

Swinton v Greystone Prop. Dev. Corp.
2018 NY Slip Op 30837(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 158320/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ANTHONY SWINTON,

Plaintiff,

- against -

GREYSTONE PROPERTY DEVELOPMENT CORP.,
38-46 WEST 33 STREET, LLC, 130 7TH
AVENUE SOUTH PROPERTY LLC and THE J.
CONSTRUCTION COMPANY, LLC,

Defendants,

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GREYSTONE PROPERTY DEVELOPMENT II CORP.
i/s/h/a GREYSTONE PROPERTY DEVELOPMENT
CORP. and 130 7TH AVENUE SOUTH PROPERTY LLC,

Third-Party Plaintiffs,

- against -

RED HOOK CONSTRUCTION GROUP-II, LLC

Third-Party Defendant.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendant The J. Construction Company, LLC (“J. Construction”), moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against it. Plaintiff, Anthony Swinton, does not oppose J. Construction’s motion. However, third-party defendant Red Hook Construction, Group-II, LLC (“Red Hook”), which has a cross claim against J. Construction for indemnification, opposes the motion.

According to the complaint, plaintiff was working at a construction site located at 130 7th Avenue South Property, New York, New York. and was injured when he was struck by falling

debris and concrete (Compl., ¶¶16, 17). The complaint alleges that J. Construction was retained to act as the general contractor and/or construction manager at the premises (*id.*, ¶12). The complaint alleges violations of Labor Law §§ 200, 240, and 241(6) (*id.*, ¶17).

Discussion

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 [1st Dept 2001]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*id.*).

Where a premises condition is at issue, a general contractor may be held liable for a violation of Labor Law § 200 if the general contractor either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Rizzuto v. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 [1998]). Where the manner of work is at issue, a general contractor must have the authority to control the activity bringing about the injury (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 [1st Dept 2012]). To hold a general contractor absolutely liable for violations of Labor Law §§ 240 and 241, there must be a showing that the subcontractor had the authority to supervise and control the work giving rise to these duties (*see Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 497 [1993]; *Russin v. Picciano & Son*, 54 N.Y.2d 311, 318 [1981]).

To defeat for a motion for summary judgment due to incomplete discovery, there must be “some evidentiary basis . . . offered to suggest that discovery may lead to relevant evidence” (*DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C.*, 125 A.D.3d 480, 482 [1st Dept 2015]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953 [1st Dept 2009], quoting *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 760 [2d Dept 2006]).

Here, J. Construction has met its *prima facie* burden of demonstrating its entitlement to summary judgment of the Complaint by establishing that it was not an owner of the subject premises and that it do or control any work at the premises. J. Construction submits the affidavit of David Brot, the principal of J. Companies, LLC (Brot Aff. ¶¶1, 4). Brot affirms that J. Construction is a wholly owned subsidiary of J. Companies (¶4). Brot additionally affirms that J. Construction did not own, manage, maintain or control the premises at any time or contract for any work that was performed at the premises during the relevant time period (*id.*). Brot further affirms that J. Construction was only retained to obtain the requisite work permit from the Department of Buildings, and was not involved in the construction project in any other capacity (*id.*, ¶5).

Red Hook fails to rebut J. Construction’s *prima facie* showing. First, Red Hook’s argument that the printout of the “selected projects” webpage from J. Companies website presents an issue of fact as to J. Construction’s role in the construction project is unavailing, since the webpage only affirms that *J. Companies* was contracted to work at the premises and the bid amount. Next, Red Hook’s assertion that J. Construction’s motion for summary dismissal is premature on the basis that discovery is incomplete is without merit. Although no depositions

have taken place, Red Hook has indeed offered no facts from which it could be inferred that further discovery will produce relevant evidence. Red Hook's hope that further discovery in this case will lead to relevant evidence is without basis. Moreover, Red Hook fails to demonstrate that the evidence needed to defeat the motion is in exclusive control of J. Construction (*see* CPLR 3212(f); *Voluto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 [1st Dept 2007]).

As to the cross-claims, the branch of J. Construction's motion to dismiss the cross-claims of co-defendants Greystone Property Development Corp. and 130 7th Avenue South Property, LLC, are granted as they have been abandoned, since neither co-defendant opposes J. Construction's motion (*see Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]).

While J. Construction's notice of motion seeks dismissal of all cross claims as against it, the moving papers do not make any arguments as to Red Hook's cross-claim for indemnification. Nor does Red Hook specifically address its own claim for indemnification against J. Construction. Notwithstanding this paucity of discussion, the Court dismisses the claim for indemnification against J. Construction, as this claim can no longer stand given that the Court has dismissed all claims of direct liability against J. Construction. The Court does so on reliance of the request for further relief that the Court deems just and proper, as well as for judicial economy.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant The J. Construction Company, LLC for summary judgment dismissing all claims and cross claims as against it is granted. It is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the action is severed and continues against the remaining defendants. It is further

ORDERED that defendant The J. Construction Company, LLC shall serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry.

This constitutes the decision and order of the Court.

Dated: May 3, 2018



Hon. Carol Robinson Edmead, J.S.C

**HON. CAROL R. EDMEAD
J.S.C.**