

Zakota v City of New York

2021 NY Slip Op 31270(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 157284/2014

Judge: Margaret A. Chan

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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. MARGARET PUI CHAN PART IAS MOTION 33EFM

Justice

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KATHARINE ZAKOTA, AS ADMINISTRATOR OF THE ESTATE OF RAFAEL ZAKOTA,

Plaintiff,

INDEX NO. 157284/2014

MOTION DATE

MOTION SEQ. NO. (MS) 008

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, HALMER CONSTRUCTION CORP., HALMER INTERNATIONAL CONSTRUCTION, LLC, HAKS GROUP, INC., HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.,

Defendant.

DECISION + ORDER ON MOTION

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THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Plaintiff,

Third-Party Index No. 595095/2015

-against-

HALMAR INTERNATIONAL, LLC, PRECISION CONCRETE PUMPING, INC.

Defendant.

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HAKS GROUP, INC., HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, P.C.

Plaintiff,

Second Third-Party Index No. 595529/2015

-against-

JA UNDERGROUND PROFESSIONAL CORPORATION D/B/A JACOBS ASSOCIATES

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 357, 358, 359, 360, 361, 364, 365, 366, 367, 370, 371, 372, 373, 374, 375, 376, 377, 378, 381, 392

were read on this motion to/for DISMISSAL.

In this Labor Law matter, defendant Halmar Construction Corp. (HCC) moves in MS8 to dismiss the complaint of plaintiff Katherine Zakota, as Administrator of the Estate of Rafael Zakota, pursuant to CPLR 3211(a)(7). HCC argues that it does not own the accident site, 918 Homestead Avenue, Maybrook, New York (Maybrook property), and instead third-party defendant Halmar International, LLC (HI) owns the site. Plaintiff and defendants City of New York/The New York City Department of Environmental Protection (City), Haks Group, Inc./Haks Engineers, Architects and Land Surveyors, P.C. (Haks), and JA Underground Professional Corporation d/b/a Jacobs Associates (JA) oppose the motion. The Decision and Order is as follows:

BACKGROUND

This court's October 1, 2019 Decision and Order (October 2019 Order) provides a detailed factual accounting of this accident (NYSCEF # 365 at 2-4). In short, this action arises from a construction site accident that occurred on December 2, 2013. Decedent Rafael Zakota was a journeyman carpenter who was employed by HI to work on a water tunnel project for the Delaware and Catskill Aqueduct. Zakota was injured when a concrete form for a mockup water tunnel collapsed (*id.*).

The October 2019 Order resolved plaintiff's, HCC's and Halmar International Construction, LLC's (HIC), and third-party defendant Precision Concrete Pumping, Inc.'s respective motions for summary judgment. Critically for the instant motion, the October 2019 Order denied summary judgment to HCC on the basis that there was a question of fact regarding its ownership of the Maybrook property, potentially exposing HCC to Labor Law liability (*id.* at 7)¹.

At the time of the summary judgment motion, HCC and HIC did not include any conclusive evidence regarding the ownership of the Maybrook property. Robert Power, who testified on behalf of Halmar, testified that a Halmar entity owned the property, but he did not know which one (*id.*).

Now, a year after HCC and HIC filed for summary judgment, HCC returns to this court with the instant motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. This time, HCC includes the supposed deed to the Maybrook property, claiming that it indicates that HI, and not HCC or HIC, is the owner of the site (NYSCEF # 359). HCC also includes an affidavit from Chris Larsen, the managing member of HI, who claims that HI is the owner of the Maybrook property (NYSCEF # 360).

¹ The October 2019 Order granted summary judgment to HIC on the basis that it was protected by the Workers Compensation Bar.

HCC argues that on the basis of the deed and the affidavit, it is entitled to dismissal of plaintiff's complaint. Plaintiff's Verified Amended Complaint dated September 21, 2015 is the operative complaint at this time (NYSCEF # 374). As discussed in the October 2019 Order, plaintiff deleted allegation 27 from the original complaint that previously alleged that HCC owned the Maybrook property (NYSCEF # 365 at 6).

DISCUSSION

HCC moves pursuant to CPLR 3211(a)(7) for failure to state a claim. A defendant may move to dismiss a complaint pursuant to CPLR 3211(a)(7) at any time (CPLR 3211[e]).

HCC's motion is denied. The law of the case doctrine applies here and prevents dismissal of plaintiff's claims against HCC at this time.

"[T]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 31 NY2d 162, 165 [1975]). "[L]aw of the case has been aptly characterized as 'a kind of intra-action res judicata'" (*People v Evans*, 94 NY2d 499, 502 [2000]). The law of the case doctrine only applies to "legal determinations that were necessarily resolved on the merits in the prior decision" (*Sudarsky v City of New York*, 668 N.Y.S.2d 350 [1st Dep't 1998]). "[P]reclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" (*Evans*, 94 NY2d at 502 [internal citations omitted]).

This court considered, and decided, this very issue regarding the ownership of the Maybrook property in the October 2019 Order.

"There remains a question of fact regarding ownership of the Maybrook property. Robert Power, who testified on behalf of Halmar, averred that a Halmar entity owned the property but did not know which one (NYSCEF #282 - Power EBT at 47). While Halmar is correct that its failure to respond to plaintiffs' amended complaint does not equal an admission to ownership, Halmar Construction might still be liable under an ownership liability theory."

(NYSCEF # 365 at 7).

HCC, in its summary judgment motion, raised the exact same issue that it now brings regarding plaintiff's removal of allegation 27 in the amended complaint. HCC argued then, as it does now, that this deletion necessitated dismissal of this action against it. At the summary judgment phase, Power's testimony raised a


legitimate question of fact regarding the ownership of the Maybrook property. This court will not upset that determination at this time.

HCC had a full and fair opportunity to contest this issue at summary judgment. HCC jumped to move for summary judgment at the first instance without proper evidence which was within their control. HCC should have proffered the deed for the Maybrook property at summary judgment. It chose not to, and indeed gave information contrary to what HCC now asserts. While HCC claims that dismissing the case now would ease the burden of the courts especially after the pandemic (NYSCEF # 392), HCC's concern is disingenuous since the courts, including the Appellate Division, are now hearing the same arguments again. Under the law of the case, this court will not reward HCC's second attempt at summary judgment disguised as a CPLR 3211(a)(7) motion.

Accordingly, it is ORDERED that Halmar Construction Corp.'s motion to dismiss is denied; and it is further

ORDERED that plaintiff is to serve a copy of this order with notice of entry on all parties within fifteen (15) days of this order.

This constitutes the Decision and Order of the court.

<u>4/9/2021</u> DATE			 MARGARET A. CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<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"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE