Cunningham v City of New York
2020 NY Slip Op 31054(U)
April 24, 2020
Supreme Court, New York County
Docket Number: 150564/2018
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 150564/2018

TIMOTHY CUNNINGHAM,

Plaintiff,

MOTION SEQ. NO. 003

- v -

CITY OF NEW YORK, LIRO ENGINEERS, INC., LIRO CONSTRUCTORS, INC., LIRO HOLDINGS, INC., LIRO GIS AND SURVEY, P.C., TC ELECTRIC, LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action commenced by plaintiff Timothy Cunningham against defendants the City of New York ("the City"), Liro Engineers, Inc., Liro Constructors, Inc., Liro Holdings, Inc., Liro GIS and Survey, P.C. (collectively "Liro" or the Liro defendants"), and TC Electric, LLC ("TCE"), TCE moves for summary judgment dismissing the complaint and all cross claims against it. Plaintiff and the City oppose the motion. Liro opposes the motion in part. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on February 6, 2017 in which plaintiff, an associate field inspector for the New York City Transit Authority ("NYCTA") was injured while performing an asbestos inspection inside manhole # 35, located in front of 110 William Street in Manhattan. Doc. 66 at 72-73. Plaintiff claims that he was injured when a grating or catwalk on which he was standing collapsed. Doc. 66 at 78. There is no dispute that the manhole was owned by the City and leased to the NYCTA. Doc. 77.

Pursuant to an award letter dated September 22, 2016, TCE was retained by NYCTA under Contract P-36445 ("the contract") for the "Sandy" Repair Project - Clark Street Tube Rehabilitation in the Boroughs of Manhattan and Brooklyn. Doc. 78 ("the project"). The NYCTA advised TCE that the contract was "deemed to be in effect as of the date of th[e] award letter." Doc. 78. The contract required TCE to, inter alia, remove and replace electrical cables inside the Clark Street subway tunnels which were damaged by superstorm Sandy. Doc. 80.[1]

Before TCE was permitted to perform any work in manhole # 35, a contractor retained by the NYCTA had to perform an asbestos survey. Doc. 66 at 63; Doc. 80. The contract provided, inter alia, that because asbestos was present at

[1] The contract was allegedly annexed to TCE's motion as Doc. 79. Although the contract was not accompanied by a Notice of Hard Copy Exhibit Filing (form EF-21), as required by NYSCEF, none of the other parties dispute the existence of the agreement.

the work site, asbestos removal would be performed by an asbestos abatement contractor retained by the NYCTA. Doc. 80. The contract further provided that an engineer was to perform an asbestos survey in manholes identified on supplementary drawings EN-28 thru EN-35, which included manhole # 35, and that the samples could take up to four weeks to be analyzed. Doc. 80. Additionally, the contract provided that, if TCE discovered any asbestos during the course of its work, it was to notify NYCTA's engineer. Doc. 57 at par. 7.

On or about March 15, 2017, plaintiff filed a notice of claim against the City. Doc. 59. On or about January 19, 2018, plaintiff filed a summons and verified complaint against the City under Index Number 150564/18. Doc. 60. Plaintiff's counsel and the City thereafter stipulated to allow plaintiff to amend the notice of claim to omit a reference to wrongdoing by the Port Authority and to correct the location of the alleged accident. Doc. 62.

Plaintiff filed a summons and verified complaint against the Liro defendants and TCE under Index Number 154450/18 on May 11, 2018. Doc. 63. In the complaint, plaintiff alleged, inter alia, that he was injured due to the negligence of the defendants, as well as their violations of Labor Law sections 200, 240(1), and 241(6). Doc. 63. On or about June 8, 2018, TCE served its verified answer to the complaint. Doc. 64. On or about June 14, 2018, the Liro defendants served their verified answer to the verified complaint. Doc. 65.

On or about July 18, 2018 plaintiff filed a supplemental summons and verified amended complaint against the City. Doc. 67. The City thereafter filed an answer to the amended complaint on or about July 27, 2018. Doc. 68.

In his verified bill of particulars as to TCE dated November 28, 2018, plaintiff alleged that he was injured as a result of TCE's violations of Labor Law sections 200, 240(1), and 241(6), and that TCE violated a litany of Industrial Code sections triggering liability under section 241(6). Doc. 69.

In December 2018, plaintiff moved to consolidate its action against the City with his action against the Liro defendants and TCE. The motion was granted on January 30, 2019 and the actions were consolidated under the Index Number in the captioned action. Doc. 73.

On or about March 5, 2019 the City filed cross-claims against Liro and TCE. Doc. 74. TCE answered the City's cross claims on or about March 21, 2019. Doc. 75. In its response to plaintiff's discovery demands, Liro included statements given by its employees Bret Boudi and Kayode Edmonds, both of whom noted that employees of TCE, the general contractor, were present at the site "as observers" when plaintiff was injured. Doc. 76.

At his 50-h hearing, plaintiff testified that he was an environmental inspector licensed by the State of New York and worked for the Environment Engineering Division ("EED") of Capital Program Management ("CPM"), a subdivision of

NYCTA, which performed asbestos inspections of facilities such as manholes in connection with CPM projects. Doc. 66 at 60-61. He represented that it was "probably correct" that EED performed asbestos inspections so that TCE, an electrical contractor, could repair cables and other electrical equipment as part of the project. Doc. 66 at 63, 132. TCE's work involved repairing damage to electrical equipment caused by Sandy. Doc. 66 at 77. TCE was not permitted to work on cables or wiring until EED gave it clearance to do so. Doc. 66 at 63.

Plaintiff recalled that there were about five or six TCE employees present at the site on the night the incident occurred but that he did not know their names because he did not speak to them. Doc. 66 at 82. Nor did he know why the TCE employees were present at the time, although they had been present during prior inspections. Doc. 66 at 82-83. Two representatives of Liro, a construction manager, were also present at the site, one of whom plaintiff believed was a safety engineer. Doc. 66 at 79-81. No TCE or Liro employees were permitted to enter manhole #35, which he also referred to as an electrical closet, until permitted to do so by EED. Doc. 66 at 82. TCE would not have received permission to enter manhole #35 that evening because any samples taken therefrom would have needed testing. Doc. 66 at 82-83.

To date, no depositions have been conducted and the note of issue has not been filed.

TCE now moves: 1) pursuant to CPLR 3212, for summary judgment dismissing the complaint against it on the ground that it is not a proper defendant pursuant to Labor Law sections 240(1) and 241(6); 2) that plaintiff's claim pursuant to Labor Law section 240(1) must be dismissed since the collapse of the permanent structure where plaintiff was working was not foreseeable; 3) that plaintiff' claim pursuant to Labor Law section 241(6) must be dismissed on the ground that the provisions of the Industrial Code allegedly violated by TCE are inapplicable herein; and 4) the Labor Law section 200 claim against it must be dismissed on the ground that it did not create or have notice of any hazardous condition and did not supervise plaintiff's work; and 5) dismissing all cross claims against it.

In support of the motion, TCE submits, inter alia, the pleadings, bill of particulars, witness statements, an attorney affirmation, the affidavits of its project manager, Jeffrey Nalbone, and its foreman, John Castranova, TCE's work log for the date of the accident, statements given by Boudi and Edmonds of Liro, and photographs marked at plaintiff's 50-h hearing.

TCE argues that it is entitled to dismissal of the claims pursuant to Labor Law sections 240(1) and 241(6) because it was not an owner or general contractor within the meaning of those statutes. TCE further asserts that it cannot be liable pursuant to Labor Law section 240(1) since plaintiff fell from a permanent

structure, the collapse of which was not foreseeable. Additionally, TCE argues that the Industrial Code sections alleged by plaintiff are either inapplicable to the facts herein or are too general to invoke liability pursuant to Labor Law section 241(6). TCE also urges that plaintiff's claim pursuant to Labor Law section 200 must be dismissed since it did not supervise or control plaintiff's work and did not create or have notice of the condition which caused plaintiff's injury. TCE further argues that the contractual indemnification claim against it must be dismissed since its negligence did not cause or contribute to the accident. It further insists that the common law and contribution claims against it must be dismissed since it did not supervise or control plaintiff's work.

In his affidavit in support, Nalbone maintains that TCE was not an asbestos removal contractor and that it was only at the site at the time of the incident to observe the abatement process by CPM and EED so that it could determine whether it could start work. Doc. 80. Nalbone further asserts that the equipment used by plaintiff at the time of the incident was "customarily provided" by the "MTA". Doc. 80. TCE's daily log for the date of the incident reflects that "[n]o field work [was] done" by the company. Doc. 81. He further asserts that TCE began its work in manhole #35 in March 2017 and completed its work there in April 2017. Doc. 80. Nalbone does not represent that he was present when the accident occurred.

Castranova represents in his affidavit that TCE did not direct, manage, or supervise any of the work being performed in manhole #35 at the time of the incident. Doc. 82. Although he admits that TCE personnel were at the project when the incident occurred, it was only to monitor the asbestos abatement work because it could not begin its work on the cables until the abatement work was finished. Doc. 82. Castranova did not see the accident occur but was present when plaintiff was removed from the manhole #35.

In opposition to the motion, the City submits, inter alia, the affidavit of Abdul Jabbar, a professional engineer and construction manager for the NYCTA, who attests that TCE was the general contractor on the project at the time of the alleged incident. Doc. 89.

The City also submits the contract between NYCTA and TCE. Doc. 92. The section of the agreement entitled "information for bidders" provides at paragraph 15 (c) that the notice of award of the contract was to become effective when mailed and that the bidder's execution of the bid bound it to the contract terms. Doc. 92. Paragraph 1.01 (c) of the contract provides that the terms "work" or "project" include miscellaneous or incidental work performed at the site. Doc. 92. Section 2.01 provides that TCE's work was to begin within 10 days after the notice of award was issued. Doc. 92. Paragraphs 6.02 (a) and (b) rendered TCE liable for injuries to persons arising from "the performance of the work", including

miscellaneous or incidental work. Doc. 92. TCE was also required, pursuant to paragraph 6.03, to indemnify NYCTA, "to the fullest extent permitted by law," from liability arising from injuries to persons. Doc. 92. Paragraph SC6 of the "special conditions" section annexed to the contract required TCE "to isolate electrical panels" and "other equipment as necessary, shut off power, and move conduits and cables to enable [NYCTA's] asbestos-abatement contractor to perform its work." Doc. 92.

In opposing the motion, the City argues that TCE's motion must be denied since the asbestos inspection was a necessary first step to be taken pursuant to the project before TCE could perform its work. Thus, the City maintains, since there are questions of fact regarding whether the preparatory or ancillary work TCE performed between September 22, 2016 and February 7, 2017 fell within the scope of its work as general contractor, summary judgment cannot be granted to TCE pursuant to Labor Law sections 240(1) and 241(6).

The City further asserts that the motion must be denied as premature since no depositions have been held.

Plaintiff also opposes the motion, arguing, inter alia, that, pursuant to paragraph SC6(1)(a), TCE was supposed to coordinate its work with NYCTA's asbestos removal contractor. Additionally, paragraph SC6 (1)(b) required TCE to "test, pump, and dispose of water" from manhole #35 before the engineer checked

for asbestos in that area. Doc. 92. Thus, claims plaintiff, TCE was clearly involved in the asbestos removal phase of the project. Plaintiff further asserts that TCE is a proper Labor Law defendant; that the collapse of the catwalk was foreseeable; that plaintiff alleged applicable and specific sections of the Industrial Code which give rise to liability pursuant to Labor Law section 241(6); and that TCE failed to establish that it is entitled to dismissal of the Labor Law section 200 claim.

Liro joins in the City's and plaintiff's opposition to TCE's motion insofar as they assert that TCE is a general contractor pursuant to the Labor Law. However, Liro supports that branch of TCE's motion seeking dismissal of the Labor Law section 240(1) and 241(6) causes of action on the ground that the work plaintiff was performing when he was injured was not covered by those statutes.

In response to plaintiff's opposition, TCE asserts that it was not the general contractor for the asbestos removal work. It asserts that, although it was required to pump water from the areas being tested for asbestos, this did not make it an asbestos removal contractor. TCE further asserts that plaintiff's fall from a catwalk in manhole #35 does not give rise to liability pursuant to Labor Law section 240(1) because it was a permanent structure. It further maintains that the Labor Law section 241(6) claim must be dismissed because plaintiff failed to allege that TCE violated specific and/or applicable sections of the Industrial Code and that the section 200 claim must be dismissed on the ground that it did not

supervise or control plaintiff's work and neither created nor had actual or constructive notice of the allegedly dangerous condition which harmed plaintiff.

LEGAL CONCLUSIONS

Summary judgment is drastic relief since it denies a litigant of the opportunity to go to trial. Thus, summary judgment should only be granted where there are no triable issues of fact *(see Andre v Pomeroy*, 35 NY2d 361 (1974). The focus for the Court is on issue finding, not issue determination. *see Genesis Merchant Partners, L.P. v Gillbride, Tusa, Last & Spellane, LLC*, 157 A.D.3d 414 (1st Dept 2018). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *see Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *see Zuckerman v City of New York*, 49 NY2d 557 (1980).

Moore v A & C Supermas, Inc., 2019 NY Slip Op 33697(U), *3-4 (Sup Ct, NY County 2019).

The Appellate Division, First Department, has held that when discovery is incomplete, an order granting summary judgment may be premature. *See Ali v Effron,* 106 AD3d 560, 560 (1st Dept 2013) (holding "[p]laintiff's cross motion for partial summary judgment was properly denied as premature in light of the incomplete state of discovery, including the lack of any depositions"); *Wilson v Yemen Realty Corp*., 74 AD3d 544, 545 (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"); *McGlynn v Palace Co*., 262 AD2d 116, 117 (1st Dept 1999) (holding " this is not a situation where defendants can be charged with a failure to diligently seek discovery, since plaintiffs' motion was made almost immediately after entry of the court's preliminary conference order, and the motion for summary judgment brought into force a stay of discovery proceedings . . . Under the circumstances presented here, it was error to grant summary judgment prior to affording defendants an opportunity to depose plaintiff.").

The preliminary conference order dated May 28, 2019 directed that the depositions of the plaintiff and the defendants were to take place in August and September, 2019, respectively. Doc. 55. For reasons not addressed in the motion papers, the depositions did not take place as directed and, instead, TCE moved for summary judgment before all parties had the opportunity to depose witnesses regarding the precise role of TCE at the site, including whether it was involved in removing water from manhole #35 in connection with the project. *see Lyons v New York City Economic Dev. Corp.*, 176 A.D.3d 512 (1st Dept 2019); *see also Blech v. West Park Presbyterian Church*, 97 A.D.3d 443 (1st Dept 2012). Nor does it appear from the motion papers that there has been any discovery regarding the installation, maintenance, or repair of the catwalk from which plaintiff allegedly fell. *Id.* Thus, the motion is denied with leave to renew at the close of discovery.[2]

Even assuming, arguendo, that the motion were not premature, it must be denied given TCE's failure to establish its prima facie entitlement to summary judgment as a matter of law.

Specifically, TCE claims that it had no authority to oversee plaintiff's work since it was conducted "under a separate contract for asbestos-abatement work that did not involve [TCE]." Doc. 57 at par. 16. However, as noted above, plaintiff

[2] Should TCE be inclined to renew its motion at the close of discovery, it must submit the contract as an exhibit by filing a notice of hard copy filing (NYSCEF form EF-21).

testified at his 50-h hearing that the Environment Engineering Division ("EED") of Capital Program Management ("CPM"), a subdivision of NYCTA, performed asbestos inspections of facilities such as manholes in connection with CPM projects. Doc. 66 at 60-61. Thus, plaintiff's own motion raises an issue of fact regarding TCE's potential involvement in the asbestos abatement phase of the project. Additionally, if NYCTA hired an asbestos abatement contractor, TCE provides neither the name of this company nor a copy of any contract with that entity.

TCE insists that its employees who were present at the site at the time of the incident were there only "to observe the abatement process by CPM and EED to see if they [TCE] could start work." Doc. 57 at par. 17. However, since Nalbone stated in his affidavit that it could take up to four weeks to obtain the results of the asbestos tests (Doc. 80), TCE's contention is incredible (*See Carthen v Sherman*, 169 AD3d 416, 417-418 [1st Dept 2019]) and underscores the need for discovery regarding its role at the site.

Although Nalbone asserts that TCE performed "no field work" on the date of the incident, and this representation is supported by TCE's log for that day (Docs. 80, 81), TCE is suspiciously silent regarding any work it performed relating to asbestos abatement either prior to or after that date, especially in light of the fact paragraph SC6 of the "special conditions" section annexed to the contract required

TCE "to isolate electrical panels" and "other equipment as necessary, shut off power, and move conduits and cables to enable [NYCTA's] asbestos-abatement contractor to perform its work." Doc. 92.[3] Given this provision, it is apparent to this Court that TCE had at least some involvement in the asbestos removal process at the site.

Additionally, although TCE insists that its work under the contract still had not started as of the date of plaintiff's accident, the September 22, 2016 award letter, by its own terms, triggered the effective date of the contract.

In asserting that it is entitled to summary judgment, TCE primarily relies on *Wong v. New York Times Co.*, 297 AD2d 544 (1st Dep't 2002). In that case, the First Department considered whether a general contractor was liable under the Labor Law for injuries sustained by an individual who was supervised by a different general contractor. In *Wong*, the plaintiff, an employee of a subcontractor who was engaged to install a printing press, was injured when he fell while dismantling a crane. The plaintiff sued the general contractor responsible for the general construction at the worksite, even though there was a different general contractor responsible for the installation of the printing presses. The First Department dismissed the plaintiff's claim, reasoning that the general contractor for

[3] This Court further notes that there is no indication in the motion papers that Nalbone was present at the site on the day of the incident.

the construction was not strictly liable for an injury suffered by a worker who was supervised and hired by the prime contractor for the printing press installations.

However, *Wong* does not warrant dismissal of the claims against TCE. As noted above, TCE fails to establish as a matter of law that it was not involved in the asbestos removal process during which plaintiff was injured. Additionally, as discussed above, TCE has failed to establish that there was another contractor hired by NYCTA to perform the asbestos removal. Thus, TCE's reliance on the said decision is misplaced.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the findings above.

In light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendant TC Electric, LLC is denied without prejudice to renew at the close of discovery; and it is further

ORDERED that the parties are directed to appear for a status conference on July 14, 2020 at 80 Centre Street, Room 280 at 2:15 p.m; and it is further

ORDERED that this constitutes the decision and order of the court.

4/24/2020
DATE

KATHRYN E. FREED, J.S.C.

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