Nava v Shore Tower Group LLC
2022 NY Slip Op 31414(U)
April 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 514612/2018
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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ANGEL ALBERTO GATICA NAVA and
KARINA MARTINEZ,

Plaintiffs,

-against-

Index No.: 514612/2018
Motion Seq. Nos.: 05, 06, 07

SHORE TOWER GROUP LLC, 8629 BAY PARKWAY
HPD CONSTRUCTION INC., LAKHI GENERAL
CONTRACTOR INC. and PHOENIX SUTTON STR. INC.,

Defendants.

DECISION AND ORDER

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PHOENIX SUTTON STR., INC.,

Third-Party Plaintiff,

-against-

ROCKLEDGE SCAFFOLD CORP.,

Third-Party Defendant.

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ROCKLEDGE SCAFFOLD CORP.,

Second Third-Party Plaintiff,

-against-

RHG MANPOWER INC,

Second Third-Party Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the plaintiff's motion for leave to serve a supplemental summons and complaint, and defendants' motions for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 05) 116-141, 181-19; (Motion 06) 143-173, 192, 193, 196, 197, 201; and (Motion 07) 174-179, 194, 195, 199, 200 were read on these motions.

The plaintiff commenced this action by filing a summons and verified complaint on July 17, 2018, which included as defendants the owner of the premises, Shore Tower Group, LLC (Shore Tower), 8629 Bay Parkway, LLC, HPD Construction, Inc. (HPD), the general contractor, as well as Lakhi General Contractor Inc. (Lakhi) and Phoenix Sutton Str. Inc. (Phoenix). On or about October 16, 2019, Phoenix commenced a third-party action against Rockledge Scaffold Corp. (Rockledge), which included a copy of the plaintiff's original summons and verified complaint. Issue was joined by Rockledge on or about January 3, 2020, which asserted cross-claims against the other defendants in the action. Rockledge filed an amended verified answer on or about January 17, 2020. On or about February 10, 2020, Rockledge commenced a second third-party action against RHG Manpower Inc. (RHG).

This action arises from an accident that occurred on October 30, 2017, at 1301 Surf Avenue, in the County of Kings, City and State of New York. The plaintiff alleges that he fell while standing on beams being used as a platform, when performing work that included dismantling and removing a sidewalk shed at the premises, causing him to sustain personal injuries.[1] The plaintiff's complaint alleges violations of Labor Law §§ 240(1), 241(6) and 200, as well as common-law negligence. The plaintiff moves, pursuant to CPLR §§ 305(c), 203(f), 203(g) and 3025, for the following relief: seeking leave to serve a supplemental summons and complaint upon proposed defendant/third-party defendant, Rockledge; deeming the amended summons and complaint, submitted as an exhibit to the instant motion, as served upon the attorneys for Rockledge; deeming the amended summons and complaint as having been served "nunc pro tunc"; and estopping Rockledge from asserting the defense of statute of limitations (Motion 05).

The defendant, Lakhi, moves pursuant to CPLR § 3212, for summary judgment and dismissal of the plaintiff's complaint and all counterclaims and cross-claims (Motion 06); and defendant/third-party plaintiff, Phoenix, moves for summary judgment and dismissal of the plaintiff's complaint, pursuant to CPLR § 3212, and for the imposition of sanctions and/or attorneys' fees against the plaintiff/and or his attorneys, pursuant to 22 NYCRR § 130-1.1, including an award to Phoenix of reasonable attorneys' fees associated with this motion (Motion 07).

In support of his motion, the plaintiff asserts that Rockledge was not sued as a defendant in the initial summons and verified complaint because it was erroneously believed that Rockledge was the plaintiff's employer. The plaintiff claims that he first learned that RHG, and not Rockledge, was the plaintiff's employer during the course of the plaintiff's deposition, which was conducted on or about June 24, 2021, when an exhibit entitled "First Report of Injury" was marked as an exhibit indicating that RHG was the plaintiff's employer. Thereafter, on or about July 10, 2021, defendant Lakhi served a Notice to Admit upon Rockledge. In its response, Rockledge admitted that it contracted with the owner of the premises, Shore Tower, "to dismantle and remove all scaffolding it installed at 1301 Surf Avenue including but not limited to all scaffolding on Surf Avenue and the approximately 52 linear feet of scaffolding installed by Rockledge Scaffold Corp. on Stillwell Avenue." Rockledge also admitted that it "hired RHG [the plaintiff's employer] to perform the dismantling of the sidewalk bridge at 1301 Surf Avenue, Brooklyn, NY," and that it "did not have a contract with Lakhi General Contractor Inc. to dismantle the sidewalk bridge at 1301 Surf Avenue, Brooklyn, NY."

The plaintiff argues that the motion should be granted because it was filed within a reasonable time after learning the correct name of the plaintiff's employer after the plaintiff's

[1]The derivative action of plaintiff Karina Martinez was discontinued.

deposition. The plaintiff further contends that there is no prejudice to Rockledge because it was aware that it should have been named as a defendant at the time of the filing of the third-party action against it by Phoenix, and when Rockledge filed its second third-party complaint against RHG, prior to the expiration of the statute of limitations. The plaintiff relies on the relation-back doctrine, asserting that service of a supplemental summons and amended complaint against a defendant arising out of the same conduct, transaction or occurrence as a third-party summons and complaint served within the applicable statute of limitations is permissible.

Only Rockledge opposes the plaintiff's motion, and argues that the plaintiff failed to timely file a direct action against it within the applicable statutory time period, which it asserts was tolled from October 30, 2020 to June 16, 2021, based on New York's Executive Orders which were issued due to the Covid pandemic. It asserts that the plaintiff had ample opportunities to discover the identity of his employer, including a December 13, 2018 Workers' Compensation decision stating that the plaintiff was an employee of RHG; Phoenix's third-party complaint against Rockledge, which was filed on October 16, 2019; a lien letter dated November 25, 2019, from the New York State Insurance Fund, addressed to plaintiff's attorney identifying the plaintiff's employer as RHG; and Rockledge's answer to the third-party complaint, served on January 3, 2020, in which it did not raise an affirmative defense based on Workers' Compensation. According to Rockledge, further notice of the identity of the plaintiff's employer is evidenced by Rockledge's second third-party complaint against RHG, alleging that the plaintiff sustained injuries "while in the course of his employment" with RHG; the plaintiff's bill of particulars dated November 4, 2020, responding to Phoenix's demand, stating that the plaintiff was employed as a full-time laborer for RHG; and Rockledge's discovery demands, in September of 2020, seeking authorizations for the plaintiff's employment records from RHG.

Rockledge argues that the relation-back doctrine is inapplicable here because it is not united in interest with any of the defendants named in this action, and the plaintiff cannot rely on the third-party complaint as providing notice to Rockledge that it was a proper defendant. Rockledge further contends that it is not a proper Labor Law defendant because it was neither an owner nor a general contractor, and Rockledge did not direct or supervise the plaintiff's work, as RHG was hired by Rockledge as an independent contractor.

A plaintiff must satisfy three conditions in order to establish that the claims against one defendant may relate back to claims asserted against another: "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well." *See Xavier v RY Management Co., Inc.*, 45 AD3d 677, 678 (2d Dept 2007), quoting *Austin v Interfaith Med. Ctr.*,

264 AD2d 702 (2d Dept 1999) (internal quotation marks omitted). "Unity of interest is a question of law and not of fact." *See Connell v Hayden*, 83 AD2d 30, 42-43 (2d Dept 1981). In a negligence action, "the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other." *See Weckbecker v Skanska USA Civil Northeast, Inc.*, 173 AD3d 936, 937 (2d Dept 2019), quoting *Xavier v RY Mgt. Co., Inc*., 45 AD3d 677 (internal quotation marks omitted). Parties are united in interest if their interest "in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." *See Mileski v MSC Indus. Direct Co., Inc.*, 138 AD3d 797, 800 (2d Dept 2016), quoting *Mondello v New York Blood Ctr.--Greater N.Y. Blood Program*, 80 NY2d 219 (1992) (internal quotation marks omitted).

Here, the plaintiff has failed to satisfy his burden of establishing the applicability of the relation-back doctrine, as there is nothing in the record to indicate that Rockledge and the named defendants are vicariously liable for the acts of the other. The plaintiff's argument rests primarily on the third prong of the test, whether Rockledge knew or should have known that but for a mistake as to the identity of the proper parties by the plaintiff, the action would have been brought against Rockledge. The plaintiff ignores the second prong, raised by Rockledge in its opposition papers, that it is not united in interest with the other defendants. The evidence submitted, and Rockledge's own admission, established that Rockledge was not an owner or general contractor with respect to the premises, and that it was hired by Shore Tower to dismantle the existing sidewalk shed that Rockledge had erected years prior. Rockledge and the other named defendants may have different defenses, and none of the entities are vicariously liable for the acts of the other. Moreover, a judgment against one would not affect the other.

The relation-back doctrine also requires that the plaintiff's failure to name a party be a result of a mistake as to the proposed party's identity. *See Nani v Gould*, 39 AD3d 508 (2d Dept 2007). In the instant matter, the plaintiff knew or should have known that Rockledge was not the plaintiff's employer, and was a proper defendant, long before the expiration of the statute of limitations. This is evidenced by, inter alia, the December 13, 2018 Workers' Compensation decision stating that the plaintiff was an employee of RHG, and the plaintiff's bill of particulars dated November 4, 2020, served in response to the discovery demands of Phoenix, which unequivocally asserted that the plaintiff was employed as a full-time laborer for RHG (NYSCEF Doc. No. 187). As such, the plaintiff's motion is denied, as an action against Rockledge is time-barred.

Turning to the motions of Lakhi and Phoenix (Motions 06 and 07 respectively), the defendants argue that they are entitled to summary judgment and dismissal of the plaintiff's complaint and all claims against them. Phoenix also seeks the imposition of sanctions and attorneys' fees against the plaintiff and/or his attorney. The defendants' motions are opposed only by the plaintiff. Lakhi argues that it was not involved in the work performed by the

plaintiff, and that Rockledge hired the plaintiff's employer, RHG, to dismantle the sidewalk shed, as demonstrated by documentary evidence, including a proposal dated March 30, 2006, and final waiver of lien and release dated October 30, 2017, between Rockledge and Shore Tower, as well as the plaintiff's Workers' Compensation records showing that RHG was the plaintiff's employer at the time of the accident. Lakhi also relies on Rockledge's response to Lakhi's Notice to Admit dated July 10, 2021, admitting that it was responsible for dismantling and removing the subject scaffold and hired RHG to perform the work. Rockledge also admitted that it owned the flatbed truck, depicted in the photographs exchanged in discovery, which was utilized in the work being performed to dismantle the scaffold. Lakhi further relies on the plaintiff's testimony, which it argues demonstrates that the plaintiff never heard of a company by the name of Lakhi, and that he believed that he was working for Rockledge when he was dismantling and removing the sidewalk shed.

Lakhi submits the sworn affidavit of Lakhi's president, Gurcharan Singh, dated August 10, 2021, who avers that Lakhi was hired by HPD to perform emergency repair work regarding installation of a sidewalk shed along Stillwell Avenue. However, the sidewalk shed was different from the one installed by Rockledge nine years earlier, which is the subject of this action. He further states that Lakhi was not involved in Rockledge's work of dismantling the older scaffolding; did not provide labor for the work; did not own the sidewalk shed being dismantled; and did not supervise or control the work.

Defendant Phoenix previously filed a motion to dismiss, pursuant to CPLR § 3211(a)(7), which was denied as premature by order of the Hon. Francois A. Rivera, dated July 25, 2019, because issue had not yet been joined.[2] Thereafter, Phoenix filed a third-party action against Rockledge, alleging that Rockledge was responsible for dismantling the sidewalk shed, and for the work performed by the plaintiff. In support of the motion, Phoenix submits records of the New York City Department of Buildings concerning the work permit issued to Rockledge for the installation of the sidewalk shed in March of 2006; email correspondence; and the sworn affidavit of the president of Phoenix, Anna Siwiec, dated August 19, 2021. Phoenix further relies on the documents referenced in defendant Lakhi's motion, as well as the plaintiff's deposition testimony. According to Anna Siwiec's affidavit, Phoenix never performed work at the subject premises, and had nothing to do with, and never contracted with any party for the dismantling and removal of the sidewalk shed at issue. She further avers that Phoenix had no ownership interest in either the premises or the sidewalk shed, and that it is an improperly named party in this action. Phoenix argues that significant discovery has been conducted since the filing of its pre-answer motion to dismiss, and the motion is no longer premature.

[2] Judge Rivera also issued a separate order on July 25, 2019, which deemed plaintiff's claims against defendant 8629 Bay Parkway abandoned "when plaintiff withdraws its opposition to 8629 Bay Parkway's cross motion to dismiss." (NYSCEF Doc. No. 63)

The plaintiff opposes the motions of Lakhi and Phoenix, asserting that motions are premature, as the defendant's depositions have not yet taken place. In opposition, the plaintiff submits only an attorney affirmation.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also Phillips v Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See* CPLR § 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v City of New York*, 49 NY2d at 562.

In the instant action, the defendants Lakhi and Phoenix have demonstrated their prima facie entitlement to summary judgment through the sworn affidavit of Gurcharan Singh on behalf of Lakhi, and the sworn affidavit of Anna Siwiec on behalf of Phoenix, as well as documentary evidence that includes the proposal and final waiver of lien and release entered into between Rockledge and Shore Tower, photographs of the accident site, the plaintiff's deposition testimony, and the admissions of Rockledge in its response to Lakhi's Notice to Admit dated July 10, 2021, that it was responsible for dismantling and removing the subject sidewalk shed and hired RHG, the plaintiff's employer, to perform the work. Rockledge also admitted that the flatbed truck depicted in one of the photographs exchanged in discovery and shown to the plaintiff during his deposition, was owned by Rockledge.

In opposition, the plaintiff has failed to raise a triable issue of fact that defendants Lakhi and Phoenix had any involvement with the subject work at the time of the plaintiff's accident. The plaintiff's attorney affirmation alone, containing mere conclusions and unsubstantiated allegations, is insufficient to raise a triable issue of fact. *See Browne v Castillo*, 288 AD2d 415 (2d Dept 2001). Further, the motions of defendants Lakhi and Phoenix are not premature. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *See Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768, 770 (2d Dept 2014), quoting *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 (2d Dept 2006) (internal quotation marks omitted).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiffs' motion (Motion 05) is **DENIED** in its entirety; and it is further

ORDERED, that the motions of defendants Lakhi (Motion 06) and Phoenix (Motion 07) are **GRANTED** only to the extent that the plaintiff's complaint and all claims and cross-claims asserted against them are dismissed.

This constitutes the decision and order of the Court.

Dated: April 27, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.