

Haynes v Penrith URF LLC

2019 NY Slip Op 32232(U)

July 25, 2019

Supreme Court, New York County

Docket Number: 150347/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 150347/2017

STANLEY HAYNES,

Plaintiff,

MOTION SEQ. NO. 006

- v -

PENRITH URF LLC, CENTRAL DEVELOPMENT CORP., CDC HOUSING, INC., AMERICAN STAIR BUILDERS CORP., ERIC & NG ELECTRICAL INC., AMC PLUMBING, HEATING & COOLING, INC., and CITY HOUSING CONSTRUCTION CORP. A/K/A CITY HOUSING CORPORATION,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action, defendant American Stair Builders Corp. (ASB) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. After a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on August 4, 2016 in which plaintiff Stanley Haynes was injured when he fell through an interior stairway located at 1290 Bergen Street, Brooklyn, New York (“the premises”), where a construction project was underway. As a result of the incident, plaintiff commenced the captioned action against defendants Penrith URF LLC (“Penrith”), Central Development Corp. (“Central”), CDC Housing, Inc. (“CDC”), American Stair Builders Corp. (“ASB”), Eric & NG Electrical Inc. (“Eric”), and AMC Plumbing, Heating

& Cooling (“AMC”) on January 11, 2017. Doc. 1. Plaintiff alleged, inter alia, that defendants owned, controlled, managed, supervised, or performed work at the premises. Doc. 1.

ASB joined issue by its verified answer filed February 22, 2017. Doc. 16.

Penrith joined issue by its answer filed March 13, 2017. Doc. 17. In its answer, Penrith cross-claimed against Central, CDC, ASB, Eric and AMC for contribution and common-law and contractual indemnification. Doc. 17.

Eric joined issue by its answer filed June 6, 2017. Doc. 20. In its answer, Eric cross-claimed against Penrith, Central, CDC, ASB, and AMC for contribution and (unspecified) indemnification. Doc. 20.

CDC joined issue by its answer filed August 18, 2017. Doc. 39. In its answer, CDC cross-claimed against each of the other defendants, including ASB, for contribution and (unspecified) indemnification. Doc. 39.

AMC joined issue by its answer filed September 18, 2017. Doc. 45. In its answer, AMC cross-claimed against Penrith, Central, CDC, ASB, and Eric for contribution and common-law and contractual indemnification. Doc. 45.

Central joined issue by its answer filed September 21, 2017. Doc. 47. In its answer, Central cross-claimed against Penrith, CDC, ASB, Eric, and AMC for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 47.

On or about September 29, 2017, plaintiff amended the complaint to name City Housing Construction Corp. a/k/a City Housing Corporation (“CHC”) as a defendant. Doc. 58.

CDC filed an answer to the amended complaint on October 5, 2017. Doc. 61. CDC again cross-claimed against all defendants for contribution and (unspecified) indemnification. Doc. 61.

Penrith filed an answer to the amended complaint on October 13, 2017. Doc. 63. In its answer, Penrith cross-claimed against all defendants for contribution and common-law and contractual indemnification. Doc. 63.

Eric filed an answer to the amended complaint filed October 13, 2017. Doc. 64. In its answer, Eric cross-claimed against all defendants for contribution and (unspecified) indemnification. Doc. 64.

ASB filed an answer to the amended complaint filed October 30, 2017. Doc. 69.

Central filed an answer to the amended complaint filed January 12, 2018. Doc. 74. In its answer, Central cross-claimed against all defendants for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 74.

CHC filed an answer to the amended complaint on January 18, 2018. Doc. 75. In its answer, CHC cross-claimed against all defendants except CDC for contribution and (unspecified) indemnification. Doc. 75.

AMC filed an answer to the amended complaint on January 22, 2018. Doc. 76. In its answer, AMC cross-claimed for contribution and (unspecified) indemnification. Doc. 76.

CHC filed an amended answer to the amended complaint on April 3, 2018. Doc. 85. In its amended answer, CHC cross-claimed against all defendants except CDC for contribution and (unspecified) indemnification. Doc. 85.

On or about November 2, 2018, AMC moved for summary judgment dismissing all claims and cross claims against it. Doc. 135. By order dated entered February 5, 2019, this Court granted the motion and dismissed all claims and cross claims against AMC without prejudice. Doc. 181.

