Quiroga v 277 W. 10 Owner, L.P.
2020 NY Slip Op 30442(U)
February 14, 2020
Supreme Court, New York County
Docket Number: 154302/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, *Justice* — PART IAS MOTION 23EFM

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FREDDY QUIROGA,

Plaintiff,

- v -

277 WEST 10 OWNER, L.P., 277 WEST 10 OWNER GP, L.L.C., 277 WEST 10TH CONDOMINIUM, TATOOINE 275, LLC, MIDWAY ELECTRIC CORP., MIDWAY ELECTRICAL CONTRACTING, INC., PRIMO PLUMBING & HVAC CORP.

Defendants.

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INDEX NO. 154302/2019

MOTION DATE 11/07/2019, 01/06/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 38, 43, 44, 45, 46

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISCOVERY.

In this personal injury action, plaintiff alleges that he was injured while working for non-party Zen Restoration, in Penthouse C, located at 275 W. 10th Street, New York, New York, on October 26, 2018, when he claims he was struck by falling debris. (NYSCEF Doc. No. 1). In motion sequence number 001, defendant Primo Plumbing & HVAC Corp. ("Primo"), seeks an Order pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) dismissing the Complaint claiming it cannot be found liable under theories of common law negligence or under New York Labor Law Sections 200, 240, and 241(6), and for summary judgment pursuant to CPLR § 3211(c). Plaintiff and defendant Tatooine 275 LLC ("Tatooine") oppose the motion.

In motion sequence number 002, defendant Tatooine seeks an order pursuant to CPLR §3042(c), compelling plaintiff to serve a Bill of Particulars in response to defendant's demand

and, pursuant to CPLR §3124, compelling plaintiff to respond to Defendant's combined demands. Motion sequence number 002 is submitted without opposition. The motions are consolidated for disposition.

BACKGROUND

This action is in the early stages of discovery and no depositions have been held. A Preliminary Conference is scheduled for March 24, 2020. (NYSCEF Doc. No. 57). Plaintiff alleges that during his employment with non-party Zen Restoration, Inc. ("Zen") he sustained injuries while engaged in construction at Penthouse C, when he was allegedly struck by falling debris. (NTSCEF Doc. No. 1, ¶151).

In support of its pre-answer motion to dismiss, defendant Primo submits the affidavit of Piotr Mleczko, the General Manager for Primo, a copy of plaintiff's employer's Report of Work-Related Injury and a copy of the Subcontract Agreement between Zen and defendant Primo for work to be done at defendant Tatooine's, Penthouse C where plaintiff's accident allegedly occurred. (NYSCEF Doc. Nos. 25, 27, 29). Defendant Primo contends that the documents submitted in support of its motion, establish that it owed no duty to plaintiff and cannot be held liable under the Labor Law or theories of common law negligence because it did not cause, create or otherwise contribute to the condition that allegedly caused plaintiff's injuries.

In opposition, plaintiff and defendant Tatooine contend that defendant's motion is premature and that the pleadings and documents submitted in support of the motion, raise issues of fact regarding Primo's liability. Specifically, Tatooine has submitted a Certificate of Insurance identifying Tatooine as additional insured on Primo's insurance policy, for purposes of this construction project. (NYSCEF Doc. No. 45). Plaintiff argues that the contract between

Zen and Primo provides that the work at Penthouse C was to begin on September 19, 2018 and was expected to be completed within two weeks, which was just before plaintiff's accident.

Based on the allegations set forth in the complaint and because no discovery has taken place, specifically, no depositions have been held, plaintiff and Tatooine maintain that Primo's motion to dismiss and for summary judgment should be denied.

DISCUSSION

A motion to dismiss may be granted pursuant to CPLR 3211(a)(1) if the defendant asserts "a defense . . . founded upon documentary evidence" (CPLR 3211[a][1]). Dismissal is warranted "only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]).

A motion to dismiss may be granted pursuant to CPLR 3211(a)(7) if "the pleading fails to state a cause of action" (CPLR 3211[a][7]). "[T]he pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory" (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019]). Where a motion under CPLR 3211(a)(7) "is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "[A]ffidavits submitted by

the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (*id.*).

"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 . . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). The burden then shifts to the party opposing the motion 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, 812 N.Y.S.2d 12 [1st Dept 2006]).

When there is insufficient evidence regarding how an accident occurred and discovery could aid in establishing what happened, a granting of summary judgment would be premature. (See *Somereve v Plaza Constr. Corp.*, 31 NY3d 936, 937, 72 N.Y.S.3d 525, 95 N.E.3d 567 [2018]; see also *Groves v Land's EndHous. Co.*, 80 N.Y.2d 978, 607 NE2d 790, 790-791, 592 N.Y.S.2d 643 [1992] ["[g]iven that defendants in their affidavits asserted that they needed more discovery time to depose witnesses as to the use and existence of safety devices, and given that the discovery timetables set forth in a preliminary conference order had not yet expired, we cannot conclude that the Appellate Division erred in its disposition"]).

An order granting summary judgment may be premature when discovery is incomplete. (See *Wilson v Yemen Realty Corp.*, 74 AD3d 544, 545, 903 N.Y.S.2d 42 [1st Dept 2010] ["in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature"]; see also *Churaman v C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485, 486, 35 N.Y.S.3d 716 [2d Dept 2016] [holding the "motion for summary judgment on the issue of liability on the causes of action alleging violations of Labor

Law §§ 240 (1) and 241 (6). . . was premature since there has been almost no discovery in the case and the plaintiff has not been deposed"]).

Here, the parties have not commenced discovery. A preliminary conference has not been conducted and one is scheduled for March 24, 2020. Plaintiff and defendant Tantooine have demonstrated that there are issues of fact related to how the accident occurred, and issues of fact on the issue of liability and Tatooine's cross-claims for contractual indemnification, common-law indemnification and contribution and breach of contract for failure to procure insurance. Moreover, plaintiff provided a bill of particulars on December 9, 2019 and defendant Tatooine has filed a motion to compel plaintiff to provide responses to combined discovery demands that have not yet been provided. Plaintiff has not been deposed about the circumstances at the site which allegedly caused his accident, nor has plaintiff had the opportunity to testify as to which defendants, if any, were supervising or instructing his work. Furthermore, defendants have also not been deposed to establish what work, if any, was being conducted at the site prior to, and at the time of, plaintiff's accident.

A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (see *Malester v Rampil*, 118 AD3d 855, 856, 988 NYS2d 226 [2d Dept 2014]; *Video Voice, Inc. v Local T.V., Inc.*, 114 AD3d 935, 980 NYS2d 828 [2d Dept 2014]; *Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654, 932 NYS2d 128 [2d Dept 2011]; *Venables v Sagona*, 46 AD3d 672, 673, 848 NYS2d 238 [2d Dept 2007]). A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (see CPLR 3212 [f]; *Nicholson v Bader*, 83 AD3d 802, 920 NYS2d 682 [2d Dept 2011]).

Plaintiff and defendant Tatooine have demonstrated that issues of fact exist regarding the liability of defendant, Primo, a plumbing contractor, in an action where plaintiff is alleging that plumbing materials fell on him, causing injuries. The documents submitted by Primo in support of its dispositive motion raise issues of fact related to when the work was performed, which defendants, if any, were supervising the work and what caused plaintiff's alleged injuries. Accordingly, the court denies defendant Primo's motion to dismiss and motion for summary judgment without prejudice to renew upon the completion of discovery.

Motion sequence number 002.

Defendant Tatooine seeks an order pursuant to CPLR §3042(c), compelling plaintiff to serve a Bill of Particulars in response to defendant's demand and, pursuant to CPLR §3124, compelling plaintiff to respond to defendant's combined demands. This motion is submitted without opposition. It appears that plaintiff has provided a Bill of Particulars, however, there is no indication that plaintiff has responded to defendant Tatooine's combined demands, served on September 26, 2019. Accordingly, Tatooine's motion to compel is granted.

Based on the foregoing, it is hereby,

ORDERED that defendant Primo Plumbing & HVAC Corp.'s motion sequence number 001 to dismiss the complaint is denied in its entirety; and it is further

ORDERED that defendant Primo Plumbing & HVAC Corp.'s motion sequence number 001 for summary judgment is denied, with leave to renew upon the completion of discovery; and it is further

ORDERED that defendant Tatooine 275 LLC's motion sequence number 002, to compel is granted; and it is further

ORDERED that plaintiff shall produce to defendant Tatooine on or before March 16, 2020, responses to defendant Tatooine 275 LLC's combined discovery demands; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 307, 80 Centre Street, on March 24, 2020, at 9:30 AM.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

2/14/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE