

Joseph v Pacolet Milliken Enters., Inc.

2018 NY Slip Op 34507(U)

December 12, 2018

Supreme Court, Bronx County

Docket Number: Index No. 28742/2017

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

WILSTON JOSEPH,

Index No.: 28742/2017
(Action No. 1)

Plaintiff,

- against -

PACOLET MILLIKEN ENTERPRISES, INC. and
TURNER CONSTRUCTION COMPANY,

Defendants.

DECISION and ORDER

WILSTON JOSEPH,

Index No.: 29820/2018
(Action No. 2)

Plaintiff,

- against -

HINES 1045 AVENUE OF THE AMERICAS
INVESTORS LLC, STRUCTURE TONE, LLC
and BANK OF CHINA GROUP INVESTMENT LTD.,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant Turner Construction Company's (Turner Construction's) motion to dismiss pursuant to CPLR §3211(a)(1)(7) (Motion Sequence # 2 of Action # 1) is whether Turner Construction is liable to Plaintiff under its negligence and Labor Law §§240(1), 241(6) causes of action.¹ The court finds that Plaintiff's complaint and all cross-claims must be dismissed as to Turner Construction.²

¹ Turner Construction also sought to dismiss all the cross-claims in Action No.: 1. The Co-Defendant, Pacolet Milliken Enterprises, Inc. in Action No.: 1 failed to interpose opposition with respect to that branch of Turner Construction's motion to dismiss, therefore, all of Co-Defendant, Pacolet Milliken Enterprises, Inc.'s cross-claims are dismissed without opposition.

² Defendant Pacolet Milliken Enterprises, Inc.'s motion seeking to consolidate Action No.: 1 bearing Index No.:

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction and courts accept the facts as alleged in the complaint as true. *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). Therefore, plaintiffs are given the benefit of every possible favorable inference, and the court only determines whether the facts as alleged fit within any cognizable legal theory. *Id.*

Under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *See NRES Holdings, LLC v. Almanac Realty Sec. VI, LP*, 140 A.D.3d 640, 33 N.Y.S.3d 707 (1st Dep't 2016). Further, in assessing a motion under CPLR §3211(a)(7) a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether plaintiff has a cause of action, not whether he has stated one. *See Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 25 N.Y.S.3d 85 (1st Dep't 2016).

Turner Construction in its moving papers submitted an affidavit of its Vice President and Senior Operation Manager Joseph R. Byrne ("Mr. Byrne"). Mr. Byrne posited that Turner Construction was neither the owner or general contractor of the subject construction site, nor did it perform any work thereat. In addition, Mr. Byrne asserted that none of Turner Construction's employees or contractors were present at the subject construction site on the date of Plaintiff's accident nor did it control the means and methods or supervised Plaintiff's injury-producing work.

Plaintiff in its opposition failed to include an affidavit from a person with personal knowledge or any evidence to traverse the veracity of Mr. Byrne's affidavit. Further, Plaintiff

28742/2017 and Action No.: 2 bearing Index No.: 29820/2018 (Sequence # 1 of Action # 1) and Plaintiff's motion seeking to amend the complaint (Motion Sequence # 1 of Action # 2) are respectively granted without opposition.

failed to provide any basis, other than speculation, for this court to conclude that discovery will yield information inconsistent with Mr. Byrne's affidavit. *See White v. NY City Tr. Auth.*, 308 A.D.2d 341, 764 N.Y.S.2d 90 (1st Dep't 2003).

Therefore, Plaintiff's complaint must be dismissed as to Turner Construction. The documentary evidence presented herein conclusively established Plaintiff's negligence cause of action must be dismissed as he will not be able to demonstrate the existence of a duty, breach and proximate cause considering there was no nexus between any work performed by Turner Construction and Plaintiff's injuries. *See Kenny v. City of New York*, 30 A.D.3d 261, 817 N.Y.S.2d 264 (1st Dep't 2006); *see also Manson v. Consolidated Edison Co.*, 220 A.D.2d 374, 633 N.Y.S.2d 138 (1st Dep't 1995). Likewise, Plaintiff's Labor Law §§240(1), 241(6) causes of action must similarly be dismissed as Plaintiff failed to establish Turner Construction violated Labor Law §§240(1), 241(6) and that said violations proximately caused his injuries. *See Santos v. Condo 124 LLC*, 161 A.D.3d 650, 78 N.Y.S.3d 113 (1st Dep't 2018); *see also Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018).

Accordingly, it is

ORDERED, Defendant Pacolet Milliken Enterprises, Inc.'s motion seeking to consolidate Action No.: 1 bearing Index No.: 28742/2017 and Action No.: 2 bearing Index No.: 29820/2018 is granted without opposition and consolidated for all purposes including a joint trial on liability and damages under Index Number 28742/2017 as it appears both actions have common questions of law and fact (Motion Sequence # 1 of Action # 1); and it is further

ORDERED, that Defendant Turner Construction Company's motion to dismiss is granted (Motion Sequence # 2 of Action # 1); and it is further

ORDERED, that Plaintiff's motion seeking to amend the complaint to the extent of adding 7BP OWNER, LLC. as a named Defendant is granted without opposition (Motion Sequence # 1 of Action # 2); and it is further

ORDERED, that the consolidated action shall bear the following amended caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

WILSTON JOSEPH,

Index No.: 28742/2017

Plaintiff,

- against -

PACOLET MILLIKEN ENTERPRISES, INC.,
TURNER CONSTRUCTION COMPANY,
HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,
STRUCTURE TONE, LLC,
BANK OF CHINA GROUP INVESTMENT LTD.,
and 7BP OWNER, LLC,

Defendants.

and it is further

ORDERED, that the pleadings in these actions shall stand as the pleadings in the consolidated action; and it is further

ORDERED, that Defendant Pacolet Milliken Enterprises, Inc.'s shall serve on the Clerk of the Court and the Motion Support Office (Room 217) a copy of this decision and order with notice of its entry. The Clerk shall consolidate the papers in these actions and shall mark the Clerk's records to reflect the consolidation; and it is further

ORDERED, that within thirty (30) days after the date of this decision and order, Plaintiff shall file a supplemental summons and amended complaint in the form annexed to his moving papers as Exhibit "A" (Motion Sequence # 1 of Action # 2) and shall serve same upon all Defendants; and it is further

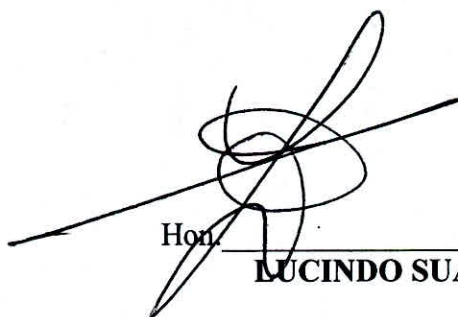
ORDERED, that the Clerk of the Court shall enter judgment in favor of Defendant Turner Construction Company dismissing Plaintiff's complaint and Co-Defendant Pacolet Milliken

Enterprises, Inc.'s cross-claims; and it is further

ORDERED, that the respective attorneys having previously consented to electronic filing,
that this consolidated action shall continue as an electronically-filed action.

This constitutes the decision and order of the court.

Dated: December 12, 2018


Hon. _____
LUCINDO SUAREZ, J.S.C.