

Montesdeoca v 101-19 37th Ave. LLC

2018 NY Slip Op 30813(U)

May 4, 2018

Supreme Court, Queens County

Docket Number: 27647/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEIS IA Part 2
Justice

JOSE MONTESDEOCA and SONIA
MONTESDEOCA,

Plaintiffs,

101-19 37TH AVENUE LLC, UNITED
FOUNDERS, LTD, SAAL MAANGEMENT
CORP., AND FEREYDOUN POURATIAN,
ALPHA BUILDER INC., and LESS
ENGINEERING, P.C.,

Defendants,

101-19 37th AVENUE LLC,

Third-Party Plaintiff,

-against-

SAMUEL FELDMAN LUMBER CO., INC., and
FELDMAN LUMBER INDUSTRIES, INC.,

Third-Party Defendants.

UNITED FOUNDERS LTD, and FEREYDOUN
POURATIAN,

Second Third-Party Plaintiffs,

-against-

SAMUEL FELDMAN LUMBER CO., INC., and
FELDMAN LUMBER INDUSTRIES, INC.

Second Third-Party Defendants

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Motion Date : 12/11/17

Motion Seq. No. 6

The following papers read on this motion by third-party defendants/second third-party defendants Samuel Feldman Lumber Co., Inc. (SFLC) and Feldman Lumber Industries, Inc. (Feldman Lumber) (1) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and second third-party complaint, (2) pursuant to CPLR 3212 for summary judgment in their favor on their cross claims against defendant/third-party plaintiff 101-19 37th Avenue LLC and defendants/second third-party plaintiffs United Founders Ltd (United Founders) and Fereydoun Pouratian, and (3) pursuant to CPLR 8303-a for an award of costs and reasonable attorneys' fees.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-9
Answering Affidavits - Exhibits	10-14
Reply Affidavits	15-17

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action, alleging violations of Labor Law §§ 200, 240(1), 240(2), 240(3) and 241(6), and common-law negligence. Plaintiffs allege that Jose Montesdeoca sustained injuries when he fell through a hole in the ground on the property owned by defendant 101-19 37th Avenue LLC, while he was delivering sheetrock materials during the course of his employment by third-party defendant SFLC, a supplier of construction materials, to a construction project on the property. Defendant 101-19 37th Avenue LLC served an answer and commenced a third-party action against SFLC and Feldman Lumber for common-law and contractual indemnification, contribution, breach of contract and failure to procure liability insurance naming it as an additional insured. Defendants United Founders Ltd. and Fereydoun Pouratian served a joint answer and commenced a second third-party action against SFLC and Feldman Lumber also asserting claims for indemnification, contribution, breach of contract and failure to procure liability insurance, naming United Founders and Pouratian as additional insureds. Third-party defendants/second third-party defendants SFLC and Feldman Lumber served answers to the third-party complaint and the second third-party complaint, and interposed cross claims against third-party plaintiff 101-19 37th Avenue LLC, seeking contribution and common-law and contractual indemnification, breach of contract and failure to procure liability insurance for them, and cross claims against third-party plaintiffs United Founders and Pouratian for contribution and common-law indemnification.

It is well established that 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,” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, which then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

With respect to that branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber for summary judgment dismissing the third-party complaint and second third-party complaint, SFLC and Feldman Lumber assert that SFLC was the employer of plaintiff Jose Montesdeoca at the time of the accident, and plaintiff Jose Montesdeoca did not suffer a “grave injury” as defined in Workers’ Compensation Law § 11 as a result of the accident. Third-party defendants/second third-party defendants SFLC and Feldman Lumber also assert that Feldman Lumber played no part in the happening of the accident insofar as Feldman Lumber ceased operations in the early 1990’s and did not employ plaintiff Jose Montesdeoca to deliver the materials to the construction site. Third-party defendants/second third-party defendants SFLC and Feldman Lumber further assert there is no contract between them and defendant/third-party plaintiff 101-19 37th Avenue LLC, or between them and defendant/second third-party plaintiff United Founders or Pouratian.

Where there is no written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant, an employer may be held liable for contribution or indemnification only if the employee has sustained a “grave injury” within the meaning of the Workers’ Compensation Law (Workers’ Compensation Law § 11; *see Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Grech v HRC Corp.*, 150 AD3d 829 [2d Dept 2017]). A “grave injury” is defined, in relevant part, as “an acquired injury to the brain caused by an external physical force resulting in permanent total disability” (Workers’ Compensation Law § 11). The statute does not define “permanent total disability,” but the Court of Appeals has determined that “a brain injury results in ‘permanent total disability’ under [Workers’ Compensation Law §] 11 when the evidence establishes that the injured worker is no longer employable in any capacity” (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]).

The submissions of third-party defendants/second third-party defendants SFLC and Feldman Lumber demonstrate that plaintiff Jose Montesdeoca was an employee of SFLC on December 3, 2011, and was never an employee of Feldman Lumber. The submissions also demonstrate that no contract or agreement existed at the time of the accident between third-party defendant/second third-party defendant SFLC or Feldman Lumber and any of the third-party plaintiffs. Furthermore, defendant/second third-party plaintiff United Founders concedes that it had no contract or agreement for indemnification with third-party defendants/second third-party defendants SFLC and Feldman Lumber. In addition, the employee records of third-party defendant/second third party defendant SFLC includes a hospital emergency room report dated December 3, 2011, indicating that plaintiff Jose Montesdeoca had suffered a minor head injury. Those employee records also include a note

from the treating orthopedist for plaintiff Jose Montesdeoca, indicating Montesdeoca was authorized to return to work on May 14, 2012, with only the restriction of no repetitive bending. The business and payroll records of third-party defendant/second third-party defendant SFLC show that plaintiff Jose Montesdeoca worked on a consistent basis for SFLC from May 11, 2012 through December 23, 2012. Plaintiff Jose Montesdeoca also testified at his deposition that he returned to work as a driver. Under such circumstances, third-party defendants/second third-party defendants SFLC and Feldman Lumber have established prima facie that no written contract, including for contribution or indemnification, existed between them and the third-party plaintiffs, and plaintiff Jose Montesdeoca did not sustain a grave injury, as defined by Workers' Compensation Law § 11, since he was gainfully employed after his accident.

Second third-party plaintiffs United Founders and Pouratian do not raise any triable issue of fact with respect to such showing, and as noted, concede that no contract exists between United Founders and SFLC and Feldman Lumber. Second third-party plaintiffs United Founders and Pouratian assert that they had a good faith belief to commence the second third-party action, because such action is predicated upon plaintiffs' allegations that plaintiff Jose Montesdeoca suffered a traumatic brain injury.

Third-party plaintiff 101-19 37th Avenue LLC asserts that plaintiff Jose Montesdeoca has claimed that he cannot currently work, insofar as he alleges in his bills of particulars that he has past lost wages in the amount of \$593,000.00 and future lost wages in the amount of \$2,284,000.00, and has suffered traumatic brain injury. Third-party plaintiff 101-19 37th Avenue LLC also asserts that a medical report dated January 17, 2012 of Dr. Daniel Kuhn, M.D., provided by plaintiffs' counsel, opines that plaintiff Jose Montesdeoca suffered a minor traumatic brain injury and brief loss of consciousness, and indicates the permanency of disability and prognosis is "undetermined at this time." Third-party plaintiff 101-19 37th Avenue LLC additionally asserts that it had a good faith belief to commence the third-party action, because such action was based upon plaintiffs' claim that plaintiff Jose Montesdeoca suffered a traumatic brain injury. Third-party plaintiff 101-19 37th Avenue LLC further asserts that third-party defendants SFLC and Feldman Lumber have failed to demonstrate their entitlement to summary judgment on the cross claims asserted against it.

To the extent that third-party plaintiff 101-19 37th Avenue LLC relies upon the medical report of Dr. Kuhn to raise a triable issue of fact as to whether plaintiff Jose Montesdeoca suffered from a grave injury, such report includes a statement that "[t]he patient is severely partially disabled from a psychiatric point of [v]iew" and "can work now part time in a sedentary job." Because such report allows that plaintiff Jose Montesdeoca is able to work, albeit part-time, and is not totally disabled, it fails to raise a triable issue of fact as to the prima facie showing by third-party defendants/second third-party defendants SFLC and Feldman Lumber that plaintiff Jose Montesdeoca did not suffer a grave injury.

That branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber for summary judgment dismissing the third-party complaint and second third-party complaint is granted (CPLR 3212).

That branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber for summary judgment on their cross claims against defendant/third-party plaintiff 101-19 37th Avenue LLC for contractual indemnification, breach of contract and failure to procure liability insurance for them is denied. Third-party defendants/second third-party defendants SFLC and Feldman Lumber admit there was no contract between them and defendant/plaintiff 101-19 37th Avenue LLC.

That branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber for summary judgment in their favor on their cross claims against defendant/third-party plaintiff 101-19 37th Avenue LLC for common-law indemnification and contribution is denied. That branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber for summary judgment in their favor on their cross claims against defendants/third-party plaintiffs United Founders and Pouratian is denied.

That branch of the motion by third-party defendants/second third-party defendants SFLC and Feldman Lumber to impose costs against third-party plaintiff 101-19 37th Avenue LLC and second third-party plaintiffs United Founders and Pouratian and for an award of attorneys' fees pursuant to CPLR 8303-a on the ground that the third-party plaintiffs commenced the third-party actions in bad faith is denied. Third-party defendants/second third-party defendants SFLC and Feldman Lumber have failed to demonstrate that the conduct by third-party plaintiff 101-19 37th Avenue LLC, second third-party plaintiff United Founders, or second third-party plaintiff Pouratian was frivolous as that term is defined under 22 NYCRR 130-1.1(c), or that the third-party action or second third-party action was commenced or continued in bad faith (*see* CPLR 8303-a[c][i]; *Broich v Nabisco, Inc.*, 2 AD3d 474 [2d Dept 2003]; *Karnes v City of White Plains*, 237 AD2d 574, 576 [2d Dept 1997]).

Dated: May 4, 2018

J.S.C.