Matter of 260 Madison Ave. HVAC Unit Collapse
2021 NY Slip Op 30235(U)
January 26, 2021
Supreme Court, New York County
Docket Number: 783000/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

IN RE: 260 MADISON AVENUE HVAC UNIT COLLAPSE	**DECISION/ORDER**
	IND. NO. 783000/18
This Decision/Order Relates To:	
Welch v. 260-261 Madison Ave. LLC. *et al.*	Ind. No. 162502/15 Mot Seq. 008
Admiral Indemnity Co. v. 260-261 Madison Ave. LLC. *et al.*	Ind. No. 162167/15 Mot Seq. 008
260-261 Mad. Ave LLC. v. Penguin Air Cond. Corp. *et al.*	Ind. No. 157898/17 Mot Seq. 006 & 008
Beck v. 260-261 Madison Ave. LLC *et al*.	Ind. No. 152458/17 Mot Seq. 007
Continental v. Skylift *et al*.	Ind. No. 154570/18 Mot Seq. 002
Pacific v. Penguin Air Cond. Corp. et al.	Ind. No.151809/18 Mot Seq. 002
-and-	
Pyle v. 260-261 Madison Ave. LLC. *et al.*	Ind. No. 154601/18 Mot Seq. 004 & 006
	Present: Hon. Lynn R. Kotler, J.S.C.

There are nine motions pending in these coordinated actions which arise from a crane accident that occurred on May 31, 2015 at 261 Madison Avenue, New York, New York (the "premises"). An HVAC chiller unit fell while being hoisted by a crane to the 30th floor of the premises.

In the above-captioned action entitled 260-261 Mad. Ave LLC. v. Penguin Air Cond. Corp. *et al.* (Index No. 157898/17), Hanes Supply Company, Inc. ("Hanes") and Paul's Wire

Rope and Sling ("Paul's" and collectively the "Hanes defendants") move for summary judgment (motion sequence 8). In that same motion sequence, Marine & Industrial Supply Company, Inc ("Marine") cross-moves for summary judgment in its favor. The remaining motions are to compel and/or arise from the parties' disputes as to discovery.

In the interest of judicial economy, these nine motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court will first consider the motion for summary judgment.

Summary Judgment

In their summary judgment motion, the Hanes defendants move for summary judgment dismissing the complaint by 260/261 Madison Avenue, LLC ("Madison") and the third-party complaint by Skylift Contractor Corp ("Skylift") as well as any other claims, crossclaims, counterclaims, or causes of action arising out of the underlying incident.

Marine cross-moves for summary judgment in its favor dismissing Madison and Skylift's complaint and third-party complaint against it, respectively. The following parties oppose the motion and cross-motion for summary judgment: Skylift, Timbil Mechanical, LLC, Madison and SFM Construction LLC f/k/a ASRR Construction LLC.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available.

Applicable Law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Facts and arguments

Madison and Skylift each allege that the HVAC unit fell from the 30th floor of the subject premises because the slings holding the HVAC unit failed and further, that the slings failed due to a design or manufacturing defect. Marine manufactured the sling and Paul's distributed the sling. Paul's dissolved in 2013 and Hanes is Paul's successor-by-merger.

After the underlying incident occurred, various governmental agencies conducted a post-incident investigation, which include the New York City Police Department, New York City Department of Investigation, and New York City Department of Buildings ("DOB"). DOB retained an independent engineer, Gary Cowles, of Cowles, Murphy, Glover & Associates, LLP, ("CMG"), who prepared a report dated September 15, 2016. The report provides in pertinent part as follows: "[i]n summary, SKYLIFT's overall execution of the lift of the Absorber-Evaporator and the subsequent failure of the rigging shows carelessness and negligence in proper planning, proper rigging practice, and proper management of the lifting evolution."

DOB brought a proceeding against Brad Allecia (sometimes "respondent") before the New York City Office of Administrative Trials and Hearings ("OATH"). Allecia, a licensed master rigger, was responsible for rigging operations in connection with the HVAC unit. In the OATH proceeding, DOB charged Allecia with: (1) endangering the public safety and welfare; (2) demonstrating negligence, incompetence, lack of knowledge or disregard for the Administrative Code and related laws and rules; and (3) failing to comply with the requirements of the Administrative Code and any lawfully-enacted requirements by DOB's Commissioner, in

violation of Admin Code §§ 28-401.19 (11), (6) and (7). In a written decision dated March 28, 2019, (*Dep't of Buildings v. Allecia*, OATH Index No. 0545/17, modified on penalty, Comm'r Dec. [April 19, 2019]), Administrative Law Judge Noel R. Garcia recommended a one-year suspension of Allecia's master rigger's license. The Commissioner adopted the ALJ's findings, but disagreed that Allecia's negligence did not cause the accident and imposed the penalty of license revocation.

The Hanes defendants contend that the sling was not defectively manufactured or designed and that neither Madison nor Skylift can prove their causes of action sounding in products liability against them. Movant primarily relies upon Cowles' report, as well as his affidavit submitted in support of the motion and a supplemental report by Cowles generated in response to the OATH decision. In his affidavit, Cowles states "that the sole proximate cause of the subject orange roundsling failure was the inadequate softeners and softening techniques utilized by the individuals and personnel who rigged the HVAC chiller unit, to wit, Skylift Contractor Corp." Movants have further provided to the court a report generated by ITI Field Services and Mike Parnell dated February 27, 2017, which provides responses and comments to Skylift's "Corporation Sting Failure Analysis report, February 16, 2017, by Messrs. Joe Collins and Tom Mackey, P.E., of Becht Engineering." The Hanes defendants maintain that their record "irrefutably establishes the lack of a defect in the subject sling." Therefore, movants assert that they have provided sufficient evidence "to show that the product was not defective." Movants further argue that they "made no implied or express warranty that the subject sling could be used in the outrageous manner in which Skylift personnel appropriated it." Relatedly, they argue that the acts of Skylift's personnel "breaks any causal connection which they could possibly attribute to other parties, particularly the Hanes Defendants." Marine adopts the Hanes defendants' arguments.

Both Skylift as well as Madison and SKM argue that the Hanes defendants' motion and Marine's cross-motion should be denied on procedural grounds. Specifically, these parties

complain that Cowles' affidavit lacks a certificate of conformity and that the ITI report is not in admissible form. Movants disagree, and on reply submit a certificate of conformity in connection with Cowles' affidavit.

Madison and SKM assert that the motion should be denied because movants failed to annex copies of the pleadings and they failed to specifically seek relief as to each respective index number. The first argument fails since this is an efiled case. However, as to the latter argument, the court agrees with Madison and SKM. Insofar as movants implicitly seek relief under index numbers for which it hasn't not expressly moved, movants are not entitled to such relief. However, in light of the result reached by the court on the motion, this point is moot. Nonetheless, the court takes this opportunity to remind the parties that if they seek any relief with respect to a specific index number, they must bring a motion under that index number in conformance with the case management order applicable to these coordinated actions.

Madison and SKM further argue that the motion and cross-motion are premature as substantial discovery remains. These parties argue that they "are entitled to conduct their own depositions of all parties and retain experts to opine on the propriety of the sling and the rigging, with the benefit of [the OATH proceeding] transcripts" to which Madison and SKM were not parties. Substantively, Skylift argues that the Hanes defendants have not met their burden and eliminated a triable issue of fact, to wit "whether the failure of the sling in question was caused by improper rigging as Hanes contends, or by a defective sling, as asserted by Skylift." Madison and SKM point to differing opinions between Brecht reports (which have been provided in opposition to the motion) and the ALJ's finding that "it is more likely than not that the sling failed due to a latent manufacturing defect", as compared to those offered by Cowles.

Otherwise, the balance of the reply argues that the motion is unopposed as to any alleged breach of implied warrant and/or express warranty because the Hanes defendants moved as to all causes of action. The Hanes defendants complaint that Skylift performed

destructive testing of the sling resulting in spoliation of evidence which cannot be used to undermine Cowles' findings. Otherwise, movants assert that the Brecht report has "zero probative value" because it uses inapplicable testing procedures.

Discussion

The motion and cross-motion for summary judgment are denied for the reasons that follow. At the outset, the court finds that summary judgment is premature on this record. Summary judgment is premature when facts not in a party's possession could be discovered during the course of discovery which would enable it to defeat a CPLR § 3212 motion (CPLR § 3212[f]). Here, Madison and SKM were not even parties to the OATH proceeding, the findings and result of which movant and cross-movant attempt to undercut by way of this motion. There is no dispute that depositions have not yet been held and therefore, there is likely testimony and evidence not in Skylift, Madison and SKM's possession which could enable them to successfully oppose the instant motions.

Further, the ALJ's decision highlights triable issues of fact on this record. To wit, in finding that the DOB did not establish that that Allecia failed to protect the slings from the sharp edges of the unit or used improper rigging practices creating a hazardous condition that caused the accident, he stated:

> … it was DOB's burden to prove by a preponderance of the evidence that respondent caused the accident by failing to protect the sling from the sharp edge of the unit, but failed to do so. Instead, the evidence established that it is just as likely, if not more likely, that the sling failure was caused by a manufacturing defect.

Therefore, assuming *arguendo* that summary judgment was not premature and the Hanes defendants and Marine had met their burden on this motion, triable issues of fact exist which are sufficient to defeat the motion at this juncture. Indeed, the record reveals a proverbial battle of the experts, whose opinions the court cannot resolve.

Accordingly, the Hanes' defendant's motion and Marine's cross-motion for summary judgment are denied for at least these reasons. The court now turns to the discovery motions.

Discovery

Skylift's motions to compel the Hanes defendants

Skylift moves to compel the Hanes defendants to respond to Skylift's Combined Interrogatories and Requests for Discovery and Inspection or deeming the issue that is the subject of that discovery demand resolved in favor of Skylift under the following index numbers: Index No. 157898/17, seq. 6; Index No. 154601/18, seq. 4; Index No. 162502/15, seq 8; Index No. 162167/15, seq. 8; Index No. 152458/17, seq. 7; Index No. 154570/18, seq. 2; and Index No. 151809/18, seq. 2.

Skylift's counsel explains that "[t]hese discovery demands are tailored to elicit evidence concerning the issue of whether Hanes is a successor-by-merger to Paul's Wire, and as such putatively liable for the defect in the sling to the same extent as would be Paul's Wire as the distributor of the sling." According to a deficiency letter dated July 25, 2019, Skylift's counsel identified the following outstanding items:

> Documents concerning the customers of Paul's Wire Rope & Sling, Inc. ("Paul's Wire") that were provided to Hanes at or prior to the closing were requested. In its response, Hanes refers to the document stamped Hanes0073. Such is captioned "Customer & Job List." The pagination indicates that it is the first of 58 pages, yet the remaining 57 pages of the document were not produced. No explanation was offered.
>
> Documents concerning the accounts receivable of Paul's Wire were requested. None were provided. In light of Skylift's allegations to the effect that Hanes is the successor-by-merger to Paul's Wire, these requests are within the scope of permissible discovery under CPLR 3101 and not in the nature of supplemental enforcement proceedings. In light of the order of magnitude of the aggregate damages claimed in these actions, and indeed, in the 260-261 Madison action alone, these requests are not disproportionate to the needs of the case.
>
> Documents concerning the conduct of business by Hanes under the name Paul's Wire or similar names were requested. None were provided. In light of Skylift's allegations to the effect that Hanes is the successor-by merger to Paul's Wire, these requests are within the scope of permissible discovery under CPLR 3101. In light of the order of magnitude of the aggregate damages claimed in these actions, and indeed, in the 260-261 Madison action alone, these requests are not disproportionate to the needs of the case. We reject the notion that the requested documents may be withheld as confidential, proprietary or trade secrets.

> A description of the responsibilities of Paul R. Cianciola was requested but not provided.

In opposition, the Hanes defendants' counsel argues that his clients have "responded, on multiple occasions, to all of the discovery related demands made by Skylift which are the subject of this motion, this motion must be denied." Counsel advises that "the responses in dispute, which Skylift lays out in their moving papers, were responded to directly in supplemental discovery responses served by Hanes via email on April 8, 2020."

In light of the representations made by the Hanes defendants' counsel, Skylift's motions appear to be moot. However, in the interests of judicial economy, the court will direct the parties to file supplemental affirmations identifying what outstanding discovery which was the subject of the motions remains outstanding since the Hanes' defendants April 8, 2020 responses with a briefing schedule as follows: Skylift to be filed on or before February 9, 2021 the Hanes defendants to be filed on or before February 23, 2021. These seven motions are hereby adjourned to February 23, 2021 for submission of papers as outlined herein. No in-person appearances.

Madison and SKM's motions

Under Index Number 154601/18, motion sequence 6, Madison and SKM move to compel the plaintiffs to respond to their outstanding demands, stay depositions, strike their complaint, etc. The parties stipulated to adjourn the motion to November 17, 2020 for submission of papers. However, plaintiff's counsel filed an affirmation in opposition to the motion that does not apply to this case. This document has been returned for correction and in the interests of justice, the motion is adjourned to February 23, 2021 with plaintiff's opposition to be filed on or before February 9, 2021 and reply, if any, on or before February 23, 2021. No in-person appearances.

Under Index Number 162167/15, motion sequence 8, Madison cross-moves to strike Marine's affirmative defense of lack of personal jurisdiction for failure to provide discovery and

alternatively to compel Marine to provide responses. Madison asserts that on May 31, 2019, Marine provided a second supplemental response to its joint notice for discovery and inspection, but again failed to provide an adequate response to paragraph 13, and failed to respond, in any manner to paragraphs 53-76, 100 and 101 of their demand dated February 22, 2018. In an order dated August 15, 2019, the court directed the parties to respond to all outstanding discovery within 30 days and move to compel if good faith efforts to obtain such discovery have failed.

Marine opposes the motion, arguing that Madison did not make sufficient good faith efforts to resolve the underlying discovery dispute. Addressing the merits of the motion, Marine represents that it “has provided all responsive discovery in its possession, and has provided an affidavit from Marine's President, Thomas Benton, confirming that all discovery has been provided.”

The parties then sent correspondence to the court concerning the submission of Marine’s opposition, which is moot since Madison has had an opportunity reply. Madison reiterates: “MARINE has repeatedly failed to provide an adequate response to paragraphs 53-76, 100 and 101 of 260-261’s demands dated February 22, 2018, and paragraph 13 of 260-261 and Skylift’s demand dated October 29, 2018. Given MARINE’s willful failure to provide adequate responses for over one year, this Honorable Court should issue an order compelling MARINE to provide a response by a date certain, under threat of sanction via conditional order of preclusion.”

These actions have been languishing for years. Marine has had ample opportunity to provide sufficient responses to Madison’s demands, which seek, *inter alia*, a laundry list of documents. Meanwhile, Benton’s affidavit merely states in several brief paragraphs that Marine does not have licensing, sales, dealer, distributor or other agreements, contracts or communications with Paul’s Wire Rope & Sling regarding the sale, manufacture or distribution of the sling at issue. Benton does not state that he is a custodian of records, does not describe the

search for records demanded by Madison and is otherwise insufficient. The court has reviewed the parties exhibits and does not find a response from Marine which satisfies its discovery obligations in this case. Therefore, Madison's cross-motion must be granted to the extent that the court will give Marine one final opportunity to sufficiently respond to Madison's outstanding demands, to wit, paragraphs 53-76, 100 and 101 of 260-261's demands dated February 22, 2018, and paragraph 13 of 260-261 and Skylift's demand dated October 29, 2018, within 30 days. To the extent that documents demanded do not exist, Marine must provide an affidavit from a custodian of such records which describes the search that was performed for responsive documents and attests that no such records exist. Marine's failure to do so shall automatically result in an order striking its affirmative defense of lack of personal jurisdiction pursuant to CPLR § 3126.

Conclusion

In accordance herewith, it is hereby

ORDERED that the Hanes defendants and Marine's motion and cross-motion, respectively, for summary judgment under Index Number 157898/17, motion sequence 8, is denied; and it is further

ORDERED that Skylift's seven motions to compel the Hanes defendants under the following index numbers are adjourned to February 23, 2021 for submission of papers with the parties to file supplemental affirmations as follows: Skylift on or before February 9, 2021 and the Hanes defendants on or before February 23, 2021.

Index No. 157898/17, seq. 6;

Index No. 154601/18, seq. 4;

Index No. 162502/15, seq 8;

Index No. 162167/15, seq. 8;

Index No. 152458/17, seq. 7;

Index No. 154570/18, seq. 2; and

Index No. 151809/18, seq. 2

No in-person appearances; and it is further

ORDERED that Madison and SKM's motion to compel the plaintiffs under Index Number 154601/18, motion sequence 6, is adjourned to February 23, 2021 with plaintiff's opposition to be filed on or before February 9, 2021 and reply, if any, on or before February 23, 2021. No in-person appearances; and it is further

ORDERED that Madison's cross-motion under Index Number 162167/15, motion sequence 8, to strike Marine's affirmative defense of lack of personal jurisdiction is granted as follows: the court will give Marine one final opportunity to sufficiently respond to Madison's outstanding demands, to wit, paragraphs 53-76, 100 and 101 of 260-261's demands dated February 22, 2018, and paragraph 13 of 260-261 and Skylift's demand dated October 29, 2018, within 30 days. To the extent that documents demanded do not exist, Marine must provide an affidavit from a custodian of such records which describes the search that was performed for responsive documents and attests that no such records exist. Marine's failure to do so shall automatically result in an order striking its affirmative defense of lack of personal jurisdiction pursuant to CPLR § 3126 upon Madison's counsel settling an order on notice with an affirmation attesting in support attesting to Marine's non-compliance.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: New York, New York
January 26, 2021

So Ordered:

Hon. Lynn R. Kotler, J.S.C.