

Plechaty v CDL W. 45th St. L.L.C.

2021 NY Slip Op 30491(U)

February 19, 2021

Supreme Court, New York County

Docket Number: 158259/2017

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH

PART IAS MOTION 18EFM

Justice

-----X

INDEX NO. 158259/2017

JERRY PLECHATY, JACQUELINE PLECHATY,

10/07/2020,

Plaintiff,

MOTION DATE 10/07/2020

- v -

MOTION SEQ. NO. 002 003

CDL WEST 45TH STREET L.L.C., HUDSON THEATRE,
LLC, AMBASSADOR THEATRE GROUP-NY, LLC, YORKE
CONSTRUCTION CORPORATION, GSI SYSTEMS, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

GSI SYSTEMS, INC.

Third-Party
Index No. 595969/2017

Plaintiff,

-against-

HORIZON CONTRACTING LLC

Defendant.

-----X

YORKE CONSTRUCTION CORPORATION

Second Third-Party
Index No. 595698/2019

Plaintiff,

-against-

LANE'S FLOORING COVERINGS AND INTERIORS INC.

Defendant.

-----X

LANE'S FLOORING COVERINGS AND INTERIORS INC

Third Third-Party
Index No. 595325/2020

Plaintiff,

-against-

JMC FLOOR COVERING INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, per motion sequence number 003, third third-party plaintiff/second third-party defendant Lane's Floor Coverings and Interiors, Inc. (Lane's) moves pursuant to CPLR 3212 seeking an order for summary judgment against defendant/second third-party plaintiff Yorke Construction Corporation (Yorke). Additionally, per motion sequence 002, third third-party defendant JMC Floor Covering Inc. (JMC) moves for an order dismissing Lane's Complaint pursuant to CPLR 3211[a][1] on the grounds that there is documentary evidence to support a defense in favor of a dismissal.

In the primary action, plaintiff Jerry Scott Plechaty, an employee of co-defendant Horizon Contracting, LLC, alleges that on September 7, 2016 he was caused to fall off of an 8-foot ladder while conducting installations in the Hudson Theatre (premises) at 139 West 44th Street in the County, City and State of New York. On September 14, 2017, plaintiff commenced this action against CDL West 45th Street, LLC; Hudson Theatre, LLC; Ambassador Theatre Group-NY, LLC; Yorke; and GSI Systems, Inc. GSI Systems Inc. then filed a third-party action against Horizon Contracting LLC. In turn, Yorke initiated a second third-party action against Lane's. Finally, Lane's filed the third third-party action against JMC Flooring.

The general contractor Yorke was retained to renovate the premises and subcontracted with Lane's to procure and install carpeting for the premises. Lane's then sub-subcontracted with JMC to provide the physical labor in installing the carpeting at Hudson Theatre.

Yorke claims in their second third-party action against Lane's that should Yorke be found liable: (1) Yorke is entitled to common law indemnification and contribution; (2) that the Court should find Lane's is to provide contractual indemnity for Yorke's legal defense in this suit; and (3) Yorke alleges Lane's has breached their agreement to secure liability insurance.

In Lane's third third-party complaint they claim or allege: (1) JMC entered into an agreement to indemnify Lane's in any damages awarded against Lane's and costs associated with the defense of this suit; (2) that JMC has breached their agreement to procure insurance naming Lane's as an additional insured; and that (3) JMC is in breach of contract.

1. Lane's Motion for Summary Judgment

The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks and citation omitted]). "[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

Lane's asserts entitlement to summary judgment because Yorke cannot make out a prima facie case of negligence and/or contractual indemnity against Lane's. Furthermore, Lane's avers

there does not exist a finalized executed subcontract between Lane's and Yorke; Lane's was not retained to remove old flooring/demolish; nor did they start work before October 2016.

Therefore, Lane's maintains Yorke cannot prove: (1) Lane's worked on the flooring where the accident occurred; (2) negligence on behalf of Lane's; or that (3) Lane's breached any contractual provisions.

Lane's proffers in support of its motion a draft/proposed subcontract agreement between Yorke and Lane's, arguing it has not been signed nor lays out the scope of work to have been performed. In addition, Lane's proffers its discovery demands and good faith letters to Yorke and an affidavit from Lane's owner Lane Brettschneider (Brettschneider).

In opposition to Lane's' summary judgment motion, Yorke argues that it is too premature to grant summary judgment as discovery has not been completed and depositions have yet to occur. In addition, Yorke contends that Lane's filed its motion for summary judgment before receiving responses to its discovery demands from Yorke. Additionally, Lane's has not responded to Yorke's discovery demands. Finally, Yorke would feel prejudiced if summary judgment was granted: (1) from the subsequent departure of the handling attorney during the period that Yorke was supposed to respond to Lane's discovery demands;¹ and (2) that Yorke is still awaiting discovery responses from Lane's.

In reply, Lane's maintains that to grant JMC's motion to dismiss without also granting Lane's' summary judgment would create inconsistent and incompatible results. Furthermore, Lane's contends that Yorke has failed to come forward with any evidence warranting denial of summary judgment. Moreover, Yorke does not refute the lack of any executed contractual

¹ Counsel for Yorke states that the prior handling attorney also was absent from an August 26th, 2020 status conference, which Lane's and JMC argue is incorrect. The Court recalls the prior handling attorney Justin Pomerantz, Esq. appeared for Yorke at the August 26th conference.

agreements between Yorke and Lane's or that Lane's did not do work on the job site prior to plaintiff's accident.

Brettschneider's affidavit states that the ordered carpeting was not delivered or installed before October 2016 and that Lane's did not perform any work at the Hudson Theatre project other than visiting the premises for a visual inspection. Because Lane's states that it was not present at the work site until after the accident; the lack of evidence showing a binding, executed contract; and that Lane's was not hired for demolition/removal work, Lane's has, therefore, met its initial burden.

Here, Yorke has not provided any affidavits or evidence to justify denying Lane's motion for summary judgment (*contra* CPLR 3212[f] ["the court may deny [a] motion [for summary judgment] or [...] order a continuance," "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated"]). Moreover, Yorke does not deny that the draft/proposed subcontract agreement between Yorke and Lane's was unexecuted. In arguendo, Yorke even supplied the draft/proposed subcontract to Lane's showing no further issues of fact and that summary judgment is not premature (*see Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013] ["A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant"]).

Yorke had over a year since Lane's Answer and a December 4th, 2020 so-ordered stipulation to conduct discovery. Moreover, Yorke consented to provide their discovery demands seven days from an August 26th, 2020 so-ordered stipulation, which they tendered on September 24th, 2020 (*see Cruz v Otis Elevator Co.*, 238 AD2d 540 [2d Dept 1997])["A party who claims

ignorance of critical facts to defeat a motion for summary judgment [i.e. CPLR § 3212[f]] must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue]; *see also Voluta Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [1st Dept 2007]). Furthermore, although depositions have not occurred, this in itself does not justify denying a summary judgment motion (*see Baxter Street Condominium v. LPS Baxter Holding Co., LLC*, 126 AD3d 417, 419 [1st Dept 2015] [“The mere fact that depositions have not been held is an insufficient ground to excuse the deficiencies in [the nonmovant’s] proof”]; *see also* CPLR § 3214 [a summary judgment motion stays discovery]). Accordingly, the Court finds it unavailing that future discovery would have warranted denying this motion or that summary judgment is premature.

2. JMC’s Motion for Summary Judgment

In support of JMC’s motion to dismiss Lane’s Complaint, JMC avers: (1) there exists no contracts to defend, indemnify and hold harmless between Lane’s and JMC; (2) there are no effective contracts between JMC and Lane’s that are breached; (3) there exists no contract between said parties that required JMC to obtain insurance coverage naming Lane’s as an additional insured; and (4) there is no contract for obtaining insurance for Lane’s covering damage from any and all claims or suits for personal injuries. Furthermore, JMC maintains that their proffered affidavit of JMC’s President James McElligott (McElligot) demonstrates that Lane’s had full knowledge JMC had not begun work on the job site until after the accident. In addition, the November 1, 2016 Purchase Order attached as an exhibit in conjunction with McElligot’s affidavit establishes that work was not to commence until October 24, 2016. Moreover, a further exhibit comprising a January 19, 2017 revised Purchase Order, which includes work tickets showing dates work was conducted, reiterates the date of commencement

for work to begin was October 24, 2016. Likewise, the work tickets from the revised Purchase Order show that the initial work ticket is dated December 5, 2016, thereby confirming that JMC was not present on the job site until after the accident. Finally, among JMC's legal summary judgment arguments, JMC makes an argument that none of the elements necessary to prove negligence are present here for a personal injury action against JMC.

In opposition to JMC's motion to dismiss², Yorke argues JMC's motion is premature to grant summary judgment as discovery has not been completed and depositions have yet to occur. In addition, Yorke contends that JMC filed its motion for summary judgment before receiving responses to its discovery demands from Yorke. Additionally, JMC has not responded to Yorke's discovery demands. Finally, Yorke would be prejudiced if summary judgment was granted: (1) from the subsequent departure of the handling attorney during the period that Yorke was supposed to respond to JMC's discovery demands; and (2) that Yorke is still awaiting discovery responses from JMC.

Here, the affidavit of McElligot and the accompanying exhibits mentioned supra make clear that JMC did not commence work until approximately 47 days after the date of plaintiff's accident; therefore, JMC has met their prima facie burden (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002] [a "CPLR 3211[a][1] motion to dismiss on the grounds that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law"]).

² Lane's submitted a partial opposition to JMC's motion to the extent that Lane's believes its motion should be granted for the same reasons outlined in JMC's papers and that to grant JMC's motion, but not Lane's' motion would cause conflicting results (NYSCEF Doc. No. 170).

In opposition, Yorke failed to proffer any evidence to show any genuine issues of material fact or demonstrate that the motion is premature (*see e.g. Rodriguez-Garcia v Bobby's Bus Co., Inc.*, 175 AD3d 631, 632 [2d Dept 2019])[“the [movant’s] motion was not premature, as the [nonmovant] failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the [movant]”]; *see also Baxter Street Condominium* at 419 [the nonmovement “cannot avoid summary judgment by speculating that discovery will provide the necessary evidence”]). Finally, the Court finds Yorke’s argument that JMC was supposed to respond to remaining discovery or that summary judgment is premature, unavailing.

Accordingly, it is hereby

ORDERED that Lane’s motion for summary judgment is granted, dismissing second third-party plaintiff’s complaint and any and all cross-claims against Lane’s; and it is further

ORDERED that JMC’s motion to dismiss is granted, dismissing third third-party plaintiff’s claims and any and all crossclaims against JMC.

This constitutes the decision and order of the Court.

2/19/2021
DATE

ALEXANDER M. TISCH, J.S.C.

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