Southerton v City of New York
2019 NY Slip Op 35258(U)
June 28, 2019
Supreme Court, Queens County
Docket Number: Index No. 710345/15
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JOSHUA SOUTHERTON,

Plaintiff,

- against-

CITY OF NEW YORK and JUST CONSTRUCTION,

Defendants.

CITY OF NEW YORK,

Third-Party Plaintiff,

- against -

SHANBAUM REAL ESTATE PARTNERS, INC, d/b/a WHITE CONSTRUCTION SERVICES,

Third-party Defendant.

Index No. 710345/15

Motion Date January 22, 2019

Motion Cal. No. 28 & 35

Motion Seq. No. 4 & 5

The following numbered papers read on this motion by defendant/third-party plaintiff, the City of New York (City), for a default judgment against third-party defendant, Shanbaum Real Estate Partners, Inc. d/b/a White Construction Services (White Construction), pursuant to CPLR 3215; motion by the City for summary judgment dismissing plaintiff's claims against it under Labor Law §§§ 240(1), 241(6), 200 and common-law negligence; pursuant to cross motion by plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law § 241(6) and for leave to serve a third supplemental bill of particulars.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 83 - 95 EF 97 - 124
Notice of Cross Motion - Affirmation - Exhibits.....	EF 131 - 136
Affirmation in Opposition - Exhibits.....	EF 125 - 130 EF 139 - 145
Reply Affirmation.....	EF 137 - 138 EF 146

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiff was employed as a laborer by White Construction. White Construction was hired by non-party, E. Fitzgerald Contracting (Fitzgerald), to perform carpentry work at property located at 523 Beach 134th Street, Rockaway Park, New York 11694. The subject property was owned by non-parties Jeffrey and Colleen Mercer (the Mercers) and was damaged in Hurricane Sandy. After Hurricane Sandy in 2012, the United States Department of Housing and Urban Development (HUD) allotted funds to the City. The City implemented the Build-it-Back program to aid in the recovery of residential property damaged or destroyed by Hurricane Sandy and established the Mayor's Office of Housing Recovery Operations (HRO) to administer the program. On August 29, 2013, the City contracted with Fitzgerald for Fitzgerald to act as the general contractor on contracts for rehabilitation of damaged homes. On September 30, 2014, the Mercers entered into a Grant and Subrogation Agreement with the City, pursuant to which the Mercers would receive funds to repair their home under the Build-it-Back program. On April 6, 2014, the Mercers signed a Repair Selection Agreement in which they agreed to use a contractor retained by the City to perform the work on the property. Thereafter, the City, Fitzgerald, and the Mercers entered into a contract, whereby pursuant to the grant agreement, the Mercers would receive benefits from the Build-it-Back program and that, pursuant to the construction contract between the City and Fitzgerald, Fitzgerald would perform the work on the Mercers' property. On March 9, 2015, plaintiff was allegedly injured when his left pinky finger was amputated while using a circular saw to replace basement windows in the subject property. Plaintiff commenced the instant action against defendants under Labor Law §§§ 240(1), 241(6), 200 and common-law negligence. On December 10, 2015, a stipulation of discontinuance was filed wherein plaintiff agreed to voluntarily discontinue his claims against defendants, Navillus Group, LLC, Navillus Masonry Supply, Inc., Navillus Tile, Inc., Navillus Kitchens Corp., and Navillus, Inc. On January 25, 2016, plaintiff filed a stipulation of discontinuance wherein plaintiff agreed to discontinue the action against defendant, O'Sullivan Builders & Developers, Inc., and, on December 1, 2017, plaintiff filed a stipulation of discontinuance wherein plaintiff agreed to discontinue the action against White Construction. On May 3, 2018, the City commenced a third-party action against White Construction, alleging claims for contractual indemnification, common-law indemnification and contribution, and breach of contract to procure insurance.

Initially, the court notes that, in his opposition and cross motion papers, plaintiff voluntarily withdrew his claim under Labor Law § 240(1) against defendants. Therefore, that branch of the City's motion for summary judgment dismissing that cause of action against it is denied as moot.

The City established its entitlement to judgment as a matter of law as to Labor Law § 241(6) on the ground that it was not an "owner," "contractor," or "agent" of the owner or general contractor at the time of plaintiff's accident. In opposition and on his cross motion,

plaintiff failed to raise a triable issue of fact. Since it is undisputed that the City was neither the owner nor general contractor on the renovation project, the sole issue remaining is whether it was a statutory agent of the owner or general contractor (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Rodriguez v Mendlovits*, 153 AD3d 566 [2d Dept 2017]). To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Linkowski*, 33 AD3d at 975; *see Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944 [2d Dept 2013]). The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right (*see Bakhtadze v Riddle*, 56 AD3d 589 [2d Dept 2008]).

In the case at bar, the evidence submitted established that the City's role was only one of general supervision, which is insufficient to impose liability under Labor Law § 241(6) (*see Delahaye v Saint Anns School*, 40 AD3d 679 [2d Dept 2007]; *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2d Dept 2006]). The grant agreement and the repair selection contract between the City and the Mercers, the construction contract between the City and Fitzgerald, and the contract between the City, the Mercers, and Fitzgerald, when read together do not confer upon the City supervisory control over the injury-producing work, and demonstrate that the City was not responsible for the means and methods of construction, safety precautions or programs at the subject construction project. Although plaintiff contends that the City was acting as a statutory agent for the homeowners, pursuant to the grant and repair selection agreements between the City and the Mercers, Article 4 of the contract between the City and Fitzgerald provides, ". . . the Means and Methods of Construction shall be such as the Contractor may choose . . . ." and Article 4A of that contract further provides, "[t]he Contractor shall be responsible for managing, supervising and directing its employees and Subcontractors." Moreover, the affidavits of Deborah Bander, deputy general counsel and chief contracting officer for HRO, and Jasmin Rivera, the deputy director of rehabilitation for HRO, indicate that HRO has contracts with general contractors to perform work at various projects in the Build-it-Back Program, pursuant to which the general contractor retains its own subcontractors. The affidavits further establish that HRO has vendors to inspect the work when it is completed to ensure that it is in accordance with the scope of the work to be performed under the contracts. However, the general contractor is responsible for site-safety as well as providing tools, equipment, and materials, and coordinating the work performed at the site. Plaintiff testified at his deposition that no one other than his foreman at the site, an employee of White Construction, gave him instructions on how to perform his work. As such, plaintiff's Labor Law § 241(6) claim against the City is dismissed.

Further, the City has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence claims against it. Where, as here, a claim arises out of alleged defects or dangers in the methods or manner of the work

rather than the condition of the premises, recovery against the owner or contractor cannot be had pursuant to common-law or Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]*; Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2d Dept 2008]). Based upon the foregoing, the evidence submitted by the City demonstrates that the City had no authority to supervise, direct, or control the method or manner in which plaintiff performed his work at the site, and the City's general supervision of the construction project is insufficient to trigger its liability.

Next, the court turns to the separate motion by the City for a default judgment against White Construction. When a defendant has failed to appear, plead, or proceed to trial, a plaintiff may seek a default judgment against the defendant (CPLR 3215[a]). On a motion to enter a default judgment against a defendant for the failure to appear or answer the complaint, a party must submit proof of service of the summons and complaint, proof by affidavit of the facts constituting the claim, and proof of the defendant's default and the amount due (CPLR 3215[f]). A verified complaint may be used as the affidavit of the facts constituting the claim and the amount due (*id.*), but it must contain evidentiary facts from someone with personal knowledge. Here, the City's application for a default judgment against White Construction was not based on an affidavit or a verified complaint by a party with personal knowledge setting forth the factual basis for the underlying claim, as required by CPLR 3215(f) (*see e.g. Williams v North Shore LIJ Health Sys.*, 119 AD3d 937 [2d Dept 2014]; *Lamb v Moody*, 62 AD3d 839 [2d Dept 2009]). Instead, the motion was supported by a complaint verified by counsel, who did not demonstrate personal knowledge of the evidentiary facts. It is well-settled that a pleading verified by an attorney amounts to no more than an attorney's affirmation and is insufficient to support entry of judgment pursuant to CPLR 3215 (*see New South Ins. Co. v Dobbins*, 71 AD3d 652 [2d Dept 2010]; *Finnegan v Sheahan*, 269 AD2d 491 [2d Dept 2000]). Accordingly, entry of a default judgment would be erroneous and the judgment would be a nullity (*id.*).

Accordingly, the City's motion for a default judgment against White Construction is denied. Those branches of the City's motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 241(6) and 200 and common-law negligence against it are granted. That branch of the City's motion for summary judgment dismissing the Labor Law § 240(1) cause of action against it is denied as moot. Plaintiff's cross motion for partial summary judgment on his Labor Law § 241(6) claim against the City is denied.

Dated: June 28, 2019

DARRELL L. GAVRIN, J.S.C.

FILED
JUL 18 2019
COUNTY CLERK
QUEENS COUNTY