

**Morera v New York City Tr. Auth.**

2019 NY Slip Op 31707(U)

June 14, 2019

Supreme Court, New York County

Docket Number: 157570/2014

Judge: William Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY** PART IAS MOTION 23EFM

*Justice*

-----X

DAVID MORERA,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, GEORGE  
COMFORT & SONS, INC, WWP OFFICE, LLC,

Defendant.

INDEX NO. 157570/2014  
MOTION DATE 07/19/2018  
MOTION SEQ. NO. 007

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 177, 178, 179, 180, 181, 182, 183, 195

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is denied.

In this personal injury action, third party defendant First Quality Maintenance II, Inc d/b/a First Quality Maintenance (“FQM”) moves for an Order pursuant to CPLR 3212 (a) granting summary judgment, dismissing the third-party complaint and all third-party claims that have or could be asserted against it. FQM also requests that the court dismiss all counter-claims against third-party plaintiffs as a matter of law, including an award of contractual indemnification from WWP Office LLC (“WWP”).

Plaintiff alleges that he sustained injuries when, while working on a ladder cleaning windows at/near a subway station, when he was struck by a piece of ceiling tile, which fell on him, causing him to fall. FQM states that it had provided the plaintiff with all appropriate and required safety devices with which to perform the window washing in which he was engaged at the time of his accident. Specifically, FQM asserts that plaintiff had been provided the appropriate ladder (specifically designed and intended to be used for window washing), a spotter (Mr. Christian Toledo) and the appropriate window washing cleaning tools.

George Comfort & Sons, Inc. (“George”) and WWP Office, Inc. (“WWP”) seek contractual indemnification and assert breach of contract claims against FQM for failing to procure and maintain insurance. FQM moves to dismiss these claims, asserting that there has been no showing that George and WWP are entitled to contractual indemnification or that FQM breached any contract with respect to insurance procurement.

George and WWP oppose the motion saying that they and FQM entered into a Consulting and Cleaning Management Agreement wherein; FQM was to supply cleaning and janitorial employees as needed to by WWP and; FQM was to maintain the schedule of cleaning employees, provide advice as to the type and quantity of cleaning supplies and perform periodic on-site inspection and; FQM was to indemnify WWP for any claim, suit, etc. arising out of or in connection with any act or omission of FQM or its employees.

George and WWP also assert that FQM’s expert, Mr. Kiska, incorrectly concludes that at the time of the work being performed by plaintiff, FQM was not obligated to provide plaintiff with any equipment beyond the ladder he was utilizing in conjunction with the spotter holding the ladder. George and WWP here claim that FQM’s expert makes the assumption that it does not owe any indemnity because the accident did not arise out of their its or omissions.

In this case, plaintiff’s counsel submitted a safety expert, Kathleen Hopkins, who opined that due to the height of the window at issue, plaintiff should have been provided with a scissor lift, or hoist or boom lift instead of a ladder. She alleges that a lift or hoist could have prevented the fall. That expert claims that the equipment provided by FQM for the purposes of cleaning may not have been enough to prevent plaintiff’s fall.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient evidence to demonstrate the absence of a material issue of fact as a matter of law. *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986); *Zuckerman v. City Of New York*, 49 NY2d 557 (1980). Thus, a defendant seeking summary judgment must establish prima facie entitlement to judgment as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof. *Mondello v. DiStefano*, 16 AD3d 637 (2005).

Once movant meets her initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact, *Zuckerman* at 562.

Moreover, when deciding a motion for summary judgment, the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. The Court's role is issue finding not issue determination. *Sillman v. Twentieth Century Fox*, 3 NY2d 395 (1957).

In the case at bar, an issue of fact exists as to whether plaintiff was injured because of an act or omission of FQM under the contract, namely the providing of certain equipment which may not have been proper. Therefore, the Court will not dismiss the Third-party complaint, as there are competing opinions as to whether the equipment provided to plaintiff was proper. In addition, the actual cause of plaintiff's fall creates a triable issue of fact, as it could be found that the falling tile in addition to the improper equipment allegedly provided by FQM both contributed to the plaintiff's accident. In that view of this case, WWP would be entitled to partial contractual indemnification from FQM based upon FQM's acts/omission in providing the ladder.

As there are issues of fact which must be decided by the trier of fact, the motions for summary judgment and dismissal of the Third-party complaints are denied.

This is the decision and order of the Court.

6/14/2019

DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE