

**Pooler v Shawmut Design & Constr.**

2019 NY Slip Op 32607(U)

September 3, 2019

Supreme Court, New York County

Docket Number: 160812/2016

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

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INDEX NO. 160812/2016

HOWARD POOLER,

MOTION SEQ. NO. 001

Plaintiff,

- against -

SHAWMUT DESIGN AND CONSTRUCTION, COLUMBIA  
UNIVERSITY, COLUMBIA UNIVERSITY TEACHERS  
COLLEGE, STATEWIDE CONTRACTING GROUP, CORP.,  
and STATEWIDE DEMOLITION CORP.,

DECISION AND ORDER

Defendants.

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SHAWMUT DESIGN AND CONSTRUCTION, COLUMBIA  
UNIVERSITY, and COLUMBIA UNIVERSITY TEACHERS  
COLLEGE,

Third-Party  
Index No. 595473/2018

Plaintiffs,

-against-

CURTIS PARTITION CORP.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action, defendant Statewide Demolition Corp. (“Statewide Demolition”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Howard Pooler and the cross claims of co-defendants Shawmut Design and Construction (“Shawmut”), Columbia University, Columbia University Teachers College (“Columbia”), and Statewide Contracting Group, Corp. (“Statewide Contracting”) and third-party defendant Curtis

Partition Corp. (“Curtis”). Plaintiff opposes the motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

Plaintiff alleges that he sustained injuries on the morning of January 31, 2014, when he tripped over hoses near a stairway at 509 West 121st Street in Manhattan. (Doc. 39 at 1–3.) Defendant Columbia was the owner of the premises. (Docs. 31 at 5; 43 at 6.) In undertaking a renovation project for a building known as Bancroft Hall, Columbia contracted with defendant Shawmut to serve as the construction manager on the project. (Docs. 31 at 5; 43 at 6.) Shawmut, as construction manager, contracted with defendant Statewide Contracting to perform demolition work (Docs. 31 at 5; 45) and with third-party defendant Curtis to perform drywall work (Docs. 31 at 5; 44). Statewide Demolition performed carting services on the project. (Doc. 31 at 5.)

Plaintiff filed a summons and complaint on December 23, 2016. (Doc. 33.) In the complaint, he asserted three causes of action against Shawmut, Columbia, Statewide Contracting, and Statewide Demolition: (1) negligence/New York Labor Law § 200 (*id.* at 24–25); (2) violations of Labor Law § 241(6) (*id.* at 25–27); and (3) violations of Labor Law § 240 (*id.* at 27–28). Shawmut and Columbia filed a third-party summons and complaint against Curtis on June 13, 2018. (Doc. 37.) In their answer, Shawmut and Columbia asserted cross claims against Statewide Demolition for contribution and indemnification.<sup>1</sup> (Doc. 34 at 7–8.) In its third-party answer, Curtis also asserted claims against Statewide Demolition for contribution and indemnification. (Doc. 38 at 6.)

Statewide Demolition now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it (Doc. 30) on the ground that it cannot be found liable for plaintiff’s accident because it did not perform any work inside the premises where

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<sup>1</sup> Statewide Contracting did not assert cross claims against Statewide Demolition. (*See* Doc. 35 at 10–13.)

plaintiff fell (*see* Doc. 32 at 6) and because, even though it did carting work outside the premises, it did not commence doing any work until six months after the accident (*see id.* at 2). Plaintiff opposes the motion on the grounds that it is premature because depositions have not been held (Doc. 47 at 2) and that there are issues of fact because photographs of carts annexed as exhibits to his bill of particulars depict equipment (i.e., the carts) belonging to Statewide Demolition (*id.* at 3–4).

This Court finds that the motion must be granted. A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*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].)

Statewide Demolition established its prima facie entitlement to dismissal of plaintiff's claims by submitting an affidavit by its president, Piero Musso ("Musso") (Doc. 41), who represents that Statewide Demolition performed carting services from July 15, 2014, to August 25, 2015 (*id.* at 2). This work involved providing metal carts to laborers—who were not employed by Statewide Demolition—so that they could place debris and other materials in them. (*Id.*) When the carts were full, the laborers would bring them to a curb outside the premises, at which point Statewide Demolition would send drivers to pick up the carts. (*Id.*) This work did not require any of Statewide Demolition's drivers to enter the interior of the premises. (*Id.* at 3.)

It is apparent from these facts that the complaint must be dismissed as against Statewide Demolition. Plaintiff's claims for common law negligence and Labor Law § 200—which is a

codification of an owner's or general contractor's common law duty of care toward construction site workers (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012])—must fail since plaintiff's injury occurred six months before Statewide Demolition began its work on the project. Thus, it cannot be said that Statewide Demolition either exercised supervisory control over the work that led to his injury or that it created the defective condition on the premises. (*See Prevost v One City Block LLC*, 155 AD3d 531, 533–34 [1st Dept 2017] (outlining the test for liability under Labor Law § 200).) Similarly, plaintiff's Labor Law §§ 240(1) and 241(6) causes of action are untenable as against Statewide Demolition, since under those sections liability for construction site accidents is limited to owners and general contractors or their statutory agents. (*See Urban v No. 5 Times Square Dev.*, 62 AD3d 553, 554 [1st Dept 2009] (dismissing Labor Law claims where defendant was not an owner, general contractor, or agent).)

Plaintiff failed to raise an issue of fact in opposition to the motion. He argues that the motion should be denied as premature (Doc. 47 at 2), but a “grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000].) This potential relevant evidence, he maintains, stems from photographs annexed to his bill of particulars which depict Statewide Demolition's materials on the premises and from the fact that there are missing pages from the contract between defendants Shawmut and Statewide Contracting. (Doc. 47 at 3–4.) Thus, he argues that this evidence can shed more light regarding Statewide Demolition's scope of work on the project. (*Id.*) However, after viewing the photographs in NYSCEF Document 39, this Court finds plaintiff's arguments unpersuasive. The materials owned by Statewide Demolition that are depicted in the pictures are carts, which nevertheless do not implicate Statewide Demolition in plaintiff's accident because he alleges that he tripped over

a hose. With respect to his argument that the contract *may* be incomplete (Doc. 47 at 3 (“As this document *may* be incomplete, as there *may* be additional sections relevant to the issues at hand . . .”) (emphasis added)), that argument is based on mere speculation.

Since the complaint must be dismissed as against Statewide Demolition, all cross claims for contribution and indemnification against that entity are dismissed as well.

In accordance with the foregoing, it is hereby:

**ORDERED** that defendant Statewide Demolition Corp.’s motion to dismiss the complaint of Howard Pooler as well as all cross claims asserted against it by defendants and third-party defendant is granted; and it is further

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

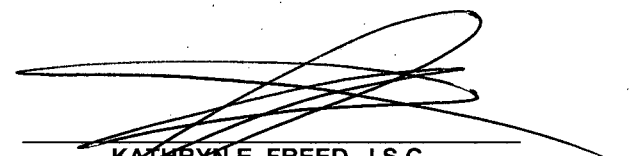
**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein and to enter judgment dismissing the case as against defendant Statewide Demolition Corp.; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

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

9/3/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

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