

Canzolneri v City of New York
2019 NY Slip Op 34116(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 114128/09
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42**

-----X
ROBERT CANZOLNERI,

Plaintiff,

- against -

Index No. 114128/09

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF SANITATION, A&F FIRE
PROTECTION CO., INC., TULLY
CONSTRUCTION CO, INC. and DART
MECHANICAL CORP.

DECISION and ORDER

Defendants.

-----X
DART MECHANICAL CORP.,

Third-Party Plaintiff,

- against -

ADVANCED AUTOMATIC SPRINKLER
COMPANY, INC.,

Third-Party Defendant.

-----X
TULLY CONSTRUCTION CO, INC.,

Second Third-Party Plaintiff,

- against -

BOVIS LEND LEASE, LMB, INC.,

Second Third-Party Defendant.

-----X
HON. NANCY BANNON, J.:

Motion sequence numbers 11, 13, 14, and 15 are consolidated for disposition.

In this action for personal injuries asserting violations of labor law, defendant / third-party plaintiff Dart Mechanical Corp. (Dart) moves for an order: 1) pursuant to CPLR 3212, for

summary judgment seeking dismissal of plaintiff's claims as well as all cross claims, counter claims and any other claims as against it; and 2) for summary judgment granting its claims for contractual indemnification against third-party defendant Advanced Automatic Sprinkler Company, Inc. (Advanced) (motion sequence 11).

Defendant A&F Fire Protection Co., Inc (A&F) and third-party defendant Advanced cross move for and order: 1) dismissing plaintiff's complaint, 2) denying the branch of Dart's motion seeking summary judgment on its contractual indemnification claims as against Advanced, 3) dismissing all cross claims as against them (motion sequence 11).

Defendant / second third-party plaintiff Tully Construction Co., Inc. (Tully) moves for summary judgment, seeking dismissal of all claims, cross claims, and third-party counter claims as against it (motion sequence 13).

Second third-party defendant Bovis Lend Lease LMB, Inc. (Bovis) moves for an order: 1) pursuant to CPLR 3212, for summary judgment seeking dismissal of plaintiff's complaint; 2) for summary judgment dismissing all cross claims, counter claims and any other claims as against it, and 3) denying the branches of the motions by Advanced, Tully, and Dart seeking dismissal of cross claims asserted against them by Bovis (motion sequence 14).

Defendants the City of New York and New York City Department of Sanitation (collectively City defendants) move for an order: 1) seeking leave to amend the answer of the City defendants to assert cross claims against Advanced and Bovis, 2) granting summary judgment dismissing plaintiff's complaint as well as any and all cross claims, counterclaims, or third-party claims asserted against them, and 3) conditional summary judgment for contractual indemnification claims asserted against Tully, Bovis and Advanced (motion sequence 15).

BACKGROUND

Plaintiff Robert Canzoneri alleges that, on March 17, 2009, he was caused to fall (the accident) while on the second floor (jobsite) of a four-story sanitation garage owned by the City defendants (plaintiff tr at 41, 48). The sanitation garage encompasses two addresses known as 780 12th Avenue New York, NY and 650 West 57th Street, New York, NY (the premises) (*id.* at 24). City defendants were constructing a sanitation garage at the premises (the project) (Simon Fridman for City defendants tr at 11-12, 14-15). Bovis was the construction manager for the project (*id.* at 14). Dart was the HVAC / mechanical prime contractor for the project, and Tully was the general construction prime contractor for the project and also responsible for cleaning the sanitation garage (*id.* at 15-17, 38). At the time of the accident, plaintiff was employed by Advanced as a union foreman responsible for a five-person crew at the jobsite (plaintiff tr at 22-24).

Plaintiff testified during his deposition that before the accident, he was carrying a pipe on his right shoulder with another coworker (*id.* at 52). They were carrying the pipe five to ten feet from a pile to a nearby scissor lift (*id.*) The pipe was then going to be affixed to the beams of the premises as part of the sprinkler system (*id.* at 44). Plaintiff testified that he fell to the ground as he was walking forward with the pipe (*id.* at 51 - 56). He stated that he “stepped on some debris or the ramp that was designated for [his] lift and something broke under [his] feet or [his] leg gave out from the debris” (*id.* at 51). Plaintiff further testified that “[i]t happened so fast,” and “[he] didn’t know if the ramp broke or it was something else in the area that [he] stepped on that broke.” (*id.* at 54). When specifically asked if he had any recollection of what debris caused him to fall, plaintiff stated that, “[he] didn’t see what [he] stepped on” (*id.* at 107). When specifically

asked if he knew what caused him to fall, he testified that, “[he] honestly [had] no idea” (*id.* at 116-117).

Plaintiff commenced this action against defendants on September 2, 2010. Dart then brought a third-party action against Advanced, and Tully brought a second third-party action against Bovis.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent “to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Dart, Tully, Bovis, and City defendants move for summary judgment dismissing plaintiff’s complaint in its entirety, arguing that plaintiff is unable to identify the cause of his alleged fall. A&F and Advanced cross move for summary judgment on the same basis. “It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury” (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]). “Although a plaintiff bears no

burden to identify precisely what caused [his] . . . fall, mere speculation about causation is inadequate to sustain the cause of action” (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009]). “[M]ere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action” (*Costantino v Webel*, 57 AD3d 472, 472 [2d Dept 2008]).

Based on plaintiff’s deposition testimony, all moving defendants have established a prima facie case for summary judgment to dismiss plaintiff’s complaint as a matter of law (*Smith v City of New York*, 91 AD3d 456, 456 [1st Dept 2012] [upholding dismissal of plaintiff’s claim where “[p]laintiff testified at her deposition that she had ‘no idea’ how she tripped and fell]”); *Fishman v Westminster House Owners, Inc.*, 24 AD3d 394, 394 [1st Dept 2005] [finding that “[a]lthough plaintiff’s pleadings allege that he slipped and fell on a wet ramp . . . his deposition testimony that . . . he simply does not know what caused him to slip and fall, prima facie establishes defendants’ entitlement to judgment as a matter of law”]). Plaintiff speculates that he fell on something, but plaintiff does not know what caused him to fall. Plaintiff testified that, “[he] didn’t see what [he] stepped on,” and when specifically asked if he knew what caused him to fall, he testified that, “[he] honestly [had] no idea” (plaintiff tr at 107, 116-117). Thus, plaintiff offers no basis, other than speculation, on the cause of his fall. Because the allegations of negligence and causation are based entirely on speculation, and may not be reasonably inferred, the branches of the motions for summary judgment of Dart, Tully, Bovis, and City defendants and the branch of the cross motion for summary judgment of A&F and Advanced seeking to dismiss plaintiff’s complaint in its entirety are granted (*see Rivera v Adinolfi*, 249 AD2d 55, 57 [1st Dept 1998]).

In light of the dismissal of the main action insofar as asserted against defendants, the remaining branches of the motions of Dart, Tully, Bovis, and City defendants, and the remaining branches of the cross motion by A&F and Advanced are dismissed as academic or moot (*see Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 538-539 [2d Dept 2005]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]).

The court need not reach any remaining contentions.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branches of the motions for summary judgment by Dart Mechanical Corp. (motion sequence 11), Tully Construction Co., Inc. (motion sequence 13), Bovis Lend Lease LMB, Inc. (motion sequence 14), and City of New York and New York City Department of Sanitation (motion sequence 15) and the branch of the cross motion for summary judgment by Advanced Automatic Sprinkler Company, Inc. and A&F Fire Protection Co., Inc. (motion sequence 11) dismissing plaintiff's complaint in its entirety are granted, and plaintiff's complaint against Dart Mechanical Corp., Tully Construction Co., Inc., and City of New York and New York City Department of Sanitation is dismissed with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that the remaining branches of the motions for summary judgment by Dart Mechanical Corp. (motion sequence 11), Tully Construction Co., Inc. (motion sequence 13), Bovis Lend Lease LMB, Inc. (motion sequence 14), and City of New York and New York City Department of Sanitation (motion sequence 15) and the remaining branches of the cross motion for summary judgment by Advanced Automatic Sprinkler Company, Inc. and A&F Fire Protection

Co., Inc. (motion sequence 11) are denied as moot.

This constitutes the Decision and Order of the court.

ENTER:

Dated: October 15, 2019



J.S.C.

HON. NANCY M. BANNON

FILED
OCT 31 2019
NEW YORK COUNTY
COUNTY CLERK