Veloso v Scaturro Bros., Inc.
2018 NY Slip Op 30786(U)
April 24, 2018
Supreme Court, New York County
Docket Number: 153222/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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ALEXANDRE VELOSO,

Index No. 153222/2017

Plaintiff,

-against-

SCATURRO BROTHERS, INC. D/B/A ALPINE PAINTING & SANDBLASTING CONTRACTORS, SIMA PEINTIN CORPORATION, NOVA DEVELOPMENT GROUP, INC., SUPER P57, LLC, HUNTER ROBERTS CONSTRUCTION GROUP, LLC, 562 MORRIS HOLDINGS LLC, ENVIRONMENTAL PLANNING & MANAGEMENT, INC., INTEGRAL ENGINEERING, P.C. and HUDSON RIVER PARK TRUST,

Defendants.

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Lebovits, J.:

Motion sequence numbers 002, 003 and 005 are hereby consolidated for disposition.

The following papers have been considered by the court:

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This is an action to recover damages for personal injuries allegedly sustained by a construction worker on April 22, 2016, when, while descending the stairs of a scissor lift at a construction site located at Pier 57 on the West Side of Manhattan (the Premises), the lights went out, causing him to miss a step and fall.

In motion sequence number 002, defendant Hunter Roberts Construction Group, LLC (Hunter) moves under CPLR 3211 (a) (1), (a) (7), and 3211 (c) to dismiss the complaint and all cross-claims against it.

In motion sequence number 003, defendant Integral Engineering, P.C. (Integral) moves under CPLR 3211 (a) (1), (a) (7), and 3211 (c) to dismiss the complaint and all counterclaims and cross-claims against it.

In motion sequence number 005, defendant Morris Holdings LLC (Morris) moves under CPLR 3211 (a) (7) and 3211 (c), to dismiss the complaint against it, and for summary judgment, pursuant to CPLR 3212, in its favor on its counterclaims against plaintiff and its cross-claims against the co-defendants.

BACKGROUND

The complaint alleges that, on the day of the accident, defendants Hudson River Park Trust and/or Super P57, LLC (P57) owned the Premises where the accident occurred. The complaint also alleges that Hunter, Integral and Morris, as well as defendants NOVA Development Group, LLC (NOVA) and Environmental Planning & Management, Inc. (EPM) were general contractors for a project at the Premises that entailed renovating Pier 57 (the Project). In addition, it is alleged that defendants Sima Peintin Corporation (Sima) and Scaturro Brothers, Inc. d/b/a Alpine Painting & Sandblasting Contractors (Scaturro) were contractors involved with asbestos abatement at the Project. Plaintiff Alexandre Veloso was an employee of Sima and/or Scaturro.

The complaint alleges claims sounding in common law negligence, as well as violations of Labor Law §§ 200, 240 (1) and 241 (6) as against each defendant.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211 (a) (1) governs motions to dismiss where a defense is founded on documentary evidence. A motion to dismiss a complaint pursuant to 3211 (a) (1) may be granted

only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *accord Ladenburg Thalmann & Co. v Tim's Amusements* 275 AD2d 243, 246 [1st Dept 2000]).

CPLR 3211 (a) (7) governs motions to dismiss for the failure to state a cause of action. "In determining a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017], citing *Leon*, 84 NY2d at 87-88). In addition, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon,* 84 NY2d at 88 [internal quotation marks and citations omitted]).

CPLR 3211 (c) allows the court, upon adequate notice to the parties, to treat a CPLR 3211 (a) or (b) motion as a motion for summary judgment.

As to those portions of the motions that are made pursuant to CPLR 3212, "the proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] 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], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If any doubt exists about a triable fact, a court must deny a summary-judgment motion (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Hunter Motions to Dismiss the Complaint (Motion Sequence Number 002)

Hunter moves under CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint and all cross-claims against it, on the ground that the complaint fails to state a claim against it, based on documentary evidence that conclusively establishes that it had no ability to supervise or control the work that allegedly caused plaintiff's accident.

