

Cantres v West-Fair Elec. Contrs., Inc.

2021 NY Slip Op 33539(U)

December 15, 2021

Supreme Court, Nassau County

Docket Number: Index No. 613863/17

Judge: David J. Gugerty

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID J. GUGERTY, J.S.C.

-----X TRIAL/IAS PART 24
FELIX M. CANTRES and YANA NORMATOV,

Plaintiffs,

Index No. 613863/17
Mot. Seqs. 04, 05, & 06
Submit Date 7/15/21

-against-

WEST-FAIR ELECTRIC CONTRACTORS, INC.,
and KS & SS ASSOCIATES, INC.,

Defendants.
-----X

The following papers were read on this motion: NYSCEF Numbered

Notice of Motion, Affirmation, and Exhibits	82 – 97
Notice of Cross-Motion and Affirmation	101 – 102
Notice of Motion, Affirmation, and Exhibits	105 – 129
Affirmation in Opposition and Exhibits	130 – 134
Affirmation in Opposition	138
Reply Affirmation	140
Affirmation in Opposition	141
Affirmation in Support	143 ¹

Plaintiffs move (Mot. Seq. 04) for an order: (1) pursuant to CPLR §3212, granting summary judgment to plaintiffs against defendant, KS & SS Associates, Inc. (KS & SS), pursuant to the doctrine of *res ipsa loquitur*; and (2) for such other and further relief as this court may deem just and proper.

Defendant, West-Fair Electric Contractors, Inc. (West-Fair), cross-moves (Mot. Seq. 05) for an order: (a) pursuant to CPLR §3212, granting West-Fair summary judgment dismissing plaintiffs’ complaint and all cross claims arising therefrom; and (b) for such other and further relief as this court may deem just and proper.

¹ Plaintiff also submits a Supplemental Affirmation in Opposition twice as NYSCEF documents 145 through 147 and 149 through 151. This submission has not been considered by the court as it is an improper sur reply submitted without permission from the court.

Defendant, KS & SS, moves (Mot. Seq. 06) for an order: pursuant to CPLR §3212, for summary judgment dismissing plaintiffs' complaint and all cross claims as to KS & SS; and for such other and further relief as this court may deem just and proper.

This is an action for alleged personal injuries sustained by plaintiff, Felix M. Cantres (Cantres) while working as a corrections officer at Sing Sing Correctional Facility at 354 Hunter Street Ossining, New York when a pipe fell, striking Cantres in his head and shoulder. Plaintiffs and KS & SS previously moved for the same relief, with both applications being denied by decision and order of the Hon. John M. Galasso, dated August 7, 2020, without prejudice to be renewed upon the completion of depositions and any other relevant discovery.

"It is well established that '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 Hosp.*, 68 N.Y.2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, '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' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993])." (*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; see also *Fairlane Financial Corp. v. Longspagh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

"Res ipsa loquitur is an evidentiary doctrine which 'permits the inference of negligence to be drawn from the circumstances of the occurrence' when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and (3) the event was not caused by the plaintiff's actions (*Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 226 [1986]). 'To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that 'it is more likely than not' that the injury was caused by the defendant's negligence" (*Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494 [1997])."

(*Barkley v. Plaza Realty Investors, Inc.*, 149 A.D.3d 74 [1st Dept. 2017])

This action was commenced by plaintiffs against West-Fair only on December 20, 2017. The examination before trial of a witness for West-Fair was conducted on December 4, 2018. As a result of the testimony of the West-Fair witness, and upon being provided with daily reports from West-Fair, plaintiffs amended their complaint on May 29, 2019 to add KS & SS as a

defendant. A second examination before trial of Cantres was conducted on October 21, 2020, and a witness for KS & SS, Arun Sharma ("Sharma"), was deposed on January 26, 2021. Based on Sharma's testimony regarding the entries in the daily report for the date of the accident, plaintiffs filed the instant motion, renewing their application for summary judgment.

In support of their motion, plaintiffs argue that the testimony of Sharma and the daily report from the date of the accident demonstrate that employees of KS & SS were working in the corridor between buildings numbers 7 and 8, known as corridor 100, when one of them dropped a pipe, which struck Cantres, who was assigned to work in that location. The daily report from KS & SS shows two employees "Corridor 100 ¾ pipe to Pull Box. Started runs to Bldg 8 entrance for BMS." Sharma testified that KS & SS was a subcontractor of West-Fair at the time of the accident and, after reviewing the daily report, confirmed that it shows the work was being done by KS & SS "going towards Building 8" but not in Building 8. The West-Fair daily report shows that none of their four employees on site were present at the location of the accident, but pipe was being installed in corridor 100 and "investigated pipe run in Bldg 7 for BMS." Plaintiff testified at his first examination before trial that he was assigned to follow the contractors and the accident occurred while they were in the hallway of building 8 between buildings 7 and 8. Plaintiffs also submit a sworn statement from Melissa Lazare ("Lazare"), a corrections officer who was present at the time of accident. She attests to seeing "a man who was part of a crew installing wires or electrical equipment in hallways, lose control and drop a pipe or metal conduit while he was on a ladder. The pipe fell from a height and struck Mr. Cantres on his head and shoulder."

In opposition, KS & SS argues that there is no evidence to support that their employees were present at the location where the accident allegedly occurred. Counsel points to Cantres's testimony that the incident occurred in the hallway of building 8 and that Sharma testified that their employees were not in the hallway of building 8 at the time of the accident. Counsel further highlights that Sharma testified that KS & SS employees were going "to" building 8, which is also stated in the KS & SS daily report, and that Lazare does not state that the employees who dropped the pipe worked for KS & SS. KS & SS also submits two affidavits that were submitted in opposition to the original motion. One is from Sharma, in which he states that the two employees of KS & SS on the premises that day were not at the accident site. The other affidavit is from Andrew O'Grady ("O'Grady"), a foreman for KS & SS, who states that he is unaware that such an incident occurred.

KS & SS further argues that an affidavit submitted by Cantres in support of plaintiffs' motion contradicts his deposition testimony and should therefore be disregarded as an attempt to change his prior testimony. KS & SS asserts that while Cantres testified at his deposition that the accident occurred in the hallway of building 8, he states in his affidavit that it was in the hallway between buildings 7 and 8 but closer to building 8. Additionally, KS & SS argues that plaintiffs' original summary judgment motion asserted that West-Fair had exclusive control over the area and that there were three workers in the location, whereas now plaintiffs argue that KS & SS had exclusive control and there were two workers in the area.

In reply, plaintiffs contend that Sharma does not state in his affidavit that the accident did not occur, only that he spoke to two people who were not aware of it, and that O'Grady only stated that he was not aware of it, but that he heard about it. As such, plaintiffs argue that there is

no dispute that the incident occurred and that Lazare, who witnessed it, confirms Cantres' testimony and affidavit. Plaintiffs further argue that Cantres has been consistent in stating where the accident occurred, pointing to his testimony at his first deposition in which, after testifying that it occurred in a hallway outside the area of building 8 and being asked whether he "mean[s] an exterior passageway that goes through the building[]" he responded as follows: "Yes. That goes through two buildings. So you are in between those two." Plaintiffs thus argue that this is confirmed by the KS & SS daily report that at the time of the accident employees were working in corridor 100 to building 8. Moreover, the Sing Sing incident report attached to the papers submitted by KS & SS lists a witness as a contractor of West-Fair, which later came to be identified as KS & SS, and which was corroborated by Sharma's testimony that KS & SS was a subcontractor of West-Fair.

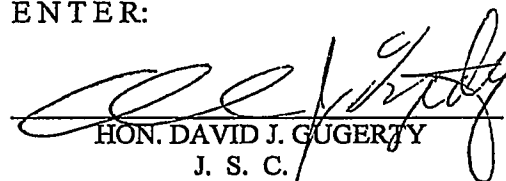
In reviewing the evidence presented plaintiffs have satisfied the elements of *res ipsa loquitur* and have therefore established a *prima facie* case of entitlement to summary judgment. The falling of the pipe is something that does not ordinarily occur absent negligence; the pipes were in the exclusive control of KS & SS; and Cantres did not contribute to the happening of the accident. KS & SS have only attempted to raise a question of fact as to the second element but have failed to do so. KS & SS rely on semantics to try to place the site of the accident in question. There is no difference between Cantres' testimony that it occurred in the hallway between two buildings near building 8 and Sharma's testimony that employees were going to building 8. This is further corroborated by the KS & SS daily report that work was being done in corridor 100. Clearly any testimony that asserts that the accident occurred in the hallway of building 8 is nothing more than a different description for the same location based upon it being closer to building 8 than building 7. Moreover, there has been no evidence offered that any workers other than those employed by KS & SS were working at the subject location. KS & SS's argument that neither Cantres nor any other witness identified the workers as being KS & SS employees until after the litigation commenced is of no moment. The discovery process is precisely intended to disclose "evidence material and necessary in the prosecution or defense of an action" (CPLR §3101[a]).

Accordingly, the motions for summary judgment by plaintiffs and West-Fair as to liability are **GRANTED**, and the complaint and cross claims against West-Fair are dismissed. The motion for summary judgment by KS & SS is **DENIED**, and the matter shall be set for a trial on damages.

This constitutes the decision and order of the Court.

Dated: December 15, 2021
Mineola, New York

ENTER:


HON. DAVID J. GUGERTY
J. S. C.

ENTERED

Jan 31 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE