

**Caracciolo v SHS Ralph, LLC**

2019 NY Slip Op 35098(U)

June 11, 2019

Supreme Court, Kings County

Docket Number: Index No. 512132/2016

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 11th day of June, 2019

HONORABLE FRANCOIS A. RIVERA  
-----X  
RICHARD CARACCILOLO,

Plaintiff,

- against -

**DECISION & ORDER**  
Index No. 512132/2016  
Motion Seq. 8, 10, & 11

SHS RALPH, LLC, DINA REALTY LLC and  
WILCOX DEVELOPMENT CORP.

Defendants.  
-----X

SHS RALPH, LLC

Third-Party Plaintiff,

- against -

THYSSENKRUPP ELEVATOR CORPORATION,

Third-Party Defendant.  
-----X

By notice of cross motion, filed on January 2, 2019, under motion sequence eight, defendant/third-party plaintiff SHS Ralph LLC's (hereinafter SHS Ralph) moved pursuant to CPLR 3212 for an order granting summary judgment in its favor on the issue of liability as against: (1) plaintiff Richard Caracciolo's (hereinafter Caracciolo or

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plaintiff) and dismissal of the complaint; (2) defendant Wilcox Development Corp. on its claim against it for indemnification; and (3) third-party defendant Thyssenkrupp Elevator Corporation (hereinafter TEC) on its claim against it for indemnification.

On January 31, 2019, third-party defendant TEC filed a notice of motion, under motion sequence ten, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability as against: (1) plaintiff and dismissal of the complaint; and (2) SHS Ralph and dismissing the third-party complaint.

On March 15, 2019, SHS Ralph filed a notice of cross motion, under motion sequence eleven, for an order: (1) pursuant to CPLR 3212, granting summary judgment on its third-party complaint against TEC; (2) pursuant to CPLR 3126, striking the pleadings of TEC for failing to respond to SHS Ralph's disclosure demands; and (3) pursuant to CPLR 3124, directing TEC to comply with SHS Ralph's disclosure demands.

After oral argument on June 4, 2019, the motions are decided as follows.

As to SHS Ralph's motion, under motion sequence eight, the Court finds that there were triable issues of fact as to the scope and nature of the work plaintiff was supposed to perform. There were also triable issues of fact as to whether the safety devices provided to the plaintiff were sufficient under the circumstances and whether the plaintiff was the sole proximate cause of his injury. Therefore, the branch of SHS's motion relating to claims pursuant to Labor Law § 240 (1) is denied.

SHS Ralph also sought dismissal of Caracciolo's Labor Law § 241 (6) claims.

With the exception of New York Industrial Codes 12 NYCRR 23-1.7(b)(1)(i) and 12 NYCRR 23-1.7(b)(1)(ii), SHS Ralph did not receive opposition to their motion regarding the dismissal of the other Industrial Codes in plaintiff's complaint. Thus, the other Industrial Code violations claimed by plaintiff are dismissed as abandoned. As to the remaining New York Industrial Codes provisions, 12 NYCRR 23-1.7(b)(1)(i) and 12 NYCRR 23-1.7(b)(1)(ii), regarding a "hazardous opening," SHS Ralph has made a prima facie showing that they do not pertain to the subject accident and plaintiff did not raise a triable issue of fact as to their applicability (*see Pope v Safety and Quality Plus, Inc.*, 74 AD3d 1040, 1041 [2nd Dept 2010]). Therefore, SHS Ralph's request for summary judgment in its favor on the issue of liability pursuant to Labor Law § 241 (6) is granted.

SHS Ralph sought dismissal of plaintiff's Labor Law § 200 claims but it did not receive opposition to its motion from Caracciolo. Therefore, Caracciolo's Labor Law § 200 claims are dismissed as abandoned as against SHS Ralph.

SHS Ralph did not demonstrate that Wilcox had control over the plaintiff's work to establish prima facie entitlement to summary judgment for common law indemnification. Therefore, this branch of SHS Ralph's motion for summary judgment on its cross claim for common law indemnification as against Wilcox is denied. SHS Ralph withdrew the branch of its motion which sought contractual indemnification against Wilcox.

SHS Ralph's motion also sought summary judgment on its third-party complaint

against TEC for its claim of contractual indemnification. However, contrary to the requirements of CPLR 2214(c), SHS Ralph did not annex a complete copy of the subject contract in support of its motion. Therefore, SHS Ralph's request for summary judgment on its claim of contractual indemnification against TEC is denied without prejudice.

TEC's motion, under motion sequence ten, is decided as follows. TEC sought summary judgment dismissing Caracciolo's complaint. This branch of TEC's motion is resolved by the Court's aforementioned decision in relation to SHS Ralph's motion to dismiss plaintiff's complaint.

TEC's motion to dismiss SHS Ralph's third-party claim for contractual indemnification is premature in as much as TEC has not demonstrated prima facie that the triggering event for indemnification does not exist. Therefore, TEC's motion to dismiss the third-party claim for contractual indemnification is denied as premature and without prejudice.

Furthermore, TEC failed to make a prima facie showing to warrant dismissal of SHS Ralph's claims for failure to procure insurance. Thus, the Court does not reach the sufficiency of SHS Ralph's opposition (*see Weingrad v NYU Medical Center*, 64 NY2d 851,853 [1985]).

SHS Ralph's subsequent cross motion, under motion sequence eleven, is decided as follows. The branch of this cross motion which sought summary judgment for contractual indemnification as against TEC is denied as duplicative of SHS Ralph's initial

cross motion, under motion sequence eight.

SHS Ralph also sought to strike TEC's pleadings pursuant to CPLR 3126 and to compel TEC's compliance with its disclosure demands pursuant to CPLR 3124. The Court does not find that TEC's conduct rises to the level of willful and contumacious conduct meriting the striking of a pleading. The branch of SHS Ralph's motion pursuant to CLPR 3126 is denied. However, TEC is directed to produce Chris Lowz for deposition within forty-five (45) days.

The foregoing constitutes the decision and order of this Court.

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