NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IA Part 30

JHONATAN PARADA-SANABRIA,

Plaintiff,

-against-

14. SO. WILLIAMSPORT HOLDINGS LLC, SERRAS CONTRACTING CORP., AQUEDUCT MECHANICAL CORP., PRATT CONSTRUCTION & RESTORATION INC., and SPRING SCAFFOLDING, LLC,

Defendants.

Index Number: 707113/2020

Motion Date: May 19, 2021

Motion Seq. No. 2



The following numbered papers 33-55 submitted and considered on this motion by defendant Serras Contracting Corp. (hereinafter "Serras") seeking summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3211(a)(1) dismissing plaintiff Jhonatan Parada-Sanabria's (hereinafter "Jhonatan") complaint against it upon the grounds that a defense is founded upon documentary evidence; pursuant to CPLR 3211(c) treating this motion as one for summary judgment and dismissing plaintiff's complaint; pursuant to 22 NYCRR 130-1.1 and CPLR 8303-a issuing costs and sanctions against plaintiff.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | EF 33-50 |
| Answering Affidavits-Exhibits ..... | EF 51-53 |
| Reply Affidavits-Exhibits..... | EF 54-55 |

Upon the foregoing papers, it is ordered that the motion is determined as follows:

On August 30, 2019 Jhonatan allegedly sustained injuries while he was dismantling a sidewalk bridge at a construction site located and known as 225 West 34th Street, City, County and State of New York. At the time of the occurrence, Jhonatan was employed by RHG Manpower Inc. Jhonatan claimed that he was taking down a sidewalk bridge which had been constructed around the building when he was injured. Jhonatan initiated this lawsuit on June 9, 2020. Co-defendant 14 So. Williamsport Holdings, LLC (hereinafter

"Williamsport") appeared in the action with the filing of an answer to the verified complaint on July 17, 2020. Pursuant to a stipulation to extend the time to answer dated July 23, 2020, Serras' time to appear in the matter was extended up to and including August 24, 2020. Serras filed a verified answer with cross claims on August 10, 2020. By Order of the undersigned dated January 6, 2021 the matter was consolidated with Index number 715022/2020 for all purposes.

In support of the motion Serras submitted the pleadings; the affirmation of Mehreen Hayat, Esq dated March 16, 2021; the affidavit of Michael Serras dated March 5, 2021; Jhonatan's verified bill of particulars dated August 17, 2020; the undersigned's Consolidation Order dated January 6, 2021; September 15, 2017, February 19, 2019 and August 20, 2019 contracts between Williamsport and Serras; Serras' construction schedule dated July 8, 2019; correspondence from Spring Scaffoldings; an after-hours variance permit issued to Spring Scaffoldings dated August 22, 2019; deed to the project premises dated August 23, 2007; Serras' Alteration Type 2 Permit; correspondence to plaintiff's counsel seeking discontinuance; and, its Memorandum of Law.

**Jhonatan's Verified Bill of Particulars**

Jhonatan alleged in his verified bill of particulars dated August 17, 2020 claims under the Labor Law against defendants. He claimed that defendants were negligent in among other things, the defendants allowed steel beams to collapse or fall; failed to make repairs to the steel beam; negligently allowed the dangerous and defective condition to remain; failed to warn or provide him with overhead protection. Jhonatan's makes claims under Labor Law 200, 240(1) and 241(6), and, Industrial Code sections 23-1.2(a), 23-1.2(e), 23-1.5(a), 23-1.7(a), 23-5 et seq., 23-6.1 et seq.

**Affidavit of Michael Serras**

Serras submitted the affidavit of its President Michael Serras dated March 5, 2021. On or about February 19, 2019 on behalf of Serras, he entered into a contract with Williamsport for interior demolition and renovation for the 19th and 20th Floors of 225 W. 34th Street, New York, New York 10122. The project was called Prager Metis 1920 since Prager Metis was the tenant on those floors. On or about August 20, 2019 he entered into another contract on behalf of Serras with Williamsport for a project at the subject premises where Serras was hired to do interior demolition and renovation for project Prager Phase III on the 18th floor of the building and a project referred to as Albanese, which referred to work to be performed on the 14th floor of the building. On August 30, 2019, Jhonatan's alleged date of the accident, he claimed that Serras was wrapping up its work on the Prager Metis 1920 Project, and that the work had not commenced on the Prager Phase III or Albanese projects. Pursuant to its construction schedule, the week of August 26, 2019, Serras was performing work on the 20th Floor of Prager Metis and was installing units, lighting and glass. Also, Jhonatan claimed that he sustained injury on August 30, 2019 at 4 A.M. when he was struck by a steel beam. Serras claimed it performed and completed its work on August 29, 2019 at approximately 4 P.M. and did not return until

August 30, 2019 until approximately 7 A.M. He stated that Serras did not have an after-hours variance permit to perform any work at the time of Jhonatan's accident. Further, Serras did not require the use of any steel beams for its work during the week of August 26, 2019, and, there is no way any of the equipment which Serras was using could have fallen on anyone outside of the building at 4 A.M. Therefore, it is not possible that Jhonatan's accident could have resulted from Serras' work, and, Jhonatan's claims should be dismissed against it.

**Discussion**

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). 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 in admissible form to eliminate any material issues of fact from the case (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Furthermore, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Where there are no material and triable issues of fact, the motion for summary judgment should be granted....[t]he party making the motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact and the party must do so by tender of evidentiary proof in admissible form." (*See Dougherty v Kinard*, 215 AD2d 521 [2d Dept 1995]; *see also Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].)

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity'" (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]).

"Under CPLR 3211 a trial court may use affidavits in its consideration of a pleading" (*see Rovello v Orofino Realty Co., Inc*., 40 NY2d 633 [1976]). Letters are not considered documentary evidence (*see Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *see also Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016]).

"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense as a matter of law...[i]n order for evidence to qualify as documentary it must be unambiguous, authentic and undeniable." (*See Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010] [internal citations omitted].)

Dismissal is warranted under CPLR 3211 (a) (7) if the facts alleged in the complaint do not fit within any cognizable legal theory (*see generally Hecht v Andover Assocs. Mgmt. Corp., etal*., 114 AD3d 638 [2d Dept 2014]; *G.L. v Markowitz,* 101 AD3d 821 [2d Dept 2012]; *Salvatore v Bd. of Educ. of Mineola Union Free School Dist*., 89 AD3d 1078 [2d Dept 2011];*Treeline 1 OCR*, *LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]).

An owner and general contractor are vicariously liable for any injuries sustained by a worker on its premises when there is a violation of Labor Law §240 (1) and 241(6). (*See Rizzuto v L.A Wenger Contr. Co., Inc.,* 91 NY2d 343 [1998].) A general contractor can meet its prima facie burden with regard to Labor Law §240 (1), by submitting sufficient evidence to show that there was no elevation-related risk which calls for any protective devices of the type enumerated in the statute. (*See Bond v York Hunter Cost. Inc.*, 95 NY2d 883 [2000]; *Rocovich v Consol. Co.,* 78 NY2d 509 [1991].) As to Labor Law § 241 (6), owners and general contractors have nondelegable duties to comply with safety regulations pursuant to the Industrial Code, and must show that either they did not violate a specific safety rule, or that such violation was not a proximate cause of plaintiff's injuries. (*See Rizzuto,* 91 NY2d 343; *Garcia v Market Associates,* 123 AD3d 661 [2d Dept 2014].)

Under Labor Law § 200 and common law negligence, generally, construction worksite cases fall into two categories, those where the injuries sustained are as a result of dangerous or defective conditions at the worksite, and those involving the manner in which the work is performed. (*See Ortega v Puccia,* 57 AD3d 54 [2d Dept 2008].) In the event that the matter involved both allegations of a hazardous worksite, and the manner in which the work is performed, the movant must address the proof applicable to both liability standards. (*See DiMaggio v Cataletto,* 117 AD3d 986 [2d Dept 2014].) A defendant can demonstrate its prima facie burden with regard to worksite allegations if it sufficiently shows that it did not create the dangerous condition or that it did not have supervision or control over the premises to remedy it. (*See Russin v Louis N. Piciano & Son,* 54 NY2d 311 [1981]; *Marquez v L&M Development Partners, Inc.,* 141 AD3d 694 [2d Dept 2016].) As to the manner in which the work is performed, it must demonstrate that it did not have sufficient authority to exercise supervision and control over the work. (*See Lamar v Hill*

*Inter. Inc.,* 153 AD3d 685 [2d Dept 2017]; *Messina v City of New York,* 147 AD3d 748 [2d Dept 2017].) General supervisory authority at a work site, the right to stop a contractor's work if a safety violation is observed, or the authority to ensure compliance with safety regulations or the terms of a contract is insufficient to impose liability under Labor Law § 200. (*Id.)*

Labor Law §240(1) imposes a non-delegable duty upon owners and contractors to provide workers with appropriate safety devices to protect workers from risks inherent in elevated work sites. (*See Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]; *Simmons v City of New York*, 165 AD3d 725 [2d Dept 2018]; *Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711 [2d Dept 2013].) In order to prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish that the defendant violated the statute and that such violation was the proximate cause of his injuries. (See *Melchor v Singh,* 90 AD3d 866 [2d Dept 2011]; *Chlebowski v Esber*, 58 AD3d 662 [2d Dept 2009].) Owners and contractors are liable under the statute regardless of whether they supervised or controlled the work. (*See Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2d Dept 2003].)

The Court finds that Serras has demonstrated its entitlement to judgment as a matter of law under CPLR 3211(a)(1) as to Jhonatan's claims against it in his complaint. Serras demonstrated based upon its documentary evidence that it was not working at the time of Jhonatan's accident; that its work was confined to the interior of the building and did not involve working with steel beams; that it did not exercise control over work that brought about the alleged injury; that it was not present at the building at the time of the alleged accident; that it had no duty to provide Jhonatan with any safety devices; that it did not violate any specific rules or regulations promulgated by the Commissioner of the Department of Labor. (See CPLR 3211; *Held v Kaufman*, 91 NY2d 425 [1998]; *Rizzuto v L.A Wenger Contr. Co., Inc.,* 91 NY2d 343 [1998]; *Russin v Louis N. Piciano & Son,* 54 NY2d 311 [1981]; *Misicki v Caradonna*, 12 NY3d 511 [2009]; *Lamar v Hill Inter., Inc*., 153 AD3d 685 [2d Dept 2017];*Dasilva v Nussdorf*, 146 AD3d 859 [2d Dept 2017]; *DiMaggio v Cataletto*, 117 AD3d 984 [2d Dept 2014]). Now Jhonatan and/or Williamsport must come forward with evidence to raise a triable issue of fact. (*Id*.)

**Opposition Papers**

Williamsport did not submit opposition. In opposition, Jhonatan submitted his attorney affirmation and his affidavit dated April 20, 2021, along with a certificate of translation from Spanish to English. Jhonatan attested that on August 30, 2019 at about 4:00 A.M. he was working for a company named RHG Manpower Inc. and he was dismantling a sidewalk bridge located around the building at the premises known as 225 West 34th Street, New York. He was working and standing on the top level of the sidewalk bridge. There was no portion of the sidewalk bridge located above him and while he was performing his work, he was suddenly struck by a metal object which fell from above him, causing him to fall.

**Reply Papers**

In reply, Serras reiterated its prior arguments and submitted another affidavit of Michael Serras dated May 17, 2021. He stated that on or about February 19, 2019 he entered into a contract with Williamsport for interior demolition and renovation for the 19th and 20th Floors of the subject building. The project was called Prager Metis 1920 as Prager Metis was the tenant in the subject building on those floors. On the week of August 26, 2019, he claimed that Serras was working on the 20th floor installing units, lighting and glass. Construction schedules are customarily made at the beginning of the project and checked off contemporaneously as items are completed. As President, he could attest that they were made and kept in the course of Serras' regular pattern and practice. Work which was performed by Serras at the subject building the week of August 26, 2019 involved the installation of commercial air-conditioning, which involved the performance of duct work through a drop ceiling, and which did not involve any exterior work. Installation of lighting performed by Serras was done indoors and it also did not involve any exterior work. Lastly, glass work was performed by Serras at the location, but not the installation of windows; the installation of glass work performed by Serras was the installation of glass for offices and conference rooms. He maintained that Serras did not perform any exterior work at the subject premises and that all of Serras' work was interior only. It was his understanding that Jhonatan claimed that he was injured on August 30, 2019 at 4 A.M. when he was struck by a steel beam while he was dismantling a sidewalk shed outside the subject premises. Serras did not require the use of steel beams for its work to perform its work the week of August 26, 2019 and none of the equipment Serras was using could have fallen on anyone outside of the building at 4 A.M. since all of Serras' work was interior, therefore it is not possible that Jhonatan's accident resulted from Serras' work, therefore, his claims should be dismissed against Serras. The Court finds Serras' documentary evidence was sufficient to establish its entitlement to relief under CPLR 3211. The Court declines to award the branch of defendant's relief sought under 22 NYCRR 130-1.1 and CPLR 8303-a.

Therefore, defendant's motion is granted to the extent that the branch of defendant's motion seeking dismissal under CPLR 3211 is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: June 4, 2021

HON. CHEREÉ A. BUGGS, J.S.C.