

**Holguin v Sabir**

2019 NY Slip Op 30226(U)

January 28, 2019

Supreme Court, New York County

Docket Number: 162466/2014

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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JOSE HOLGUIN,  
  
Plaintiff,

INDEX NO. 162466/2014

- v -

MOTION DATE 12/04/2018

SHIVA SABIR, LIBERTY MECHANICAL CONTRACTORS  
LLC, MCG CONSTRUCTION LLC, HUTCH TWO TOWER LLC, D  
& D ELECTRICAL CONSTRUCTION COMPANY, INC.,

MOTION SEQ. NO. 004

Defendant.

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 122 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that defendant D&D Electrical Construction Company, Inc.'s (hereinafter "Defendant") motion for summary judgment, for an order pursuant to CPLR 3212 to dismiss plaintiff Jose Holguin's complaint and all cross claims against Defendant since plaintiff fails to meet its burden of proof that Defendant was negligent is granted.

The present motion stems from a motor vehicle accident which occurred on May 10, 2013 at 1200 Waters Place in the County of Bronx, City and State of New York, when co-defendant Shiva Sabir was operating a forklift and pulled out of the entrance of a construction site and made contact with the middle of the passenger side of plaintiff's vehicle. Plaintiff does not oppose the motion.

### Summary Judgment

“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 eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

### Discussion

Defendant affirms that it is not liable for defendant driver as it did not employ, control, direct and/or supervise defendant driver on the date of the accident and did not own, rent or provide the forklift in question. Further, Defendant states that it did not have any obligation with regard to the construction site where the accident occurred as it was hired by codefendant MCG to work at another site located at 1250 Water Place. In support of its motion, Defendant submits a copy of a contract between co-defendant MCG Construction and Defendant which highlights that Defendant was hired for work to be performed at 1250 Water Place and not 1200 Water Place where the accident at issue occurred (Mot, Exh L).

Defendant also submits the depositions of plaintiff, defendant driver Shiva Sabir, Bernard Brender on behalf of defendant Liberty Mechanical Contractors LLC, Paul Meshonek on behalf of Defendant MCG Construction LLC & Hutch Two Tower LLC and of James J. Zervas on behalf of Defendant (Mot, Exh E, F, G, H, I & J). Upon examination of these records the Court finds that Defendant was not present at the construction site of issue, did not employ, direct, nor defendant driver, and had no connection to the motor vehicles at issue.

Conclusion

Defendant has made out a prima facie demonstration that they are not liable for the accident at issue, and the burden shifts to plaintiff to raise a triable issue of fact (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Plaintiff has not submitted opposition to the motion. Thus, Defendant's motion to dismiss plaintiff's complaint as against D&D Electrical Construction, Inc. is granted.

Accordingly, it is

ORDERED Defendant's motion that for an order pursuant to CPLR 3212 to dismiss plaintiff Jose Holguin's complaint and all cross claims against Defendant is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against Defendant D&D Electrical Construction Company, Inc., with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendant D&D Electrical Construction Company, Inc. serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 20 days of entry, counsel for Defendant D&D Electrical Construction Company, Inc. shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

1/28/2019  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE