

De Souza v Empire Tr. Mix, Inc.
2019 NY Slip Op 32611(U)
August 13, 2019
Supreme Court, Kings County
Docket Number: 502147/2013
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 03rd day of August, 2019.

PRESENT:

HON. WAVNY TOUSSAINT

Justice.

-----X
JEFFERSON DE SOUZA

Plaintiff,

Index No. 502147/2013

-against

EMPIRE TRANSIT MIX, INC, OCA LONG ISLAND CITY, II, LLC. MCGOWAN BUILDERS INC., CASINO DEVELOPMENT GROUP, INC, LIC RES, LLC, S.N.A CONCRETE PUMPING CORP. and P & L PUMPING, INC
Inc.

Defendants.

ORDER

2019 AUG 30 AM 8:35
KINGS COUNTY CLERK
FILED

-----X
CASINO DEVELOPMENT GROUP, INC

Third-Party Plaintiff,

- against -

GENUINE CONSTRUCTION SERVICES, INC

Third-Party Defendant.
-----X

2019 AUG 30 AM 8:25
KINGS COUNTY CLERK
FILED

The following papers numbered 1- to read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-12 _____
Opposing Affidavits (Affirmations) _____	13-29 _____
Reply Affidavits (Affirmations) _____	30-35 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Defendant/Third Party Plaintiff Casino Development Group's motion (Seq 22), seeking summary judgment, dismissing plaintiff's Labor Law §240 claim against all defendants; dismissal of plaintiff's negligence and Labor Law claims; and summary judgment on its third party claim over and against Genuine Construction Services, for contractual indemnification, is granted to the extent that the plaintiff's § 240 (1) claim is dismissed; and the motion is otherwise denied. The accident alleged herein does not involve an elevation related risk, thus Labor Law § 240 is inapplicable. However, questions of fact exist as to the extent of defendant Casino's supervision and control over the activity and work performed at the job site, based on among other things the assertions of third party defendant Genuine that defendant Casino had a duty, under its contract to supervise the companies responsible for the concrete work and was responsible for compliance with all safety rules and regulations.

Defendant LIC RES, LLC's motion for summary judgment (Seq 23), seeking dismissal of plaintiff's Labor Law causes of action; and granting LIC RES, LLC contractual indemnification, is granted to the extent that the plaintiff's claim pursuant to Labor Law § 240(1) is dismissed; the motion is otherwise denied. The plaintiff has alleged that he was

not provided with eye protection. Labor Law § 241(6) imposes non-delegable duties upon owners. A question of fact exists as to whether plaintiff failed to make use of eye protection, which third party defendant Genuine, the plaintiff's employer alleges was readily available.

Plaintiff's motion for partial summary judgment on his Labor Law § 241(6) cause of action (Seq 24), is denied. There are questions of fact as to whether adequate eye protection was available but not used by the plaintiff, in light of the testimony of Mr. Rodriguez who directed plaintiff in his work and was a co-employee of third party defendant Genuine Construction Services, Inc.

Defendant McGowan Builders, Inc's motion for summary judgment (Seq 25) seeking dismissal of plaintiff's Labor Law causes of action is granted to the extent that the plaintiff's claim pursuant to Labor Law § 240(1) is dismissed; the motion is otherwise denied. Plaintiff alleges that pursuant to the construction management contract, McGowan had safety duties at the project site; and that McGowan's project manager testified that he was on site daily and observed workers without safety goggles, but took no action, as required by the contract.

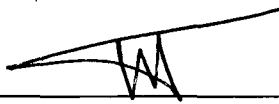
Defendant Empire Transit Mix's motion for summary judgment (Seq 26), seeking dismissal of all claims and cross claims is granted to the extent that all claims asserted against it pursuant to Labor Law §§ 200, 240(1) and 241(6) are dismissed; the motion is otherwise denied. Questions of fact exist as to whether any clog which caused the hose in question to explode came from the concrete mix itself, in light of inter alia, the examination before trial testimony of non-party Twin Peaks, suggesting that concrete inspection rules were not fully followed, in among other things the preparation of the concrete mix.

Defendant OCA Long Island City II, LLC's motion for summary judgment (Seq 27) is granted. All claims and cross claims against this defendant are hereby dismissed. Defendant has established that it was not an owner of the subject property at the time of plaintiff's accident and never contracted with defendant McGowan for any construction work. Defendant P & L's argument that defendant OCA may bear some liability, as trucks containing concrete for the project were staged on property owned by defendant OCA is not persuasive.

The action shall be severed and shall continue as against the remaining defendants.

This constitutes the decision and order of the court.


ENTER



 J.S.C.

HON. WAVNY TOUSSAINT
 J.S.C.

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