

Burgund v Verizon N.Y. Inc.
2019 NY Slip Op 30495(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 155887/2014
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY
JSC**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19**

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JAMES BURGUND,

Plaintiff,

- v -

VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., TRISTATE FILTER & HVAC SUPPLIES INC., NKD CONSTRUCTION INC., A&S CONSTRUCTION GROUP INC., A&S CONSTRUCTION CORP., JOHN DOE, the Name being fictitious, true name being unknown, and JOHN SMITH, the Name being fictitious, true name being unknown,

Defendants.

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VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., and STRUCTURE TONE CONTRACTING CORP.,

Third-Party Plaintiffs,

- v -

CUSHMAN AND WAKEFIELD, INC.,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 105, 107, 108, 110, 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for RENEWAL

HON. KELLY O'NEILL LEVY:

This is a Labor Law action arising from a trip and fall accident. Plaintiff James Burgund moves for an order, pursuant to CPLR § 2221(e), granting renewal of the previous motion of defendant JT&T Air Conditioning Corp. (hereinafter, JT&T) for summary judgment and dismissal of this action against it. JT&T opposes.

BACKGROUND

This action arises from an injury sustained by plaintiff, a mechanic for Verizon New York, Inc. (hereinafter, Verizon), when he tripped on a condenser pump from a spot cooler in the main area of the second floor of the building located at 360 Bridge Street in Brooklyn (hereinafter, the premises).

This court granted JT&T's motion for summary judgment (mot. seq. 003) and dismissed the action as against it in a Decision and Order dated April 25, 2017 (hereinafter, the April 25, 2017 Decision and Order) [April 25, 2017 Decision and Order (ex. E to the Wiener aff.)]. In the April 25, 2017 Decision and Order, the court relied on the testimony of Nicholas Castell, a service mechanic for JT&T, which established that JT&T did not own any spot coolers prior to 2013 and that the work performed by JT&T at the time was on the roof of the premises and not on the second floor, where the accident had occurred [Deposition of Nicholas Castell (ex. G to the Rice aff. for mot. seq. 003) at 11-13, 30-31].

After this court granted the motion and dismissed JT&T from this action, counsel for defendants Verizon, On Trac Construction Associates, Inc. (hereinafter, On Trac), and Structure Tone Contracting Corp. produced a November 21, 2012 Subcontractor Agreement in which On Trac engaged JT&T to perform work at the premises (hereinafter, the Subcontractor Agreement) [Subcontractor Agreement (ex. F to the Wiener aff.)]. The Subcontractor Agreement stated that JT&T was to replace the air conditioning system of the second floor of the premises.

In the present motion, JT&T provided an affidavit by its Executive Vice President, Puran Tolani, attesting that JT&T's work at the premises in April 2013 was confined to the roof [Puran Tolani Affidavit (ex. A to the Lansky aff.) at ¶ 4]. Mr. Tolani also addressed the Subcontractor Agreement and clarified that the second floor air conditioning replacement work was performed

on the roof of the premises (*id.*). Since JT&T and On Trac failed to produce a copy of the Subcontractor Agreement in a timely manner, prior to both the deposition of Mr. Castell and JT&T's previous motion for summary judgment (mot. seq. 003), this court, in its October 11, 2018 Interim Decision and Order, permitted a further deposition regarding the contents of the Subcontractor Agreement and held its decision on this motion in abeyance pending the further deposition.

JT&T produced Mr. Tolani for a further deposition. He testified that in April 2013, Nicholas Castell and his helper were the only people from JT&T working at the premises, and they were only working on the roof [Deposition of Puran Tolani (ex. B to the Parise supplemental aff.) at 18, 20, 83, 93]. He confirmed that the work JT&T performed in April 2013 was done to service the air conditioning equipment on the second floor (*id.* at 22). He clarified that the work for the air conditioning equipment on the second floor referred to in the Subcontractor Agreement had a counterpart on the roof (*id.* at 50). He stated that the spot coolers referred to in the Subcontractor Agreement were in the mechanical room and were already at the premises when JT&T arrived, that JT&T did not place the spot coolers in the main area of the second floor where the accident occurred, and that the Subcontractor Agreement did not require JT&T to place the spot coolers there (*id.* at 69, 71, 156). He reiterated that JT&T was not responsible for moving the spot coolers in the main area of the second floor and that they did not manipulate or touch those spot coolers (*id.* at 71, 74, 77).

DISCUSSION

CPLR § 2221(e) governs motions to renew and provides that a motion for leave to renew must satisfy three conditions: "(1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall

demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.”

Since this motion was identified as a motion to renew, it was based on the production of the Subcontractor Agreement which was not previously offered in the prior motion and which was related to the involvement of JT&T in this action, and since plaintiff had repeatedly requested the document during the discovery process and did not previously have access to it, the court grants plaintiff’s motion to renew. The court will now reconsider JT&T’s previous motion for summary judgment (mot. seq. 003).

Plaintiff asserts that Mr. Tolani’s testimony contradicts Mr. Castell’s original testimony. Specifically, Mr. Tolani testified that JT&T’s work was not performed in relation to the third and fifth floors, but instead was performed for the second floor air conditioning system. Mr. Castell testified that JT&T performed air conditioning work on the roof for the building’s third and fifth floor air conditioning units. This inconsistency in the testimonies is irrelevant to the court’s decision, as both Mr. Tolani and Mr. Castell testified that JT&T worked on the roof of the premises in April 2013, and not on the second floor, where the accident occurred.

Plaintiff contends that JT&T was contractually obligated to install and maintain the spot coolers on the second floor. Plaintiff asserts that the Subcontractor Agreement establishes that questions of fact exist concerning JT&T’s control and responsibility of the relevant spot cooler. But the Subcontractor Agreement and Mr. Tolani’s testimony do not negate Mr. Castell’s testimony, on which this court based its April 25, 2017 Decision and Order. The Subcontractor Agreement provides that JT&T was to pick up and install all spot coolers as indicated on the relevant drawings, but Mr. Tolani’s testimony clarified that JT&T did not pick up or install any

spot coolers in the main area of the second floor of the premises. Mr. Tolani stated that JT&T worked on the second floor air conditioning system from the roof and that JT&T did not own, place, touch, control, or move the spot coolers in the main area of the second floor where the accident occurred. Plaintiff offers no further evidence that JT&T had anything to do with the spot cooler upon which plaintiff fell. The relevant contractual provisions in the Subcontract Agreement are insufficient to raise an issue of fact regarding the location and nature of JT&T's work at the premises, as well as JT&T's control and responsibility of the relevant spot cooler. Thus, the court adheres to its April 25, 2017 Decision and Order granting summary judgment in JT&T's favor and JT&T remains dismissed from this action.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that plaintiff James Burgund's motion for an order, pursuant to CPLR § 2221(e), granting renewal of the previous motion of defendant JT&T Air Conditioning Corp. for summary judgment and dismissal of this action against it is granted; and is it further

ORDERED, that, upon renewal, the Court adheres to its Decision and Order, dated April 25, 2017, granting said motion for summary judgment and dismissing this action as against defendant JT&T Air Conditioning Corp. in its entirety.

This constitutes the decision and order of the court.

2/28/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

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