, and the subcontract between Tutor Perini and Jobin. He states that at the time of plaintiff's accident, neither Tutor Perini nor any of its subcontractors had any responsibility for, or performed work at, the location of plaintiff's accident, which based on plaintiff's hearing testimony was Stairway "D" leading from the garage to the first floor. He added that the nature and location of the curtain wall and metal panel work by Trainor and then Tutor Perini did not include the construction areas below the second floor in Stairway "D."

Defendants Jacobs Facilities, Inc. and Jacobs Project Management Co. ("Jacobs") oppose Tutor Perini's motion as premature before, among other things, the issuance of a preliminary conference order and the opportunity to conduct discovery, through the exchange of documents and depositions, including discovery of the dangerous conditions that allegedly caused plaintiff's accident and Tutor Perini's responsibilities and actual activities on the job site. Jacobs argues that discovery as to whether Tutor Perini or any of its subcontractors were responsible for the alleged dangerous conditions of the subject staircase or its construction or whether their work directly involved the subject staircase is necessary to properly oppose the summary judgment motion.

Defendant Delric Construction Company, Inc. ("Delric") indicates that it was hired as the "general construction" prime contractor for said project. It opposes the motion of Tutor Perini on the grounds that there are issues of fact as to whether employees of Tutor Perini or its subcontractors created the alleged dangerous condition by removing a barricade to the subject stairway, and as to whether Tutor Perini assumed the contractual duties of Trainor to Delric when it entered into the "completion agreement" with Fidelity such that Tutor Perini is liable to Delric for contribution and common-law indemnity as well as contractual indemnity and breach of contract for failure to procure insurance. Delric also opposes the motion on the ground that it is premature as all the parties recently appeared in the action, no preliminary conference has been held, relevant documents such as the aforementioned "completion agreement" have not been exchanged and no depositions have been conducted. Delric contends that said outstanding discovery is necessary to prepare a defense to the motion by Tutor Perini. Delric's submissions in support of its opposition include plaintiffs' bill of particulars, plaintiff's General Municipal Law § 50-h hearing transcript, and accident/daily reports. Delric notes that the accident/daily reports indicate that the area of the subject stairway was barricaded and that the Tutor Perini subcontractors Enterprise and Jobin were working in the area of the subject staircase on the date of plaintiff's accident.

The Dormitory Authority of the State of New York ("Dormitory Authority") opposes the motion for summary judgment, indicating that it owned the project site and contracted with Delric for general construction services and with Jacobs for construction management services. Dormitory Authority argues that the affidavit submitted by Tutor Perini is insufficient to establish prima facie entitlement to summary judgment, as issues of fact remain such as the exact location of the accident on Stairway B or D, whether the stairway was barricaded at the time of the accident, and whether Tutor Perini's subcontractors were working on the stairway on the date of the accident, and if so, what their work entailed and whether they erected or removed barriers. In addition, it notes that Tutor Perini failed to include a copy of the latest pleading, the second amended verified complaint, warranting denial of the motion for summary judgment. Dormitory Authority also argues that the motion is premature due to outstanding discovery necessary to address issues raised by the motion including whether Tutor Perini is bound by the contract requirements in the Trainor/Delric contract, as the substitute contractor for Trainor, to provide insurance coverage and contractual indemnification to the owner, Dormitory Authority.

Jobin cross-moves for summary judgment on the ground that it cannot be held liable for plaintiff's accident inasmuch as its employees did not work in the area of plaintiff's accident, did not perform any work with respect to the subject staircase, and did not perform any work or have any responsibility for any area in the garage/basement up to the first floor of the project. It asserts that pursuant to its contract with Tutor Perini, its work was only on the exterior and interior perimeter walls and did not involve interior stairways or any area between the garage/basement up to the first floor. Jobin also asserts that it did not create a dangerous condition, and that it did not have any responsibility to remedy a defective condition or to warn plaintiff of a dangerous condition at said location. It claims that as Tutor Perini's subcontractor, it was not an owner, general contractor or statutory agent to be potentially liable under Labor Law §§ 241 (6) and 240 (1). Jobin further asserts that based on the foregoing, it cannot be held liable for common law contribution or indemnity. In support of its cross motion, Jobin submits the affidavit of its project manager, Paul Annunziata, and relies on the

submissions in Tutor Perini's motion.

Paul Annunziata avers by affidavit that at the time of plaintiff's accident he was a project manager of Jobin, that he was present almost daily at the job site, and that Jobin was hired by Tutor Perini pursuant to a contract to install air/vapor barriers and metal panels on the exterior and interior walls of the building. He emphasizes that Jobin's work was exclusively limited to the exterior and interior of the walls and had no involvement with interior stairways of the project. In addition, he avers that Jobin did not direct, instruct, control or supervise any of the workers or employees of the other trades and did not allow the use of its supplies or tools by other trades.

The Dormitory Authority opposes the cross motion, arguing that significant issues of fact remain as to the location of the accident, the conditions near said location, and the presence and activities of Jobin at or near said location prior to as well as on the date of the accident. It also opposes the cross motion as premature due to outstanding discovery, including contracts and work records of Jobin. The Dormitory Authority notes that its incident report indicates that the subject accident occurred in Stairway D, which was barricaded and "taped off," and the daily report of Jacobs for October 12, 2012 indicates that Jobin was working at Stairway D.

Jacobs opposes the cross motion as premature, given the early stage of the action, based on outstanding discovery including the specifics of the accident and whether Jobin employees ever used the subject staircase. Jacobs argues that without discovery, the parties have not been given a fair opportunity to examine the role and activities of Jobin with respect to this project to enable the parties to oppose the motion.

Delric opposes the cross motion, contending that there are issues of fact including whether Jobin employees created the alleged dangerous condition by removing a barricade to Stairway D and whether there was any contractual requirement that Jobin indemnify and/or obtain insurance on behalf of Delric, and that it is premature pursuant to CPLR 3212 (f).

Plaintiffs oppose the motions by Tutor Perini as well as Jobin as premature pursuant to CPLR 3212 (f) and based on the existence of significant issues of fact. Plaintiffs' counsel argues that only four months of discovery was obtained prior to the instant motions for summary judgment, which stayed discovery, and that depositions are still outstanding. They argue that it is unclear at this juncture whether defendants Tutor Perini and Jobin are entities that can be held liable under Labor Law §§ 200 and 241 (6), as this information is exclusively within their knowledge and control and that Tutor Perini's subcontractor Enterprise had four iron workers as well as a general foreman and a project manager but that there is no evidence as to where they were working. They note that any lack of supervision or control over plaintiff by Tutor Perini and Jobin is irrelevant to a violation of Labor Law § 241 (6), as the duty to comply with the Industrial Code regulations is non-delegable; that Tutor Perini as the admitted replacement of Trainor is thereby a subcontractor or agent of the general contractor Delric; and that the Trainor subcontract does not contain a limitation of work to the second floor or above as asserted by Tutor Perini. Plaintiffs contend that the self-serving affidavits submitted by Tutor Perini and Jobin are insufficient to satisfy their burden on summary judgment, and that they will be severely prejudiced if they are unable to depose Tutor Perini and Jobin as well as the other defendants to learn the specifics of

the work that was conducted and whether any of said work involved the subject unfinished metal staircase. Plaintiffs' submissions include their bill of particulars and the subcontract between Delric and Trainor.

In reply, Tutor Perini contends that none of the parties opposing its motion submitted an affidavit from someone with personal knowledge of the job site or documents which contradict its prima facie showing of entitlement to summary judgment. Instead, it contends, they offer unsupported, unidentified and unauthenticated documents which support Tutor Perini's claim that it was not responsible for the conditions that allegedly caused plaintiff's accident. Tutor Perini's submissions include a reply affidavit of Mr. Bordieri in which he states that his personal knowledge is based on his presence at the job site during the week prior to the accident; that he has "in-depth, first-hand and personal knowledge regarding all subject areas covered" in his prior affidavit; and clarifies that he mentioned in his prior affidavit that staircase B was near staircase D where plaintiff's accident occurred but that in any event, the floor location and not the particular staircase indicated that Tutor Perini and its subcontractors were not present in the area of the accident. He avers that the incident/accident reports support his assertion that Tutor Perini and its subcontractors were working above the second floor. Mr. Bordieri argues that nowhere does plaintiff allege a missing barrier as the cause of his accident. He also explains that although a "completion agreement" is referred to in the "Letter of Agreement for Performance Completion Program" between Fidelity and Tutor Perini, no such document ever existed, and that the Letter of Agreement is controlling. Mr. Bordieri asserts that Tutor Perini was retained solely to complete Trainor's scope of work but that no agreement containing language that it would "assume" or "take over" the Trainor subcontract with Delric and its obligations and liabilities exists. Tutor Perini also submits the affidavit of John Hughes, its Risk Manager, stating that Tutor Perini was never served with the supplemental summons and amended complaint dated June 16, 2014, and that it was instead served on July 22, 2014 with the amended complaint dated January 29, 2014.

Jobin in reply argues that the opposition to its cross motion consisting merely of attorney's affirmations, without any admissible evidence from someone with personal knowledge in support, is insufficient to defeat its cross motion for summary judgment.

"A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Malester v Rampil*, 118 AD3d 855, 856, 988 NYS2d 226 [2d Dept 2014]; see *Video Voice, Inc. v Local T.V., Inc.*, 114 AD3d 935, 980 NYS2d 828 [2d Dept 2014]; *Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654, 932 NYS2d 128 [2d Dept 2011]). At this juncture there have been no depositions of the plaintiff or the defendants. The Dormitory Authority noted that plaintiff's General Municipal Law 50-h hearing was conducted by non-party The City of New York. Unauthenticated documents have been submitted that raise issues relevant to the motions herein. The Court notes that Mr. Bordieri in his reply affidavit on behalf of Tutor Perini fails to specifically address the allegation in opposition that the incident/accident reports indicate Tutor Perini's subcontractor Enterprise's presence at the location of plaintiff's fall. In fact, the first page of the daily report of Jacobs for October 12, 2012 submitted with Mr. Bordieri's reply affidavit indicates for "Activity" the following: "Perini/Enterprise Stair D glazing" and "Perini/Jobin MP1B at Stair D." Mr. Annunziata's statement that Jobin had no involvement with interior stairways of the project appears to be contradicted by said report. Thus, the movants failed to clearly demonstrate their entitlement to

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summary judgment on the basis of their complete lack of involvement with both the area of plaintiff's accident and the work being conducted at said location. The movants' objection to the opposition to their motions as being unsupported by admissible evidence based on personal knowledge is countered by the arguments of the opponents that the movants are in control of the relevant information which can only be obtained through discovery. Under these circumstances, the motion and cross motion for summary judgment are denied as premature, since further discovery may lead to relevant evidence. Said denials are without prejudice to renewal upon the completion of discovery (*see* CPLR 3212 [f]; *Martinez v 305 West 52 Condominium*, 128 AD3d 912, 9 NYS3d 375, 377 [2d Dept 2015]; *Mottley v Walker*, 126 AD3d 955, 956-957, 6 NYS3d 271 [2d Dept 2015]; *Johnson v Richardson*, 120 AD3d 767, 768, 991 NYS2d 357 [2d Dept 2014]).

Accordingly, the instant motion and cross motion are denied without prejudice.

Dated:

8/19/15

HON. PAUL J. BAISLEY, JR

HON. PAUL J. BAISLEY, JR., J.S.C.