

Ame v Ocean Breeze Track & Athletic Assn., Inc.

2018 NY Slip Op 30037(U)

January 8, 2018

Supreme Court, New York County

Docket Number: 154834/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

BUJAR AME,

INDEX NO. 154834/2017

Plaintiff,

- v -

OCEAN BREEZE TRACK & ATHLETIC ASSOCIATION, INC.,
SAGE AND COOMBE ARCHITECTS, LLP, NASDI, LLC,
FITZPATRICK & ASSOCIATES, INC., C & L CONTRACTING
CORP.,

MOTION SEQ. NO. 001

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 32, 33, 34, 35

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is ordered that the motion is granted.

In this action to recover for personal injuries, defendant Fitzpatrick & Associates, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it. Alternatively, it moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. After a review of the motion papers, and after consideration of the relevant statutes and case law, the motion, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Bujar Ame commenced this personal injury action against Ocean Breeze Track & Athletic Association, Inc. ("Ocean Breeze"), Sage and Coombe Architects, LLP ("Sage and Coombe"), NASDI, LLC ("NASDI"), Fitzpatrick & Associates, Inc. ("Fitzpatrick"), and C & L

Contracting Corp. (“C & L”) by filing a summons and verified complaint on May 25, 2017. Doc. 1.¹ In his complaint, plaintiff alleged that he was injured on November 30, 2016 directly across the street from Ocean Breeze Park and the Ocean Breeze Athletic Complex (“the Complex”), which was located at 625 Father Capodanno Blvd., Staten Island, New York. Doc. 1, at par. 25. He claimed that he was injured on a wet and slippery elevated surface while in close proximity to a co-worker using a defective hand-operated saw and that, as a result, he is entitled to damages arising from common-law negligence committed by defendants, as well as violations of Labor Law sections 200, 240(1), and 241(6). Doc. 1, at pars. 108, 121. Plaintiff further alleged that Ocean Breeze contracted with Fitzpatrick to perform construction work directly across the street from the Complex. Doc. 1, at par. 45.

NASDI joined issue by service of its verified answer, filed June 27, 2017. Doc. 9. In its answer, NASDI cross-claimed against, inter alia, Fitzpatrick for contribution, common-law indemnification, and breach of contract to procure insurance. Doc. 9. Fitzpatrick joined issue by service of its verified answer filed July 13, 2017. Doc. 10. Sage and Coombe joined issue by service of its verified answer filed August 10, 2017. Doc. 31. In its answer, Sage and Coombe asserted crossclaims against Fitzpatrick sounding in common-law and contractual indemnification. Doc. 31. C & L joined issue by service of its answer filed September 5, 2017. Doc. 36. In its answer, C & L cross-claimed against Fitzpatrick for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 36.

By motion e-filed July 14, 2017, Fitzpatrick moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it. Alternatively, it moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In

¹ All references are to the documents filed with NYSCEF in this matter.

support of the motion, Fitzpatrick submits the pleadings; an attorney affirmation; the affidavit of its president, Michael Hintz; its contract with the Department of Parks and Recreation of the City of New York (“DOPR”), pursuant to which Fitzpatrick agreed to install “a pre-engineered metal building in connection with [the] indoor athletic facility” at the Complex (Doc. 16); incident reports; a substantial completion letter; and a punch list. The motion is unopposed.

In his affidavit in support of the motion, Hintz avers that, despite plaintiff’s allegation that Fitzpatrick was retained by Ocean Breeze to perform construction work across the street from the Complex, and that Fitzpatrick operated, controlled and maintained the area across the street from the Complex, these claims are false. Doc. 13. Hintz maintains that Fitzpatrick was hired by DOPR to install a pre-fabricated steel building at the Complex. Doc. 13, at par. 5. He further asserts that different contractors were hired for different parts of the project. Doc. 13, at par. 5. NASDI was hired to perform phase one of the work, which included construction of the building’s footings and foundation. Doc. 13, at par. 6. Fitzpatrick was hired for phase two of the project, which involved furnishing and installing the pre-fabricated metal building, as evidenced by the contract between DOPR and Fitzpatrick annexed to Fitzpatrick’s motion. Doc. 13, at par. 7; Docs. 16-22. Its work also included the installation of the exterior framing and metal panels of the pre-fabricated building. Doc. 13, at par. 7. C & L was hired to construct the interior elements of the building. Doc. 13, at par. 8.

Hintz maintains that Fitzpatrick’s contract did not require it to perform any work across the street from the complex, where plaintiff claims he was injured, and that it did no work on the project across the street. Doc. 1, at par. 25; Doc. 13, at par. 10. He states that, although plaintiff claims that the alleged incident occurred on November 30, 2016, Fitzpatrick had no personnel on site during the entire year 2016, since phase two of the work was completed approximately three

years earlier. Doc. 13, at par. 11. In support of his contention, Hintz submits a “Substantial Completion Acceptance” (“SCA”), dated July 24, 2013, sent to Fitzpatrick by the New York City Department of Design and Construction (“DDC”) and a DDC punch list dated November 20, 2013. Doc. 13, at par. 11; Doc. 24. The SCA specifically refers to the substantial completion of the pre-engineered metal building at 625 Father Capodanno Blvd. in Staten Island. Doc. 24. It also notes that Fitzpatrick’s work “is now under the jurisdiction of [DDC] until [phases one and three] are complete at which time the entire project will be turned over to [DOPR] for maintenance and operation.” Doc. 24.

According to Hintz, Fitzpatrick last had its own personnel on site performing punch list work in August of 2013, although it hired a subcontractor to perform painting touch-up work on the structure in June of 2014. Doc. 13, at par. 12. After that, no Fitzpatrick workers or subcontractors were at the site until approximately March of 2017. Doc. 13, at par. 12. From March through May of 2017, Fitzpatrick performed electrical work at the site. Doc. 13, at par. 12. This work could not have been performed earlier, says Hintz, since electrical service had not yet been installed when it performed its initial work. Doc. 13, at par. 12.

Hintz further maintains that Fitzpatrick did not supervise plaintiff or plaintiff’s employer, did not provide plaintiff or his employer with any equipment, and that it was not aware of any dangerous condition in the area where the alleged incident occurred. Doc. 13, at pars. 16-18.

LEGAL CONCLUSIONS:

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing." *Brandy B. v*

Eden Cent. School Dist., 15 NY3d 297, 302 (2010) quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Here, defendant Fitzpatrick has established its prima facie entitlement to summary judgment dismissing the complaint and all crossclaims against it by demonstrating that its sole task at the premises was to furnish and install a pre-fabricated metal building at 625 Father Capodanno Blvd. It did not perform any work across the street from the Complex, which is where the alleged incident occurred. Additionally, Fitzpatrick showed that it did not perform any work in connection with its designated phase of the project during the entire year 2016, which encompassed the alleged accident date of November 30, 2016. Since Fitzpatrick was only hired by the DOPR to furnish and install the metal building, its liability pursuant to Labor Law sections 240(1) and 241(6) was limited to this task and the area in which its work was performed, which did not include the parking lot across the street from the Complex where plaintiff was allegedly injured. See *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 (1981) (liability of contractor for owner limited “to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created”); see also *Toro v Plaza Constr. Corp.*, 82 AD3d 505 (1st Dept 2011) (no liability imposed on contractor pursuant to Labor Law section 241[6] where contractor was not present at site on day of alleged incident and had not been there during the three weeks since its phase of the work was completed).

That branch of Fitzpatrick’s motion seeking to dismiss the claim against it pursuant to Labor Law section 200 is also granted since it established that it did not have “the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” *Maes v 408 W. 39 LLC*, 24 AD3d 298, 301 ((1st Dept 2005) quoting *Russin*, 54 NY2d, at 317.

Given that Fitzpatrick has established its freedom from negligence and statutory liability, and no party has raised a triable issue of fact in response to the instant motion, Fitzpatrick is entitled to summary judgment dismissing all claims and crossclaims asserted against it.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion (sequence number 001) by defendant Fitzpatrick & Associates, Inc. for summary judgment is granted, and the complaint and all cross claims are severed and dismissed against said defendant, and the Clerk is directed to enter judgment of favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendant Fitzpatrick & Associates, Inc. is to serve a copy of this order with notice of entry upon all parties within 20 days after this order is entered; and it is further

ORDERED that counsel for Fitzpatrick & Associates, Inc. is directed to e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, within 20 days after this order is entered, and the Clerk is directed to amend the caption to reflect that Fitzpatrick & Associates, Inc. is removed as a defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties remaining in the action shall appear for a preliminary conference on March 20, 2018 at 80 Centre Street, New York, New York at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

1/8/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE