

Cuddihy v Bronx Pro Group LLC

2019 NY Slip Op 35066(U)

September 23, 2019

Supreme Court, Bronx County

Docket Number: Index No. 25624/2019

Judge: Lucindo Suarez

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
COUNTY OF BRONX: PART 19

Mtn. Seq. # 1

BRIAN CUDDIHY,

Index No.: 25624/2019

Plaintiff,

- against -

DECISION and ORDER

BRONX PRO GROUP LLC, DREAMYARD
1017 HOME STREET HOUSING DEVELOPMENT
FUND CORPORATION, HOME BUILDERS 1 L.P.,
INSPIRON CONSTRUCTION, LEMLE & WOLFF,
CONSTRUCTION CORP., 1017 HOME STREET
PARTNERS LLC, TPM MANAGEMENT LLC and
BRONX PRO REAL ESTATE MANAGEMENT INC.,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issues in Defendant Lemle & Wolff Construction Corp's. ("L&W") motion for summary judgment are whether it made a *prima facie* showing that Plaintiff's complaint should be dismissed and whether it should be entitled to reasonable attorneys' fees and costs. The court finds that L&W established its *prima facie* burden for a dismissal of Plaintiff's complaint as Plaintiff failed to raise any triable issues of fact with respect to same. However, the court finds that its request for reasonable attorneys' fees and costs is without merit.

This action was commenced by Plaintiff for injuries he allegedly sustained while he was working on a construction site in May 2018. Here, L&W contended that it should be dismissed from this matter as it was not the owner of the subject construction site nor the general contractor. Moreover, L&W argued that it was not contracted to perform any work or provide any services at the subject construction site. Further, it maintained that it did not contract or

subcontract Exterior Erecting Services, Inc., alleged to be Plaintiff's employer to perform any work or provide any services at the subject construction site. Lastly, L&W argued that it was not involved with any work performed at the subject premises during the relevant time periods. L&W factually buttressed its arguments by attaching the affidavit of L&W's General Counsel, Kevin G. Thurman, who averred same.

In opposition, Plaintiff posited that the instant motion should be denied as it was prematurely made since discovery is in its infancy. Plaintiff argued that discovery could yield information tying L&W in some manner to Plaintiff's injury-producing work. In addition, Plaintiff attached an unverified printout of a work permit data form from the New York City Department of Buildings' ("DOB") website issued in relation to the subject construction site. Plaintiff argued that DOB's work permit provided that Lorenzo Jr. Lazala was the Superintendent of Construction and that he also listed his business as L&W. Furthermore, Plaintiff provided an internet search purporting to list Mr. Lazala as employed by L&W.

However, in reply, L&W provided an affidavit sworn to by Mr. Lazala rebutting Plaintiff's assertions that he was employed by L&W during the relevant time periods. He further averred that he inadvertently listed L&W on the DOB work permit, and that he did not have authority from L&W to do so. This was confirmed by the supplemental affidavit of Mr. Thurman and L&W's business records, which indicated that Mr. Lazala's employment with L&W was terminated effective September 2017, and that subsequent thereto Mr. Lazala had no authority to act on behalf of L&W.

Thus, the court finds that Plaintiff's argument with respect to discovery is unavailing. He cannot avoid summary judgment by speculating that discovery will provide the necessary evidence to demonstrate that L&W was involved with Plaintiff's injury-producing work. *See*

Baxter St. Condominium v. LPS Baxter Holding Co., LLC, 126 A.D.3d 417, 5 N.Y.S.3d 52 (1st Dep't 2015).

Moreover, even if the court was to consider Plaintiff's argument with respect to the unverified DOB work permit it was effectively rebutted by Mr. Lazala's and Mr. Thurman's affidavits and L&W's business records, which directly undermined Plaintiff's theory that L&W could possibly be involved with his injuries. Therefore, the court finds that Plaintiff does not possess a factual basis to assert Labor Law §§200, 240(1), and 241(6) claims against L&W.

With respect to L&W's request seeking reasonable attorneys' fees and costs the court finds it is meritless. Plaintiff's complaint against L&W was not "completely without merit in law," as he did have good faith basis based upon the DOB work permit to commence this action against it, therefore, his conduct does not warrant the imposition of a sanctions under 22 NYCRR §130-1.1 (a)(1)(2)(3) or CPLR §8303-a. *See Retina Assoc. of Long Is., P.C. v. Rosberger*, 299 A.D.2d 533, 751 N.Y.S.2d 50 (2d Dep't 2002).

Accordingly, it is

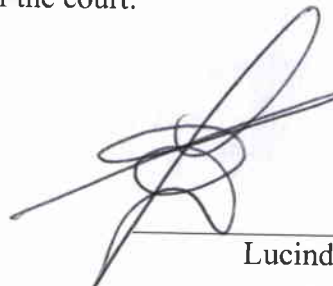
ORDERED, that L&W's application seeking to dismiss Plaintiff's complaint is granted; and it is further

ORDERED, that L&W's application seeking reasonable attorneys' fees and costs is denied; and it is further

ORDERED, that the Clerk of Court shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: September 23, 2019



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.