

Herrero v 2146 Nostrand Ave. Assoc., LLC
2020 NY Slip Op 32560(U)
July 24, 2020
Supreme Court, New York County
Docket Number: 153673/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ

PART IAS MOTION 47EFM

Justice

-----X

EDGARDO HERRERO,

Plaintiff,

- v -

2146 NOSTRAND AVENUE ASSOCIATES, LLC., ACHS
MANAGEMENT CORP., SHAWMUT WOODWORKING &
SUPPLY, INC., 49TH BROADWAY, LLC. D/B/A DALLAS
BBQ.,

Defendant.

-----X

SHAWMUT WOODWORKING & SUPPLY, INC.

Plaintiff,

-against-

J.D. CONSULTING, LLC

Defendant.

-----X

2146 NOSTRAND AVENUE ASSOCIATES, LLC., ACHS
MANAGEMENT CORP.

Plaintiff,

-against-

NOSTRAND ENTERPRISES, LLC D/B/A DALLAS BBQ,

Defendant.

-----X

SHAWMUT WOODWORKING & SUPPLY, INC.

Plaintiff,

-against-

Defendant.

INDEX NO. 153673/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 006 007

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595519/2015

Second Third-Party
Index No. 595804/2015

Third Third-Party
Index No. 595391/2017

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 483, 511, 512, 513, 514, 515, 516, 554, 555, 587, 588, 589, 590, 591, 628

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 007) 382, 383, 384, 385, 386, 387, 388, 389, 484, 544, 545, 546, 547, 548, 549, 556, 557

were read on this motion to/for DISMISSAL.

In this Labor Law action, fifth-party defendant/sixth-party plaintiff Trison, Inc. (Trison) moves for summary judgment and dismissal of all claims against it pursuant to CPLR 3211 and 3212 (Mot Seq No 6). Sixth-party defendant, Patriot Electric, Inc. (Patriot) also moves for summary judgment and dismissal of the sixth third-party complaint against it (Mot Seq No 7). Motions 6 and 7 are consolidated for decision.

Much of the background in this case is set forth in the decision and order dated January 2, 2020 (NYSCEF Doc No 381) deciding plaintiff Edgardo Herrero’s motion for summary judgment (Mot Seq No 4) and will not be repeated here. Additional background will be set forth below necessary to address Trison’s and Patriot’s summary judgment motions.

TRISON’S MOTION

Trison first argues that it should be dismissed from this action because there is no evidence that it owned the baker scaffold involved in plaintiff’s May 21, 2014 accident. Joseph Kwasnik was the manager and operator of Trison at the time of plaintiff’s accident and was responsible for the purchase, maintenance and oversight of Trison’s equipment, including its baker scaffolds (Ex YY, Kwasnik affd ¶ 1). According to Kwasnik, Trison stored its two baker scaffolds on the second floor in locked storage (Ex XX, Kwasnik trans p 33). Trison did not use a baker scaffold in the basement (where plaintiff’s accident occurred) in April or May 2014 up to

the day of plaintiff's accident (*id.* at 39). Kwasnik further testified that Trison's two baker scaffolds on the project had black frames (*id.* at 47) and that other contractors had baker scaffolds on the project with yellow frames (*id.* at 62).

Trison attempts to establish that the baker scaffold involved in plaintiff's accident was "orange/yellow" by attaching photographs as exhibit A to its motion. While these photographs bear court reporter stickers' indicating that they are plaintiffs' exhibits there is no citation to plaintiff's deposition testimony establishing that the photographs fairly and accurately depict the scaffold involved in plaintiff's accident nor is there any other testimony authenticating them (*see Kartychak v Con Ed. of NY, Inc.*, 304 AD2d 487 [1st Dept 2003] [holding court properly admitted evidence where three witnesses testified that the photographs fairly and accurately depicted the scene of the accident]). These "unauthenticated photographs [do] not constitute evidentiary proof in admissible form" (*Charlip v NYC*, 249 AD2d 432, 433 [2nd Dept 1998]) that the baker scaffold involved in plaintiff's accident was "orange/yellow" and therefore, may not be used to establish Trison's prima facie burden of proof on summary judgment (*Xian v Tat Lee Supplies Co., Inc.*, 170 AD3d 538, 539 [1st Dept 2019] [holding defendant failed to establish its prima facie burden since much of the evidence it submitted was inadmissible and could not be considered]). To the extent that Trison argues there is no evidence that it owned the baker scaffold, it "cannot obtain summary judgment by pointing to gaps in [] proof" (*Coastal Sheet Metal Corp. v Martin Assoc.*, 63 AD3d 617, 618 [1st Dept 2009]; *see also Harvey v Henry 85 LLC*, 176 AD3d 443, 444 [1st Dept 2019] [defendant failed to meet its prima facie burden, it only pointed to gaps in plaintiff's proof]). To establish its prima facie burden, Trison was required to present affirmative evidence that it did not own the baker scaffold, rather than merely pointing to

gaps in proof that it was the owner or party responsible for bringing the scaffold on the project (*Torres v Indus. Container*, 305 AD2d 136 [1st Dept 2003]).¹

Trison next argues that “Herrero’s Labor Law 200, 240(1), and 241(6) causes of action should be dismissed based on the fact that Trison was not the owner or general contractor, nor their agent” and did not have supervisory duties over plaintiff. However, Trison is not a direct defendant to plaintiff’s claims; Shawmut’s claims against Trison are for indemnification and contribution in the event that Trison is found to be negligent for bringing the defective baker scaffold onto the project. Because there are triable issues of fact as to whether Trison created the condition that caused plaintiff’s injury, its motion for summary judgment on this basis must be denied (*Singh v United Cerebral Palsy of NYC, Inc.*, 72 AD3d 272, 278 [1st Dept 2010])[holding trial court correctly denied third-party defendant’s summary judgment motion because there were triable issues of fact as to whether plaintiff’s accident was caused by third-party defendant’s negligence]).

Next, Trison argues that plaintiff’s Labor Law 240 (1) claim should be dismissed because he was the sole proximate cause of the accident and a recalcitrant worker. Again, plaintiff does not have a direct Labor Law 240 (1) against Trison. More importantly, by decision and order dated January 2, 2020, the court granted summary judgment in favor of plaintiff on his Labor Law 240 (1) claim and “that determination is the law of the case. . . absent a showing of subsequent evidence or change of law” (*Delgado v NYC*, 144 AD3d 46, 47 [1st Dept 2016] [internal quotation marks omitted]). Trison does not argue much less make a showing of

¹ Trison asserts that it attempted to subpoena documents and obtain testimony from Caruso Painting, a painting subcontractor used by Shawmut, but that Caruso failed to respond to its subpoenas. Trison does not explain why it did not seek to compel compliance to its subpoenas.

subsequent evidence or change of law and therefore, summary judgment in favor of Trison on plaintiff's Labor Law 240 (1) claim will be denied.

Finally, Trison argues plaintiff's Labor Law 241 (6) claim should be dismissed because he does not allege applicable Industrial Code provisions that were violated. However, by the January 2, 2020 decision and order, the court denied cross moving defendants cross motions for summary judgment on plaintiff's Labor Law 241 (6) as academic in light of the granting of plaintiff's motion for summary judgment on liability and again this determination is the law of the case because Trison has not made a showing of subsequent evidence or change of law (*id.*).

Since Trison has failed to demonstrate its entitlement to judgement as a matter of law the sufficiency of the opposition to its motion will not be considered (*Cuevas v NYC*, 32 AD3d 372 [1st Dept 2006] [holding summary judgment "properly denied regardless of the sufficiency of plaintiff's opposing papers"]). Accordingly, Trison's motion for summary judgment will be denied.

PATRIOT'S MOTION

Sixth third-party defendant Patriot moves for summary judgment and dismissal of the claims asserted against it in Trison's sixth third-party complaint for common law indemnification and contribution. Like Trison, Patriot argues that it cannot be held liable because it did not own the bakers' scaffold involved in plaintiff's accident. In support, Patriot submits the affidavit of Frank Pugliese, its director of operations, who states that Patriot did not have any scaffolds at the work site. Affirmation of Michael L. Stonberg dated January 6, 2020, Exh. E (Affidavit of Frank Pugliese sworn to on January 3, 2020, para. 4).

Trison opposes Patriot's motion and argues that Mr. Pugliese's affidavit is procedurally deficient as he provides no support for his source of knowledge. However, in the affidavit, Mr.

Pugliese clearly states his role at the company as director of operations and explains that his source of knowledge is based on a search of Patriot's records for this project. Given that the accident occurred six years ago, it is reasonable for Mr. Pugliese to rely on Patriot's records as the basis for his knowledge. *See Matas v. Clark & Wilkins Indus.*, 61 A.D.3d 582 (1st Dep't 2009); *McDermott v. South Farmingdale Water District*, 167 A.D.2d 517 (2d Dep't 1990). Further, to the extent that Trison argues that it requires a deposition of Mr. Pugliese, this discovery has been waived as Trison failed to seek Patriot's deposition and never raised this issue prior to the court conference in November 2019, when discovery was deemed complete. *See* Status Conference Orders dated March 14, 2019; May 9, 2019; September 5, 2019; October 10, 2019; and November 7, 2019 (NYSCEF Docs. 307, 315, 334, 369, 375).

Finally, Trison attempts to raise an issue of fact by citing to the deposition testimony of Catherine Douglas, a witness for the general contractor Shawmut Woodworking & Supply Inc. which hired Patriot to perform work at the project. According to Trison, Ms. Douglas testified that Patriot would have used a bakers' scaffold to perform its work and that Patriot performed work in the basement of the site, which is where the accident occurred. Affirmation of Bryan Lipsky dated February 12, 2020, para. 7. However, Trison fails to attach the deposition transcript to its motion papers and the exhibit it cites as the Douglas deposition transcript is a document from another case. Lipsky Aff., Exh. 2. Thus, this evidence is insufficient to raise an issue of fact with respect to Patriot's alleged ownership of the scaffold. Accordingly, Patriot's motion for summary judgment will be granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that Trison's motion for summary judgment is denied; and it is

ORDERED that Patriot's motion for summary judgment is granted and the sixth-third party complaint is dismissed as against this defendant, with costs and disbursements; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of Patriot from this action; and it is further

ORDERED that movant shall file a Notice to County Clerk (form EF-22 available on NYSCEF) to notify the clerk of the amended caption and the clerk is directed to amend its records accordingly.

7-24-20

DATE

Paul A. Goetz
PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	DENIED	