In his bill of particulars, plaintiff alleged that he was injured on an interior stairway at the premises which led from the first floor to the “garden level floor” below. Doc. 189 at par. 2. He claimed that the defendants created and had actual and/or constructive notice of the dangerous condition of the stairway. Doc. 189 at pars. 3, 6, 7, 9. He further alleged that the defendants were negligent and violated Labor Law sections 200, 240(1), and 241(6). Doc. 189 at par. 3.

At his deposition, plaintiff testified that, as of the date of the accident, he was employed by nonparty Dixon Advisory as a security supervisor. Doc. 193 at 9-10. Plaintiff entered the premises on the first floor, where “heavy construction” was underway, and, as he was descending a staircase to the main/ground/garden level floor, “the entire staircase collapsed.” Doc. 193 at 77-78.

ASB now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Docs. 185-197. In support of the motion, ASB submits, inter alia, the pleadings, plaintiff’s bill of particulars, an affidavit by its president, Giuseppe Ferrara, plaintiff’s deposition transcript, and invoices reflecting the dates on which ASB delivered prefabricated staircases to the premises. The motion is unopposed.

In his affidavit in support of the motion, Ferrara states that ASB manufactures, but does not install, stairs. Doc. 192. He further states that ASB did not install any stairs at the premises. Doc. 192. Although ASB constructed new staircases that were installed at the premises, they were not installed until after August 4, 2016. Doc. 192. Ferrara represents that, in September, 2016, ASB was hired by CDC Builder LLC¹ to build two wood staircases which were to be installed at the premises. Doc. 192. In September 2016, Ferrara visited the premises to take measurements so that the stairs could be built. Doc. 192. After the measurements were taken,

¹ Ferrara does not state whether CDC Builder LLC is related in any way to defendants Central Development Corp. or CDC Housing, Inc.

ASB fabricated the two sets of stairs, which were delivered to the premises in October and November of 2016, respectively, as confirmed by invoices annexed to his affidavit. Doc. 192. ASB did not perform any work at the premises, or direct or supervise any employee of Dixon Advisory USA Inc. at any time prior to August 4, 2016 and was never a general contractor or construction manager at that location. Doc. 192.

By the return date of the motion, May 14, 2019, none of the parties had submitted any opposition. On that date, counsel for all parties except CDC appeared before this Court, at which time plaintiff's counsel agreed to file a stipulation discontinuing all of plaintiff's claims against ASB. All counsel present agreed that the branch of ASB's motion seeking dismissal of the cross claims against it was to be submitted on the motion papers. Later that day, plaintiff's counsel filed a stipulation discontinuing "the plaintiff's complaint and any and all cross claims against [ASB]", although the stipulation was signed only by counsel for the plaintiff and ASB. Doc. 206.

LEGAL CONCLUSIONS:

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].)

ASB has established its prima facie entitlement to summary judgment dismissing all cross claims against it by demonstrating that, prior to the date of the incident, it lacked any connection to the stairway where plaintiff fell. *See Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 615-616 (1st Dept 2017); *see also Cusumano v AM&G Waterproofing, LLC*, 160 AD3d 922, 923 (2d Dept 2018). This showing shifted the burden to the cross-claiming codefendants, who were then required to submit evidence raising a triable issue of fact. However, since none of the defendants opposed the motion, they did not raise an issue of fact and the motion must be granted. *See Kellogg*, 146 AD3d at 615-616; *Cusumano*, 160 AD3d at 923.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendant American Stair Builders Corp. seeking to dismiss the complaint is denied as moot; and it is further

ORDERED that the branch of the motion by defendant American Stair Builders Corp. seeking to dismiss all cross claims asserted against it is granted; 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 of defendant American Stair Builders Corp. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, counsel for defendant American Stair Builders Corp. is to serve a copy of this order with notice of entry on all parties and on the General Clerk's Office at 60 Centre Street, Room 119, and the Clerk is directed to note the dismissal of that defendant and the change in the caption; and it is further

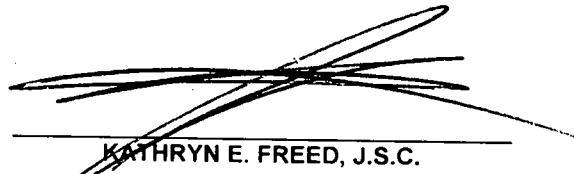
ORDERED that the Clerk of the Court is directed to enter judgment dismissing all claims against defendant American Stair Builders Corp.; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference on September 10, 2019 at 2:15 PM in Room 280 at 80 Centre Street; and it is further

ORDERED that this constitutes the order and decision of this Court.

7/25/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: