

<b>Mena v 5 Beekman Prop. Owner LLC</b>
2021 NY Slip Op 33686(U)
August 27, 2021
Supreme Court, Bronx County
Docket Number: Index No. 23506-2013E
Judge: Llinét M. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX, PART 25

HERIBERTO MENA,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 23506-2013E

5 BEEKMAN PROPERTY OWNER LLC, and  
BROADWAY CONSTRUCTION GROUP, LLC,

Defendants.

5 BEEKMAN PROPERTY OWNER LLC, and  
BROADWAY CONSTRUCTION GROUP, LLC,

Index No. 43074-2014E

Third Party Plaintiffs,

-against-

EVEREST SCAFFOLDING INC., and SMITH  
RESTORATION, INC.,

Third Party Defendants.

**BACKGROUND AND SUBMITTED PAPERS**

This action was commenced on September 24, 2013, by the filing of a summons and complaint sounding in negligence, and violations of New York State Labor Law. It is alleged that the plaintiff, Heriberto Mena, while employed by Smith Restoration, Inc. (Smith), was injured on August 13, 2013, when he fell into a gap between exterior scaffolding in the course of stripping paint from the facade of 5 Beekman Street (the premises). It is undisputed that the defendant 5 Beekman Property Owner, LLC (Beekman) is the owner of the premises, and the defendant Broadway Construction Group LLC (Broadway) was a general contractor at the premises. Smith was one of Broadway's sub-contractors, and Everest Scaffolding Inc. (Everest) owned and erected the scaffolding.

Beekman and Broadway commenced a third party action by the filing of a summons and complaint on or about May 13, 2014, asserting claims against Everest, and Smith, for contractual and common law indemnification and contribution, and breach of contract for failure to procure insurance.

The third party defendant Everest moves for summary judgment dismissing the third party action, and all cross claims against it [motion (002)]<sup>1</sup>. Everest asserts that there was no evidence that the plaintiff's accident was caused by Everest's negligence, or that there was an enforceable contract imposing a duty upon it to indemnify Broadway or Beekman, and it fulfilled its obligation to procure insurance by obtaining an insurance policy with a blanket additional insured endorsement.

Everest submitted an attorney's affirmation in support; a copy of the pleadings; a copy of deposition transcripts of the plaintiff, GFI Development Company, LLC (GFI) employee Matt Rosenbloom, the owner of Everest Jimmy Downes, and Smith employee Roman Rosa; Everest's project proposal; a six-page agreement between Broadway and Everest, dated March 19, 2013; a copy of an email chain with 16 pages of an agreement between Broadway and Everest, dated March 19, 2013; a copy of an email chain with 107 pages of an agreement between Broadway and Everest, dated March 19, 2013; an insurance policy; Everest time-sheets; and site safety logs.

The plaintiff submitted an attorney's affirmation in opposition to the instant motion; a copy of photographs marked as Exhibit A through Y; and an affidavit by William Mizel, dated June 17, 2019.

Beekman and Broadway submitted an attorney's affirmation in opposition to the instant motion; a copy of an agreement between Broadway and Everest, dated March 19, 2013; a copy of an agreement between Broadway and Smith, dated May 1, 2013; a copy of a photograph marked as Exhibit A; and an affidavit by Andrew K. Nieto, CSP, CHST, dated July 20, 2019.

Smith submitted an attorney's affirmation in opposition to the instant motion.

Everest submitted an attorney's affirmation in reply to the oppositions submitted by the plaintiff, Beekman and Broadway, and Smith.

### **DISCUSSION**

The plaintiff testified that on the day of the accident, he was on a scaffolding removing paint from the facade of the premises with a pressure hose. He testified that there was a one foot gap between the edge of the scaffolding plank and the building, but a gap was almost four feet

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<sup>1</sup> The plaintiff filed his motion (003) on June 19, 2019. Beekman and Broadway filed their motion (004) on July 31, 2019. Smith filed its motion (005) on August 9, 2019. Motion (003), motion (004), and motion (005) have been determined in separate decisions.

between the scaffolding and windowsills. He slipped through the four foot space, and fell from the fifth floor to the fourth floor.

Jimmy Downes testified that he is the owner of Everest. GFI hired Everest to erect a scaffolding bridge and pipe scaffolding on three sides of the premises. Mr. Downes testified that the scaffolding at the site was installed properly. Mr. Downes testified that they were entitled to have a space between the scaffolding and the building, and that pursuant to OSHA standards, the maximum space was eighteen inches. Further in his deposition, Mr. Downes testified, that he was mistaken on the maximum space, and that it was fourteen inches. He testified that he did not know the name of the code, but that the scaffolding was installed in compliance with OSHA standards. He also testified that he did not know what the space was between the edge of the planking and the window.

In addition, there is a material factual dispute as to whether there was an enforceable contract imposing a duty upon Everest to indemnify Broadway or Beekman. Everett submitted a copy of a six-page agreement between Everest and Broadway, dated March 19, 2013, for the scaffolding and sidewalk bridge work at the premises, as Exhibit M. The agreement states that “the parties acknowledge and agree that this Agreement is comprised of this Part I and Part II (Exhibits) collectively.” Page six of the agreement is titled “Contract Exhibits,” but none were attached. All pages were initialed by Mr. Downes, and page five of the agreement was executed by Mr. Downes, on behalf of Everest. A second copy of the same six-page agreement, submitted as Exhibit N, to which a copy of an email chain, and ten pages of exhibits were attached, was also submitted in support of the motion. All pages were initialed by Mr. Downes, and page five of the agreement was executed by Mr. Downes, on behalf of Everest. A third copy of the same six-page agreement, submitted as Exhibit O, to which additional ninety one pages were attached, was executed by Broadway and Everest.

At his deposition, Mr. Downes testified that there were no attachments to the six-page agreement, and he believed the six-page document reflected the complete contract between the parties.

The speculative and conflicting accounts within the body of Mr. Downe’s testimony, and the inconsistencies between Mr. Downe’s and the plaintiff’s testimony, as well as the inconsistencies between the three purported agreements submitted in support of the motion,

preclude summary judgment in favor of the third party defendant, Everest. It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact. *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012). The Defendants' submissions demonstrate unresolved triable issues of material fact as to the cause of and the way plaintiff's injury occurred, and whether there was an enforceable contract imposing a duty upon Everest to indemnify Broadway or Beekman.

The Court finds on this record that Everest is not entitled to summary judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

Accordingly it is hereby

ORDERED, that Everest's motion (002) for summary judgment dismissing the third party action, and all cross claims against it, is denied; and it is further

ORDERED, that all parties shall appear for a pretrial conference on September 30, 2021, at Room 711, the Bronx County Pretrial Conference Part; and it is further

ORDERED, that Everest is directed to serve a copy of this order with notice of entry on all parties within thirty (30) days from the date of entry.

This constitutes the decision and order of the court.

Dated: August 27, 2021

  
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Hon. Llinét M. Rosado, J.S.C.

HON. LLINÉT M. ROSADO, J.S.C.