

Lafroschia v Mept 5th Ave., LLC
2016 NY Slip Op 30857(U)
May 6, 2016
Supreme Court, New York County
Docket Number: 153406/2012
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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PETER LAFROSCIA,

Plaintiff,

-against-

MEPT 5TH AVENUE, LLC and
LEND LEASE (US) CONSTRUCTION LMB INC.

Defendants.

**Index No. 153406/2012
Motion Seq. 02**

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

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MEPT 5TH AVENUE, LLC and
LEND LEASE (US) CONSTRUCTION LMB INC.

Third Party Plaintiffs,

-against-

WAVERLY IRON CORP., and
GSR CONCRETE TOV, LLC,

Third Party Defendants.

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The motion by third party defendant Waverly Iron Corp., (“Waverly”) for summary judgment dismissing the third party complaint and all claims and cross-claims against it is denied. The cross-motion by third party plaintiff MEPT 5th Avenue, LLC and Lend Lease (US) Construction LMB INC (collectively, “Lend Lease”) compelling Waverly to appear for a deposition is granted in part and denied in part.

This action arises out of a personal injury suffered by plaintiff while he was working as a journeyman for non-party Able Rigging Contractors (Able Rigging) on March 24, 2012 at a job site located at 309 Fifth Avenue, New York, New York. Plaintiff alleges that he was inside of a torque tower mast section of a crane when the accident took place. Plaintiff claims that while he was assisting his co-workers with tightening bolts on the crane, he fell through an unsafe, dangerous opening on the crane.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac*

d'Amiante Du Quebec, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Waverly moves for summary judgment on the ground that its only relation to the accident was that it sold materials to Able Rigging in relation to construction on the job site on four occasions (*see* *aff* of Joseph Pizzchemi ¶ 3). In support of its motion, Waverly submits four shipping tickets that purportedly show that Waverly sent construction materials to Able Rigging. Waverly claims that two of the four sales occurred prior to plaintiff's accident while the other two took place after the accident in May 2012. Waverly also asserts that Able Rigging picked up the materials on the two occasions prior to plaintiff's accident.

Waverly argues that it cannot be held liable for plaintiff's accident because it had no contracts with Able Rigging or any other party in this litigation regarding any materials provided or work performed related to the construction site. Waverly concludes that it could not have caused or created any alleged dangerous conditions relating to plaintiff's accident.

Waverly has met its *prima facie* burden for summary judgment. The burden shifts to third party plaintiffs to raise triable issues of fact.

Lend Lease cross-moves for an order compelling Waverly to appear for a court-ordered deposition and precluding Waverly from offering evidence at trial pursuant to CPLR 3124 and 3126. Lend Lease claims that Waverly agreed to appear for a deposition in February 2015 during a compliance conference on December 2, 2014. Lend Lease further claims that Waverly refused to appear for the deposition and instead brought the instant motion.

Lend Lease claims that plaintiff's testimony indicates that plaintiff slipped on oil that was leaking from parts of the tower crane. Lend Lease asserts that the materials provided by Waverly

were used to construct this tower crane. Lend Lease requests a deposition to question Waverly regarding how their materials were used to construct the tower crane and to explore if the materials provided were defective. Lend Lease theorizes that Waverly may be liable under a strict products liability theory. Third party defendant GSR Concrete Tov, LLC joins in Lend Lease's opposition to Waverly's motion for summary judgment and in Lend Lease's request for a deposition of Waverly.

In opposition, Waverly claims that Lend Lease's cross-motion is frivolous because they agreed to schedule depositions after the resolution of the instant motion. Waverly further argues that a deposition will not alter the conclusion that Waverly had no role in the accident.

Lend Lease has raised an issue of fact that compels the Court to deny Waverly's motion and to order a deposition of Waverly. The Court has viewed Waverly's invoices. From the invoices alone it is impossible to determine what role, if any, those materials may have played in building the tower crane. At oral argument, Waverly's attorney asserted that the beams were used to create a base for the crane but there are clearly other materials listed in the invoices. Moreover, due to the abbreviations and the other cryptic descriptions in the invoices, it is entirely unclear to this Court the purposes of the different materials. Lend Lease is entitled to question Waverly's witness regarding the materials Waverly provided to Able Rigging and the intended uses therefor. Plaintiff testified that "my right foot gave away, you know because of the oil" (affirmation of Lend Lease's counsel, exhibit N at 91, lines 5-6). Lend Lease is entitled to attempt to determine how the oil appeared on the crane and whether it came from any of the materials obtained from Waverly.

Lend Lease's request to prevent Waverly from presenting evidence at trial is denied because after this motion was made, it agreed to postpone depositions pending the outcome of this motion. The deposition of Waverly shall occur on or before July 15, 2016. After the deposition occurs and transcripts are exchanged, if Waverly determines that the evidence supports summary judgment dismissing all claims against it and the other parties cannot in good faith stipulate thereto, then Waverly may move again for summary judgment.

According, it is

ORDERED that Waverly's motion for summary judgment is denied without prejudice to refile after the deposition of Waverly has been completed; and it is further

ORDERED that the branch of Lend Lease's cross-motion compelling the deposition of Waverly is granted; and it is further

ORDERED that the branch of Lend Lease's cross-motion that seeks to preclude Waverly from offering evidence at trial is denied.

This constitutes the Decision and Order of the Court.

Dated: May 6, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC