

Adaman v Park 65th Assoc., L.P.

2021 NY Slip Op 31268(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 156314/2019

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

-----X

INDEX NO. 156314/2019

BARA ADAMAN,
Plaintiff,

MOTION SEQ. NO. 003

- v -

PARK 65TH ASSOCIATES, L.P., 610 PARK AVENUE
CONDOMINIUM, THE TRUMP ORGANIZATION
INC., EVEREST SCAFFOLDING INC.,
Defendants.

DECISION + ORDER ON
MOTION

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610 PARK AVENUE CONDOMINIUM,
Third-Party Plaintiff,

Third-Party
Index No. 595029/2020

-against-

SCHNELLBACHER-SENDON GROUP,
Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action arising from injuries allegedly sustained at a construction site, defendant Everest Scaffolding, Inc. ("Everest") moves, pursuant to CPLR 3212, for an order dismissing cross-claims asserted by defendant/third-party plaintiff 610 Park Avenue Condominium ("610 Park") and third-party defendant Schnellbacher-Sendon Group, LLC s/h/a Schnellbacher-Sendon Group ("SSG"). (NYSCEF Doc. No. 70, notice of motion). Plaintiff submits papers in partial support of the motion. (NYSCEF Doc. No. 87, affirmation in partial support).¹ 610 Park and SSG both oppose the motion. (NYSCEF Doc. Nos. 91-92, 93-95). After a review of the relevant statutes and case law, the motion is granted.

The relevant facts of this case are as follows. Based on the pleadings and a notice to admit, plaintiff was allegedly injured on May 8, 2019 when he "fell from a hanging scaffold or 'rig'" while performing work at the jobsite located at 610 Park Avenue, New York, New York ("the premises"). (NYSCEF Doc. No. 72, summons and complaint; 76, notice to admit). In June 2019, plaintiff commenced this action by filing a summons and complaint against several defendants, including 610 Park, the alleged owner of the premises, and Everest, a subcontractor that performed work at the job site, asserting negligence and violations of the New York Labor

¹ Plaintiff only opposes the motion to extent that Everest seeks costs for the underlying motion against him.

Law. (NYSCEF Doc. No. 72).² 610 Park interposed an answer, asserting, among other things, cross-claims against Everest for contribution, and contractual and common law indemnification. (NYSCEF Doc. No. 75, *610 Park's answer and cross-claims*). In November 2019, after conducting its own investigation, counsel for Everest served plaintiff with a notice to admit, indicating that the subject accident occurred on a "hanging scaffold" or "rig." (NYSCEF Doc. No. 76). Plaintiff did not respond to said notice. Then, by stipulation dated January 15, 2020, plaintiff discontinued all claims as against Everest. However, 610 Park would not stipulate to discontinue its cross-claims. (NYSCEF Doc. No. 81, *stipulation of discontinuance*).

In January 2020, 610 Park commenced a third-party action against SSG, plaintiff's employer and the general contractor that was retained to perform construction work at the premises. (NYSCEF Doc. No. 78, *third-party summons and complaint*; 94 ¶ 2, *affidavit of Eric Schnellbacher*). On June 18, 2020, SSG interposed an answer in the third-party action, denying liability and asserting affirmative defenses and cross-claims against, *inter alia*, Everest, for contractual indemnification; common law indemnification; contribution and breach of contract based on its failure to procure insurance. (NYSCEF Doc. No. 79, *SSG's answer and cross-claims*). Everest also asserted similar cross-claims against SSG. (NYSCEF Doc. No. 62, *Everest's cross-claims*).

In support of its motion, Everest submits, in pertinent part, the affidavit of its president, Christopher Downes ("Downes") who affirms as to the scope of the work performed by Everest at the jobsite. Specifically, Downes avows that Everest was hired by SSG on October 25, 2016 to install a sidewalk bridge, which was completed on January 11 and 12, 2017, and remains erect. Then, on June 27, 2017, Everest submitted a proposal to SSG "to install pipe scaffolding on the south side of the building over the neighbor's roof, northwest corner of the building from the 2nd floor terrace, Park Avenue and 65th Street sides from the sidewalk bridge up." The pipe scaffolding was installed from September 2017 through February 2018. Part of the pipe scaffolding was removed in October 2018 and in July and August 2019. Everest was also contracted by SSG to install and remove overhead protection on the back of the building terrace, over the top of the neighboring yard. This protection was installed in January 2019 and dismantled on May 7, 2019. Downes represents that Everest removed its sidewalk bridge materials from the premises on June 11, 2019. He further avers that, other than the dates of installation and removal, Everest was not on-site and did not perform any work at the premises; Everest did not install any hanging scaffolds at the premises nor did it provide said equipment to any worker at the premises, including SSG; and Everest did not direct or control plaintiff's work at the premises. (NYSCEF Doc. 80, *affidavit of Christopher Downes*).

Everest argues that all cross-claims must be dismissed as against it because it bears no liability under either common law negligence or any other statute. Specifically, Everest argues that its work at the premises was limited to installing a sidewalk bridge, pipe scaffolding, and overhead protection at the premises, as well as, overhead protections on the back of an adjacent building. As such, Everest maintains that it was not involved with the hanging scaffold that occasioned plaintiff's fall. (NYSCEF Doc. No. 71 ¶ 34-57, *Loman's affirmation*).

² In August 2019, this action was discontinued as against Trump. (NYSCEF Doc. No. 74, *stipulation of discontinuance*). Moreover, in December 2019, this Court granted plaintiff's motion for a default judgment against Park 65th Associates, L.P. (NYSCEF Doc. No. 32, *December 2019 decision & order*).

In opposition to the motion, 610 Park argues that Everest's motion must be denied because significant discovery issues remain, including which scaffolding Everest removed; what portions of the scaffolding remained; and details pertaining to the work it performed on the day before and after the alleged accident. (NYSCEF Doc. 91, *McCoy, Jr. 's affirmation*). 610 Park contends that "there is an issue of fact as to whether plaintiff fell from a scaffolding supplied or assembled by Everest" or whether "work performed by Everest or on behalf of Everest to install, maintain or disassemble its scaffolding caused or contributed to plaintiff's fall and alleged injuries." (NYSCEF Doc. No. 91 ¶ 31-32). SSG makes similar arguments to those raised by 610 Park but it also submits the affidavit of Eric Schnellbacher ("Schnellbacher"), its managing member, who affirms that, "upon information and belief at the time of the alleged accident, [plaintiff] was in the process of removing a steal beam owned by Everest. Since the alleged accident involved the removal of Everest's materials, it should be found to have liability in this matter." (NYSCEF Doc. No. 94 ¶ 10, *Schnellbacher's affidavit*). SSG maintains that "there is a question of fact to be resolved in determining whether the alleged accident was caused, at least in part, by the means in which Everest's employees prepared equipment for the plaintiff to move or if it occurred as a result of [a] condition of the equipment itself." (NYSCEF Doc. 93 ¶ 28, *Consentino's affirmation*).

In reply, Everest argues that 610 Park's opposition is "wholly threadbare, vague, speculative and raises no issues of fact" insofar as it offers no evidence in admissible form. Moreover, Everest contends that Schnellbacher does not allege that Everest's personnel was on the site on the date of plaintiff's accident and that his bald allegation that plaintiff may have been moving equipment owned by Everest is insufficient to impute liability. (NYSCEF Doc. No. 99, *Loman's reply affirmation*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (*see Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, by failing to respond to the November 2019 notice to admit, plaintiff has conceded that the accident occurred on a "hanging scaffold" or "rig." (*see CPLR 3123.*) Furthermore, it is not alleged that Everest was at the premises on the date of accident; that it was involved with the hanging scaffold in any way; or that plaintiff's injuries were caused by equipment supplied by Everest. To the extent SSG relies on Schnellbacher's statement that plaintiff *may* have been in the process of removing a steal beam owned by Everest to argue that "the alleged accident was caused, at least in part, by the means in which Everest's employees prepared equipment for the plaintiff to move or if it occurred as a result of [a] condition of the equipment" (NYSCEF Doc. No. 93 ¶ 28), this argument is unavailing. Not only does this claim amount to speculation, which is insufficient to defeat a motion for summary judgment (*see James v Kensington Assoc.*, ___ AD3d ___, ___, 2021 NY Slip Op 01847, *1 [1st Dept 2021]; *Fernandez v Ortiz*, 183 AD3d

443, 443 [1st Dept 2020]), but assuming, *arguendo*, that plaintiff was carrying a beam owned by Everest, there is no proof that Everest controlled the manner in which the work was being performed on the date of the accident such that liability against it could be imposed. (see *Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [1st Dept 2014]; *Doodnath v Morgan Contr. Corp.*, 101 AD3d 477, 478 [1st Dept 2012].) Moreover, 610 Park and SSG fail to establish that further discovery would yield factual issues to preclude summary judgment. (see *Rodriguez v Beal*, 191 AD3d 617, ___, 2021 NY Slip Op 01220, *1 [1st Dept 2021]; *Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020].) All remaining arguments are either without merit or need not be addressed given the findings above. Therefore, in accordance with the foregoing, it is hereby,

ORDERED that the motion by defendant Everest Scaffolding, Inc. is granted, and all claims asserted against it are hereby dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant Everest Scaffolding, Inc. shall serve a copy of this order with notice of entry upon all parties, as well as, on the Clerk of the Court, who shall enter judgment accordingly, and it is further

ORDERED that the remaining parties are to appear remotely for a discovery conference on May 19, 2021, for which details will be provided no later than May 12, 2021.

This constitutes the decision and order of this Court.

April 9, 2021

HON. VERA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE