

Carvajal v 63 W. 38th St.
2016 NY Slip Op 30319(U)
February 22, 2016
Supreme Court, New York County
Docket Number: 155828/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD
J.S.C.
Justice

PART 35

Index Number : 155828/2012
CARVAJAL, RODRIGO
vs.
63 WEST 38TH STREET
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/4/16
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).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

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

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

In this In this personal injury action arising from a construction site project, third-party defendant Infinity Drywall, Corp. ("Infinity") moves for summary judgment dismissing the third-party complaint of Hudson Meridian Construction Group, LLC ("Hudson").

Factual Background

Defendants 63 West 38th Street Development, LLC, RSVP 38th Street Venture, LP, and 63 West 38th Street Realty, LLC (collectively, the "Owner") were the ownership entities of the subject property, which was being renovated into a hotel). Hudson was the general contractor and construction manager for the construction project. Hudson contracted with third-party defendant PG Products of NY, Inc. d/b/a PG Drywall ("PG") to install sheetrock for the construction project. PG subcontracted its sheetrock work to Infinity, plaintiff's employer.

Plaintiff alleges that on April 26, 2012, while working as a sheetrock installer at the construction site, the top sash of a window that he was trying to open dropped and struck the tip of his right ring finger.

After this action was commenced, as a relevant herein, defendants moved for summary judgment dismissing the plaintiff's complaint in its entirety, and moved for summary judgment on Hudson's third-party claim for contractual indemnification against Infinity. By order dated October 22, 2015, this Court dismissed plaintiff's Labor Law 240(1) and 241(6) claims, and denied dismissal of plaintiff's Labor Law 200 and negligence claims. The Court also denied defendants' motion for contractual indemnification.

In support of its instant motion to dismiss, Infinity argues that its delay in moving for summary judgment pursuant to the Note of Issue was due to the interim motion by defendants

Dated: _____, J.S.C.

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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and Hudson. Infinity contends that based on the Court's determination of plaintiff's and defendants' motions, it has good cause for the instant motion. Further, this Court's determination, has made the instant motion timely.

As to the merits, Infinity maintains that the only remaining causes of action plaintiff has against defendant are common law negligence and Labor Law 200, and plaintiff has no direct claims against Infinity. The Court already held that Hudson failed to establish its freedom from negligence to support a contractual indemnification claim. If plaintiff prevails against Hudson on its remaining claims, as a matter of law, Hudson is not entitled to contractual indemnification as there will be a finding that Hudson was negligent. Likewise, a finding of negligence against Hudson precludes a common law indemnity claim, which is predicated on vicarious liability without fault. A party cannot be indemnified for its own fault.

In opposition, the Owner, Hudson, and defendant RSVP 38th Street Management, Inc. (collectively, "defendants") argue that the motion is untimely, and Infinity had all the information necessary to make its own motion at the proper time. Infinity did not move within the 60 days set by the Court, or within the statutory limit of 120 days. Infinity opposed Hudson's motion, and there was nothing absent from the record that would have required Infinity to wait until defendants filed their motion. In any event, if Hudson is found not liable to plaintiff for negligence or damages, Infinity would owe Hudson legal fees and disbursements. Infinity was obligated to comply with its subcontract with Hudson to (1) indemnify PG and the Owner and Owner's agents from all claims including legal fees and court costs, and (2) defend all actions brought against PG and the Owner. Thus Hudson is to be indemnified by Infinity for legal fees and costs. No finding of fault of Hudson is necessary to trigger such clause. Further, Hudson has a viable claim against Infinity for breach of contract for failure to maintain proper insurance coverage to protect Hudson from claims. Infinity's contract requires it to comply with the terms of the contract between the Owner and PG.

Plaintiff also opposes Infinity's motion, and points out that defendants' prior motion was made months before the note of issue was filed. Thus, there was ample time for Infinity to consider the potential outcomes of the motion. Infinity should have cross moved for summary judgment in the event the Court dismissed plaintiff's Labor Law 240(1) and 241(6) claims, especially given plaintiff's allegation of defendants' "actual and constructive notice" of the dangerous condition.

In reply, Infinity argues that anticipating different outcomes and moving for summary judgment would have burdened the Court.

Discussion

"CPLR 3212(a) requires that motions for summary judgment must be brought within 120 days of the filing of the note of issue or the time established by the court; where a motion is untimely, the movant must show good cause for the delay, otherwise the late motion will not be addressed" (*Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 978 N.Y.S.2d 13 [1st Dept 2013]; *Luciano v H.R.H. Const., LLC*, 89 AD3d 578, 933 NYS2d 17 [1st Dept 2011] *citing* CPLR 3212[a]; *Isolabella v Sapir*, 96 AD3d 427, 945 NYS2d 309 [1st Dept 2012] *citing* *Brill v City of New York*, 2 NY3d 648, 652, 781 NYS2d 261 [2004]).

The Preliminary Conference Order of this Court required summary judgment motions be made within 60 days of the filing of the Note of Issue. The note of issue was filed in June 17,

2015, and the instant motion was filed on December 8, 2015, beyond the 60-day (and 120-day statutory period). Infinity acknowledges, that its motion is untimely.

The merits of an untimely motion for summary judgment may be considered by the court only if the movant demonstrates “good cause for the delay in making the motion - a satisfactory explanation for the untimeliness” (*Luciano v H.R.H. Const., LLC*, 89 AD3d 578, 933 NYS2d 17 [1st Dept 2011] citing *Brill v City of New York*, 2 NY3d 648, 652, 781 NYS2d 261 [2004]). Law office failure does not constitute good cause (*Maschi v City of New York*, 110 A.D.3d 460, 973 N.Y.S.2d 51 [1st Dept 2013]). And, “courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure” (*Fofana v. 41 West 34th Street, LLC*, 71 A.D.3d 445897 N.Y.S.2d 46 [1st Dept 2010] citing *Azcona v. Salem*, 49 A.D.3d 343, 343, 852 N.Y.S.2d 767 [2008]).

For example, “good cause for a late summary judgment motion can be established where a discovery request relevant to the motion was outstanding until shortly before the motion was made,” or where the movant was awaiting the receipt of deposition transcripts relevant to the motion” (*Filannino v. Triborough Bridge and Tunnel Authority*, 34 A.D.3d 2808, 24 N.Y.S.2d 244 [1st Dept 2006] citing *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131, 733 N.E.2d 203 [2000]; *Cooper v. Hodge*, 13 A.D.3d 1111, 787 N.Y.S.2d 551 [2004]; see also *247 Kunz v. Gleeson*, 9 A.D.3d 480, 781 N.Y.S.2d 50 [2004]).

Infinity’s excuse for not filing a timely motion, *to wit*: the Court’s determination changed the landscape of the case and made its application timely and necessary, is unavailing; there was no threshold issue before the Court that was required to be first decided in order for Infinity to move for relief (*cf. Trump Village Section 3, Inc. v. New York State Housing Finance Agency*, 307 A.D.2d 891, 764 N.Y.S.2d 17, leave to appeal denied 1 N.Y.3d 504, 775 N.Y.S.2d 780, 807 N.E.2d 893 [1st Dept 2003] (good cause found where motion could not have been filed earlier because it was premised on *Appellate Division’s determination* on prior appeal that HFA did not owe owners supervisory contractual duties alleged in the complaint, and addressed a *threshold, potentially determinative issue*”) (emphasis added); *DeFilioppio v Miller*, 106 A.D.3d 770, 964 N.Y.S.2d 594 [2d Dept 2013] (good cause existed for defendants’ delay in moving to dismiss plaintiff’s assault and battery claims where “the judgment of [plaintiff’s] conviction in the criminal action was rendered shortly before the defendants made their motions, [and thus] they could not have made their motions any sooner”). Infinity’s position is also belied by fact that it offers no new discovery or new information in support of its motion. Further, no reason exists for Infinity’s failure to cross move for dismissal in response to Hudson’s motion for indemnification against Infinity (see *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 978 N.Y.S.2d 13 [1st Dept 2013] (a “cross motion is ‘merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion’”). Infinity could have relied on the papers submitted with the main motion to support the relief sought (*id.*). And, Infinity’s claim that a motion at that time would have burdened the Court, is invalid. By making such a cross-motion, Infinity would have saved it “the time and trouble of amassing fresh proof, if it happens that all or part of the evidentiary foundation on which the cross motion is based has already been produced for consideration.” (*Id.*) Judicial economy would have been served by permitting the Court to address the arguments now raised with the evidence then presented. Infinity’s decision to await the Court’s decision as to plaintiff’s

negligence and Labor Law 200 claims, a decision which was not essential to the making of arguments in support of dismissal of third-party complaint, amounts to law office failure, insufficient to support a finding of good cause (*Azcona v. Salem*, 49 A.D.3d 343, 852 N.Y.S.2d 767 [1st Dept 2008] (“courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure”)).

Conclusion


Based on the foregoing, it is hereby

ORDERED that the motion by Infinity Drywall, Corp. for summary judgment dismissing the third- party complaint of Hudson Meridian Construction Group, LLC is denied; and it is further

ORDERED that Infinity shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 2/22/16



HON. CAROL R. EDMEAD
J.S.C.

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CASE DISPOSED

MOTION IS: GRANTED DENIED

SETTLE ORDER

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NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

REFERENCE