

Arreaga v G&M Realty L.P.

2019 NY Slip Op 35158(U)

January 11, 2019

Supreme Court, Bronx County

Docket Number: Index No. 23215/2018

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

EDINSON R. CERNA ARREAGA,

Index No.: 23215/2018

Plaintiff,

- against -

DECISION and ORDER

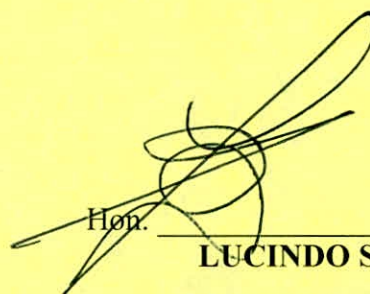
G&M REALTY L.P., CIVETTA-COUSINS JV, LLC, and
SSC HIGH RISE CONSTRUCTION INC.,

Defendants.

	<u>PAPERS NUMBERED</u>
Defendant CIVETTA-COUSINS JV, LLC's Notice of Motion, Affirmation in Opposition, Affidavit in Support, Exhibits	1, 2, 3, 4
Defendant SSC HIGH RISE CONSTRUCTION INC's. Affirmation in Opposition, Exhibits	5, 6
Defendant CIVETTA-COUSINS JV, LLC's, Reply Affirmation, Exhibits	7, 8

Upon the enumerated papers, Defendant CIVETTA-COUSINS JV, LLC's, summary judgment motion seeking a dismissal of Plaintiff's complaint and Co-Defendants' cross-claims is granted in accordance with the annexed decision and order.

Dated: **01/11/2019**



Hon.

LUCINDO SUAREZ, J.S.C.

LUCINDO SUAREZ, J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

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Index No.: 23215/2018

Plaintiff,

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DECISION and ORDER

G&M REALTY L.P., CIVETTA-COUSINS JV, LLC, and
SSC HIGH RISE CONSTRUCTION INC.,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant CIVETTA-COUSINS JV, LLC's ("CCJV") motion for summary judgment is whether the complaint and cross-claims should be dismissed against it. The court finds there is no basis with regards to Plaintiff's cause of action for negligence or his Labor Law §§200, 240 or 241 to hold CCJV liable under same, requiring a dismissal of the complaint. Similarly, the court finds that the Co-Defendants' cross-claims asserted against CCJV must be dismissed as well.¹

I. Summary Judgment Standard

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 demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Id.* Once this showing has been

¹ Notably, Plaintiff did not file opposition to the instant motion. Therefore, its Labor Law §§200, 240 and 241 causes of action are dismissed against CCJV without opposition.

made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

II. Negligence Cause of Action and Cross-Claims

CCJV has established its *prima facie* showing that Plaintiff's cause of action for negligence and cross-claims sounding in same must be dismissed.

To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause. *Kenny v. City of New York*, 30 A.D.3d 261, 817 N.Y.S.2d 264 (1st Dep't 2006; *see also Manson v. Consolidated Edison Co.*, 220 A.D.2d 374, 633 N.Y.S.2d 138 (1st Dep't 1995). One who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site. *Id.*

CCJV posits it had no duty to Plaintiff as it did not perform any work at the construction site where Plaintiff was injured, and that it did not enter into any agreements with any contractor who performed work thereat. To buttress its position CCJV attached an affidavit by its Operations Director Mark Dulberg, which averred CCJV did not perform any work at the construction site where Plaintiff was injured nor did CCJV enter into any agreements with any contractor who performed work thereat.

In opposition, SSC HIGH RISE CONSTRUCTION INC., ("SSC") argued that because there was a filing with the New York City Department of Buildings ("DOB") during the period in question that listed Valon Ademaj as the concrete safety manager of the construction site and because he listed his employer as CCJV that there exists a question of fact. In addition, SSC contends that the instant application for summary judgment is premature because the parties

should be permitted through discovery to obtain more information as to Mr. Ademaj filing with the DOB.

However, CCJV attached an affidavit by Valon Ademaj, which averred that said filing was done in error, that he was not an employee of CCJV when Plaintiff's accident occurred, and that CCJV did not perform any work at the construction site. SSC failed to submit any proof or documentary evidence to contradict or traverse the averments contained in the affidavits of Mr. Dulberg or Mr. Ademaj.

Therefore, SSC failed to sustain its burden to establish the existence of material issues of fact which require a trial requiring a dismissal of Plaintiff's negligence cause of action and cross-claims sounding in negligence. SSC's remaining contention that discovery should be permitted on the issue of Mr. Ademaj's filing with the DOB is without merit as speculation is an insufficient basis for court to conclude that discovery will yield information inconsistent with affidavits provided by CCJV. *See White v. NY City Tr. Auth.*, 308 A.D.2d 341, 764 N.Y.S.2d 90 (1st Dep't 2003).

III. Contractual and Common Law Indemnification Cross-Claims

CCJV has demonstrated its *prima facie* burden that all cross-claims seeking contractual and/or common law indemnification against it must be dismissed.

In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of statutory liability. *Correia v. Professional Data Mgt., Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999); see also GOL §5-322.1. A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances. *Torres v. Morse Diesel Int'l, Inc.*, 14 A.D.3d 401, 788

N.Y.S.2d 97 (1st Dep't 2005).

CCJV alleges that it did not enter into any agreements with any contractor who performed work at the construction site where Plaintiff was injured. CCJV attached an affidavit by its Operations Director Mr. Dulberg, which averred same.

SSC in opposition, did not proffer any agreement between SSC and CCJV or an affidavit from someone with personal knowledge claiming that such agreement exist. Therefore, SSC has no basis to assert a cross-claim for contractual indemnification absent an agreement between the parties requiring a dismissal of SSC's cross-claim for contractual indemnification.

Likewise, SSC's cross-claim for common law indemnification must be dismissed as well. A party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011).

CCJV posits it did not perform any work at the construction site where Plaintiff was injured. Further, CCJV attached an affidavit by its Operations Director Mr. Dulberg, which averred same. Thus, it would have been an impossibility that CCJV was either negligent or actually supervised Plaintiff's injury-producing work.

SSC failed to contradict or deny the veracity of Mr. Dulberg's affidavit or submit an affidavit in opposition wherein it claimed that CCJV in fact did perform work at the construction site. Therefore, SSC did not establish its burden of raising an issue of fact with respect to its cross-claim for common law indemnification requiring a dismissal of same.

IV. SSC's Amended Complaint Defense

SSC argues that CCJV's summary judgment motion is a nullity because it was made with respect to Plaintiff's first complaint and not Plaintiff's amended complaint, which was filed after

CCJV filed the instant motion.

The Appellate Division, First Department, has consistently held that an amended pleading does not automatically abate a motion to dismiss that was addressed to the original pleading, and a trial court may direct the motion to dismiss toward the amended complaint because plaintiff sought an amendment rather than attempting to defend the complaint. *See Fownes Bros. & Co., Inc. v. JPMorgan Chase & Co.*, 92 A.D.3d 582, 939 N.Y.S.2d 367 (1st Dep't 2012); *see also DiPasquale v Sec. Mut. Life Ins. Co.*, 293 A.D.2d 394, 740 N.Y.S.2d 626 (1st Dep't 2002); *see also Sage Realty Corp. v. Proskauer Rose L.L.P.*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1st Dep't 1998).²

CCJV filed the instant motion in September 2018. Plaintiff in lieu of filing opposition to this motion instead chose to amend his complaint in October 2018. The fact that Plaintiff amended his complaint does not render this summary judgment motion a nullity, and this court can direct summary judgment toward the amended complaint especially when the causes of action in both complaints asserted against CCJV are identical.

Accordingly, it is

ORDERED, that Defendant CIVETTA-COUSINS JV, LLC's summary judgment motion is granted; and it is further

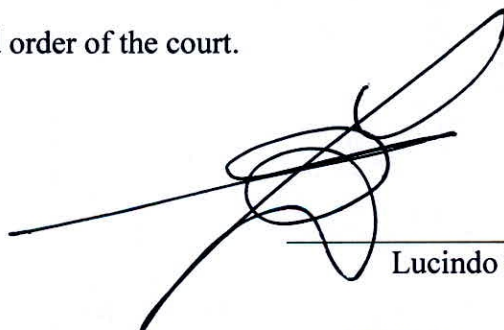
ORDERED, that the Clerk of the Court is directed to dismiss Plaintiff's amended complaint against Defendant CIVETTA-COUSINS JV, LLC; and it is further

ORDERED, that the Clerk of the Court is directed to dismiss Co-Defendants' cross-claims asserted against Defendant CIVETTA-COUSINS JV, LLC.

² The case law that SSC cites in its affirmation in opposition to support its proposition hails from the United States Court of Appeals for the Third Circuit, which although is persuasive authority it is not binding upon this court. In contrast, CCJV provides in its reply affirmation case law from the Appellate Division, First Department, which is binding authority upon this court.

This constitutes the decision and order of the court.

Dated: January 11, 2019



Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.