In support of its motion, Hunter puts forth an affidavit from its principal that asserts that plaintiff failed to state a claim as against Hunter. This affidavit is not accompanied by any documentary evidence supporting the assertions set forth therein, and a review of said affidavit reveals that it does no more than assert the inaccuracy of the allegations in the complaint.

Notably, "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss [pursuant to CPLR 3211 (a) (1) and (a) (7)], for the purpose of determining whether there is evidentiary support for the

complaint . . . , and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007] [internal citation omitted]; *accord Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). Accordingly, Hunter's unsupported affidavit is insufficient to conclusively establish a defense to the claims alleged against them in the complaint.[1]

Thus, Hunter is not entitled to dismissal of the complaint or the cross-claims asserted against it.

Because Hunter's motion to dismiss is denied, the court will not entertain its request to convert its motion to dismiss into one for summary judgment under CPLR 3211 (c).

Integral's Motion to Dismiss the Complaint (Motion Sequence Number 003)

Integral moves under CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint and all cross-claims against it, on the ground that documentary evidence put forth by it conclusively establishes that Integral was not charged with any responsibility in regard to the scissor lift or the lighting at the Project, and that it only provided air testing services at the Project. Importantly, Integral provides not only an affidavit setting forth said facts, but also annexes several documents to said affidavit, which the court considered.

Additional Facts in Support of This Motion

The Allegations Against Integral

In the complaint, plaintiff alleges that he was injured "while attempting to descend the stairs of a dangerous and defective scissor-lift without adequate illumination thereby causing plaintiff to miss a step and fall to the ground below" (complaint, ¶ 22). Plaintiff also alleges that Integral was either the general contractor at the Project or a contractor who "was to perform certain work at [the Project], including construction, excavation, demolition, alteration, renovation, lead paint removal and repair work" for P57 (complaint, ¶ 46). In addition, it is alleged that Integral hired Scaturro or Sima, or both, to perform construction work at the Project. Further, it is alleged that Integral owned or leased the scissor lift that plaintiff allegedly fell from.

Affidavit of Keith P. Brodock, P.E. (Integral's President)

In his affidavit, Keith Brodock states that, at the time of the accident, he was the president of Integral and, accordingly, he is familiar with Integral's work at the Project. He also states that Scaturro and Sima were not subcontractors of Integral, and that Integral did not "direct, control, manage or supervise the work of [Scaturro or Sima], nor did it provide equipment to either [Scaturro or Sima]" (Brodock affidavit, ¶ 7).

[1] As noted above, while a plaintiff's affidavit may be considered on a motion to dismiss under CPLR 3211 (a) (7) for limited purposes, Hunter is not a plaintiff.

Instead, according to Brodock, Integral was hired by non-party RXR Realty, Inc., on behalf of its subsidiary, P57, to provide "lead based paint abatement monitoring and consulting services" at the Project. (*id.*, ¶ 8) (the RXR/Integral Agreement). Integral then entered into a work order with EPM (the Work Order), wherein EPM "assumed all the obligations, risks and responsibilities" of Integral under the RXR/Integral Agreement (*id.*, ¶ 11). According to Brodock, these documents establish that Integral's scope of work did not include the work of plaintiff or his employers, or any construction work at all.

The RXR/Integral Agreement

The RXR/Integral Agreement, entered into on March 2, 2016, describes Integral's work at the Project as "lead based abatement monitoring" (Brodock affidavit, exhibit B, the RXR/Integral Agreement at 1). It also states that Hunter was the Project's "on-site construction manager," and that NOVA was the "lead abatement contractor." In addition, it states that "[t]he work described [in the RXR/Integral Agreement] will be performed by NOVA" (*id.*).

Integral's scope of work, as set forth in the RXR/Integral Agreement, included three "tasks" (*id.*). The first task entailed reviewing contractor submissions, attending meetings, reviewing abatement plans and coordinating with Hunter and NOVA. The second task included "full-time monitoring of the area outside of the containment" (*id.* at 2). The monitoring would specifically "evaluate procedures and how they are being performed in accordance with the plan" (*id.* at 2). The third task entailed compiling documents and preparing a closure report.

Subsequently, on May 2, 2016, the RXR/Integral Agreement was modified. This modification (the Modification) does not add any new duties, however it notes the following:

> "Integral has worked to maintain the coverage that would allow regular reports to be completed, maintain contact with the contractor for schedule, keep up the important housekeeping, waste management as well as discussing the issues of painting and priming"

(Braddock affidavit, exhibit C, the Modification).

The Work Order

The Work Order, effective on March 2, 2016, is an agreement between Integral and EPM wherein EPM "assume[d] toward Integral all the obligations, risks and responsibilities that Integral, by the [RXR/Integral Agreement], assumes towards [RXR]" (Braddock affidavit, exhibit D, the Work Order, at 1). The Work Order's scope of work included the following:

> "[F]ull-time, on site real-time particulate air monitoring over night shifts, conduct one weekly event of low volume area monitoring/ sampling, and support coordination, management, and review of submittals and laboratory results"

(*id.*, at 2).[2]

The Arch Letter

In his opposition to Integral's motion, plaintiff puts forth a denial letter, dated September 29, 2016, from non-party Gallagher Basset Services, the third-party administrator for non-party Arch Insurance Company (Arch), the insurer of Hunter (the Arch Letter). In the Arch Letter, Arch discusses its investigation into the instant accident and asserted that NOVA, pursuant to its contract with P57, was responsible for lighting at the Project, Scaturro was NOVA's subcontractor, and "Nova and its subcontractor's work was overseen and inspected by another contractor, EPM, who in turn was retained by [Integral]" (plaintiff's affirmation in opposition, exhibit A, the Arch Letter at 3).

The Labor Law §§ 240 (1) and 241 (6) Claims Against Integral

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

[2] The parties also make reference to a June 3, 2016 "agency agreement" between Integral and RXR (the Agency Agreement) (Brodock affidavit, exhibit E). In the Agency Agreement, Integral agreed to "monitor[] the lead abatement work related to the redevelopment of the Premises" (Brodock affidavit, ¶ 13.). Notably, this agreement postdates plaintiff's accident. Accordingly, any obligations that Integral may have undertaken pursuant the Agency Agreement have no bearing on this action.

Initially, Labor Law §§ 240 (1) and 241 (6) apply only to owners and contractors and their agents. Here, it is not alleged that Integral was an owner of the Premises where the accident took place. In addition, documentary evidence put forth by Integral, namely the RXR/Integral Agreement, establishes that Integral was not a general contractor, but, rather, a monitoring and consulting engineering company. As such, it must be determined whether the allegations in the complaint support a claim that Integral might be liable for plaintiff's alleged injuries under the Labor Law as an agent of the owner and/or general contractor.

> "When the work giving rise to [the duty to conform to the requirements of Labor Law §§ 240 (1) and 241 (6)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]).

Here, plaintiff has alleged that while he was walking down the stairs of a scissor lift, the lights went out, causing him to miss a step and fall. The documentary evidence put forth by Integral demonstrates that Integral was not charged with the procurement, use, or supervision of equipment, such as scissor lifts, at the Project; nor does it contemplate any duty on Integral's part with respect to illumination at the Project. The Arch Letter proffered by plaintiff in opposition to Integral's motion does not support the position that Integral had the authority to supervise and/or control either the scissor lifts or the illumination at the Project.

Thus, Integral has provided sufficient documentary evidence to conclusively establish a defense to the factual allegations of the complaint. In opposition, plaintiff has not proffered sufficient evidence to overcome the facts set forth in Integral's submissions and, therefore Integral is entitled to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims alleged against it.

The Common-Law Negligence and Labor Law § 200 Claims Against Integral

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such

> places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *accord Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [emphasis in original]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 "'when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice'" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

It is alleged that the accident was caused when the lights suddenly shut off while plaintiff was descending the stairs of a scissor lift, causing him to miss a step and fall.[3] Accordingly, the complaint alleges that plaintiff's accident arose from the means and methods of the work performed at the Premises.

Integral has provided sufficient documentary evidence to establish that its duties at the Project included neither the procurement, use or supervision of scissor lifts at the Project, nor the illumination of the Project. In opposition, the Arch Letter, put forth by plaintiff, does not sufficiently support the allegation that Integral's negligence caused the accident.

Thus, Integral is entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

[3] To the extent that plaintiff argues that it has set forth a claim based on a slipping hazard caused by sandblasted grit, the complaint does not include an allegation that plaintiff slipped on a substance, and the record is devoid of any documents that might amplify the complaint, such as a bill of particulars or an affidavit from plaintiff.

The Cross-Claims

While Integral seeks dismissal of all cross-claims against it, Integral does not address said cross-claims in its brief. Accordingly, Integral is not entitled to dismissal of the cross- claims against it at this time.

Morris's Motion to Dismiss the Complaint and for Summary Judgment on its Counterclaims and Cross-Claims (Motion Sequence Number 005)

Morris moves under CPLR 3211 (a) (7) to dismiss the complaint against it, on the ground that the complaint failed to state a claim because Morris was not involved in any way with the Project, as it was a holding company for a Bronx property that is unrelated to the Premises. Morris also moves under CPLR 3212 for summary judgement on its counterclaims and cross-claims for malicious prosecution, negligence, and an award of its attorney's fees.

Initially, as plaintiff and Morris entered into a stipulation, dated December 13, 2017, which discontinued the complaint and all of Morris's counterclaims, that part of Morris's motion that seeks relief against plaintiff is moot. Thus, that part of Morris's motion that seeks dismissal of the complaint is denied, and that part of Morris's motion that seeks summary judgment on the counterclaims is also denied.

In addition, Morris and Hunter entered into a stipulation, dated December 15, 2017, which discontinued all cross-claims alleged against each other. Accordingly, the part of Morris's motion that seeks summary judgment in its favor as to its cross-claims against Hunter is moot. Thus, that part of Morris's motion that seeks summary judgment on its cross-claims against Hunter is denied.

As to the remainder of Morris's motion, Morris has not sufficiently established his entitlement to judgment in its favor on its cross-claims for malicious prosecution, negligence arising from the filing of cross-claims, or for an award of attorney fees. Morris has not provided any evidence of malice (*Colon v City of New York*, 60 NY2d 78, 82 [1983]), nor has it established that the remaining cross-claimants were negligent in filing cross-claims against Morris. Thus, Morris is not entitled to summary judgment in its favor on its cross-claims as against the remaining co-defendants.

The court has considered the remaining arguments raised by each party in their respective motions and finds said arguments to be unavailing.

For the foregoing reasons, it is hereby

ORDERED that defendant Hunter Roberts Construction Group, LLC's motion, pursuant to CPLR 3211 (a) (1), (a) (7), and 3211 (c), to dismiss the complaint and all cross-claims against it is denied; and it is further

ORDERED that the part of defendant Integral Engineering, P.C.'s motion, pursuant to CPLR 3211 (a) (1), (a) (7) and 3211 (c), to dismiss the complaint against it is granted, and the

complaint is dismissed as against it with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and the motion is otherwise denied; and it is further

ORDERED that that part of defendant Morris Holdings LLC's motion, pursuant to CPLR 3211 (a) (7), and 3211 (c), seeking to dismiss the complaint and all cross-claims against, as well as that part of its motion, pursuant to CPLR 3212, for summary judgment in its favor on its counterclaims and crossclaims, is denied; and it is further

ORDERED that defendant Integral Engineering, P.C. must serve a copy of this decision and order on the County Clerk's Office which is directed to enter judgment accordingly.

The parties are reminded that this matter is scheduled for a preliminary conference on May 9, 2018, at 11:00 a.m. in Part 7, at 60 Centre Street, room 345.

Dated: April 24, 2018

J.S.C.
HON. GERALD LEBOVITS
J.S.C.