

Villante v Saber Dobbs Ferry, LLC
2021 NY Slip Op 33523(U)
April 13, 2021
Supreme Court, Nassau County
Docket Number: Index No. 610231/2017
Judge: David P. Sullivan
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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

-----X
SALVATORE VILLANTE,

TRIAL/IAS PART 24
NASSAU COUNTY

Plaintiff,

-against-

Motion Seq. No. 003
Index No. 610231/2017
Motion Submitted: 04/13/21

SABER DOBBS FERRY, LLC, DD&B
CONSTRUCTION and QUALITY STAIR & RAIL, LLC,

Defendants.

-----X
DD&B CONSTRUCTION,

Third-Party Plaintiff,

-against-

CALAMAR CONSTRUCTION MANAGEMENT, INC.,

Third-Party Defendant.

-----X
CALAMAR CONSTRUCTION MANAGEMENT, INC.,

Second Third-Party Plaintiff,

-against-

QUALITY STAIR & RAIL, LLC,

Second Third-Party Defendant.

-----X

The following papers having been read on this motion:

Notice of Motion (QSR).....	1
Opposition (Calamar)	2
Opposition (DD&B).....	3
Opposition (Plaintiff).....	4
Reply.....	5

Reply.....6

Defendant/Second Third-Party Defendant moves for summary judgment, pursuant to CPLR §3212, seeking dismissal of Plaintiff's complaint, the second third-party complaint, and any cross-claims asserted against it in their entirety in this labor law action. Third-Party Defendant/Second Third-Party Plaintiff, Defendant/Third-Party Plaintiff/Third Third-Party Plaintiff, and Plaintiff have all opposed the motion. In light of the premature nature of the instant application, the motion is hereby denied in its entirety, with leave to renew following certification of the completion of discovery in this matter, in accordance with the following.

On November 23, 2016, Plaintiff was employed by Third-Party Defendant/Second Third-Party Plaintiff as a supervisor/project manager for a construction project taking place in Dobbs Ferry, Westchester County, New York. Plaintiff, in performing his duties on this day, went up to the newly constructed fourth floor from his second-floor office throughout the day to monitor a concrete pour taking place. Upon his return from one such visit to the fourth floor, he tripped and fell over a nail that was protruding from the cement on the third floor, causing injuries to his head, right wrist, and lumbar spine. Plaintiff then brought this action, asserting claims under New York Labor Law §200, 240(1), and 241(6), including against Defendant/Second Third-Party Defendant.

Subsequent to the commencement of this action, three separate third-party complaints have been filed, including one against the moving party herein, seeking indemnification and contribution. It should be noted that all of the third-party complaints were commenced after Plaintiff's deposition was completed. Nevertheless, while acknowledging that discovery has not yet been completed, Defendant/Second Third-Party Defendant has sought summary judgment dismissing all claims and complaints as asserted against it.

The proponent of a summary judgment motion must make a *prima facie* showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. Cantor-Sanchez v. Gonzalez-Socarras, 189 AD3d 977, 133 NYS3d 920 (Mem) (2nd Dept., 2020). The mere hope or speculation that evidence to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion. Paul v. Village of Quogue, 178 AD3d 942, 115 NYS3d 450 (2nd Dept., 2019).

Counsel for Defendant/Second Third-Party Defendant acknowledges in his affirmation in support of the motion that there is still quite a bit of discovery outstanding; furthermore, his papers in reply concede that the motion is premature in light of the amount of discovery still outstanding. Three separate third-party complaints were filed in this action following Plaintiff's deposition, two of which added additional parties that were not present during Plaintiff's deposition whatsoever. Indeed, Third-Party Defendant/Second Third-Party Plaintiff was not present and did not participate in either the deposition of Plaintiff or the deposition of Defendant/Second Third-Party Defendant in this case; likewise, Defendant/Third-Party Plaintiff/Third Third-Party Plaintiff has highlighted

that Defendant Saber has not been deposed and Third Third-Party Defendant has only recently entered the case and also has not been deposed.

While the instant motion appears to have merit as to Plaintiff's Labor Law §240(1) claim (*see* Edwards v. C&D Unlimited, Inc., 289 AD2d 370, 735 NYS2d 141 [2nd Dept., 2001]) and Plaintiff's Labor Law §241(6) claim (*see* Keener v. Cinalta Construction Corp., 146 AD3d 867, 45 NYS3d 179 [2nd Dept., 2017]), with the amount of discovery still outstanding, it would be improper for this Court to decide such a drastic remedy at this time. *See generally* Castlepoint Insurance Company v. Command Security Corporation, 144 AD3d 731, 42 NYS3d 30 (2nd Dept., 2016). Therefore, the instant motion is hereby denied, with leave to renew following the recertification of this action as well as the filing of a new note of issue thereafter.

The Court would be remiss if it did not address the extremely convoluted procedural history that has occurred in this case as well as the apparent repeated delays in the completion of discovery herein. It is of no consequence to the Court that certain parties have only recently been brought into the action and may not have caused some of these delays. All parties henceforth are to work together diligently to ensure that discovery proceeds as expected in accordance with the following:

- 1) All outstanding depositions are to be completed no later than June 19, 2021;
- 2) Any post-deposition demands are to be served no later than twenty (20) days after the completion of said deposition, with responses to be provided no later than thirty (30) days after service of said demands. To the extent that depositions of certain party-witnesses have already been completed but post-deposition demands have not been served, such demands must be served no later than April 30, 2021, or shall be deemed waived;

- 3) To the extent that Plaintiff's independent medical examination has not taken place, same shall be designated no later than July 6, 2021, and shall be held no later than August 27, 2021, or shall be deemed waived;
- 4) All future amendments to pleadings or third-party complaints shall be done by motion seeking consent and approval of this Court;
- 5) This matter will appear on this Court's calendar for a final certification conference on September 9, 2021.

Defendant/Second Third-Party Defendant shall file and serve a copy of the within order with notice of entry upon all parties in this action on or before May 5, 2021. Thereafter, the parties shall participate in a discovery conference before this Court as currently scheduled on July 19, 2021.

This hereby constitutes the Decision and Order of this Court.

Dated: April 13, 2021
Mineola, New York

ENTER


HON. DAVID P. SULLIVAN, J. S. C.

ENTERED

Apr 19 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE