SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. [illegible] **PART** 35

Justice

Index Number : 159867/2015
MARTINEZ, ERIK
vs.
FORTY SEVENTH FIFTH COMPANY,
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/22/16
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

In this Labor Law personal injury action, defendant Ebro Construction Corp. ("Ebro") moves pursuant to CPLR §3212 for summary judgment dismissing the complaint of the plaintiff Erik Martinez ("plaintiff") and any cross-claims asserted against Ebro.

Factual Background

Plaintiff claims that on September 16, 2015, he allegedly fell from a height due to a partial collapse of the area while working for non-party FM Kelly, Inc. at a building located at 580 East Fifth Avenue, New York, New York (the "work site").

Defendant Forty Seventh Fifth Company, LLC ("Forty Seventh"), the building owner, hired Ebro to perform façade rehabilitation work at the building located at the work site.

According to Ebro, Ebro's work was limited to the exterior of the building at 580 Fifth Avenue. However, plaintiff's claims that his accident occurred while he was performing construction and demolition work on the second floor of the interior of the subject building, when there was partial collapse of the area where he was working. Ebro contends that it was not performing any work on the interior of the subject building, and did not have any employees working on the inside of the building. Ebro had no supplies located within the interior of the building. Nor did Ebro direct or control any of the work performed on the interior of the building, including the work being performed by the plaintiff and his employer. Ebro's agreement with Defendant Forty Seventh did not require Ebro to direct or control any of the work

Dated: _____ _____, **J.S.C.**

1. CHECK ONE: ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. CHECK AS APPROPRIATE: .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. CHECK IF APPROPRIATE: ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

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

being performed on the interior of the subject building. Therefore, as Ebro did not have any duty to plaintiff under the contract, and did not undertake any duty owed by another party, and did not create any hazardous condition which caused plaintiff's accident, the complaint and all cross claims must be dismissed against Ebro.

In opposition, plaintiff argues that the affidavit submitted by Ebro, in the absence of any discovery exchanged in this matter, fails to establish that Ebro did not cause or contribute to the happening of the accident. The defendants were doing large-scale renovations to the building's façade, which could have weakened the structural integrity of the building and the contract submitted by Ebro demonstrates that its work was widespread and complex.

In reply, Ebro adds that the façade work was not structural in nature, and specifically limited to the repairs to the decorative portions of the building's exterior. Further, there is no evidence that Ebro assumed a duty to plaintiff, which was subsequently breached.

Notably, there is nothing within the subject agreement which required Ebro to perform any work within the building's interior, including the second floor of the subject premises. Plaintiff's opposition fails to raise an issue of fact as to whether Ebro's decorative work on the building's exterior impacted the structural integrity of the second floor interior where plaintiff was performing demolition work. Plaintiff failed to produce any affidavits, which connect Ebro's exterior work to plaintiff's interior accident. Plaintiff's mere hope that he further evidence will establish liability is insufficient.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] lv to appeal denied, 24 NY3d 917 [2015] *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not

feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Given that the co-defendants did not oppose Ebro's motion to dismiss all cross-claims, Ebro's motion as to the co-defendants is granted on default.

With respect to summary judgment against the plaintiff, in support of its motion, Ebro submits the pleadings, and the contract and affidavit of its President, Ramon Calvo ("Calvo"). In Calvo's affidavit, he attests that: Ebro did not own, operate, maintain, or control the premises where plaintiff's accident occurred (¶ 4). Ebro's contract with Forty Seventh was "to perform a facade rehabilitation project" at the work site; that Ebro "commenced the facade restoration" at the work site; and that "Ebro's work was performed exclusively on the exterior of the building." (¶¶5-7). Calvo also denies that it performed any work or stored any of its supplies on the interior of the building, or that any of its employees worked in the interior of the building (¶¶7, 9). Calvo also states that Ebro did not direct or control any of the worker's or plaintiff's work inside the subject building (¶ 9) The contract also indicates that Ebro was hired to perform facade work.

However, Calvo's affidavit is *silent* as to whether Ebro's facade work bore any relation to to the collapse in the interior portion of the building which allegedly caused plaintiff's injuries. Calvo does not explain how the work on facade of the building was not the proximate cause of the collapse. Although *counsel* for defendant states that the work on the facade of the building was not structural in nature (reply, ¶6), such conclusory assertion, without more, is inadequate to establish, as a matter of law, that Ebro's work bore no relation to the cause of the accident (*cf. 112 West 34th Street Associates, LLC v. 112-1400 Trade Properties LLC*, 95 A.D.3d 529944 N.Y.S.2d 68 [1st Dept 2012] (noting that plaintiff's "experts stated that the recladding of the curtain wall (work item [a][viii]) was not a structural change" and that "Defendant failed to rebut plaintiff's showing that the challenged work was not structural")). Further, contrary to Ebro's contention, the tasks noted in the contract do not eliminate this issue as a matter of law. The contract indicates extensive facade work to be performed by Ebro, and Ebro failed to show, as a matter of law, that such facade work was not the proximate cause of the collapse in the interior of the building.

Further, while Ebro points out that plaintiff failed to submit any affidavit indicating that the facade work was connected to the collapse of the floor in the interior of the building, it is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law and the absence of triable issues of fact and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Corprew v City of New York*, 106 AD3d 524, 965 NYS2d 108 [1st Dept 2013]; *TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 937 NYS2d 586 [1st Dept 2012]; *Santos v New York City Transit Authority*, 99 AD3d 550, 952 NYS2d 179 [1st Dept 2012]).

And, as pointed out by plaintiff, further discovery, including depositions of the parties, may reveal evidence indicating the impact, if any, Ebro's contract and/or facade work had upon the interior portions of the building (*see* CPLR 3212(f)). Plaintiff's asserted need for further discovery on this issue is not merely speculative.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendant Ebro Construction Corp.'s motion pursuant to CPLR §3212 for summary judgment dismissing the complaint of the plaintiff asserted against it is denied, without prejudice; and it is further

ORDERED that the branch of defendant Ebro Construction Corp.'s motion pursuant to CPLR §3212 for summary judgment dismissing any cross-claims asserted against is granted, on default, and the defendants' cross-claims against Ebro Construction Corp. are severed and dismissed; and it is further

ORDERED that defendant 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 7/26/16

ENTER: , J.S.C.

HON. CAROL R. EDMEAD

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE