

Morera v New York City Tr. Auth.

2022 NY Slip Op 31433(U)

May 3, 2022

Supreme Court, New York County

Docket Number: Index No. 157570/2014

Judge: William Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

DAVID MORERA,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, GEORGE
COMFORT & SONS, INC, WWP OFFICE, LLC,

Defendant.

-----X

GEORGE COMFORT & SONS, INC, WWP OFFICE, LLC

Plaintiff,

-against-

FIRST QUALITY MAINTENANCE II D/B/A FIRST QUALITY
MAINTENANCE

Defendant.

-----X

INDEX NO. 157570/2014
MOTION DATE N/A
MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595564/2015

The following e-filed documents, listed by NYSCEF document number (Motion 008) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

Third-Party Defendant First Quality Maintenance (“FQM”) moves for renewal, pursuant to CPLR 2221[e], of its prior motion seeking summary judgment dismissal of the third-party complaint filed against it by Defendants/Third-Party Plaintiffs George Comfort & Sons and WWP Office LLC (“Defendants”), which was denied by this court via decision and order dated June 14, 2019. (NYSCEF Doc No. 222, FQM’s Memo; NYSCEF Doc No. 211, Ms007 Decision.) FQM bases its motion on dicta contained in the Appellate Division, First Department’s April 30, 2020 decision (NYSCEF Doc No. 220, Ms004 Affirmance), which unanimously affirmed this court’s

June 14, 2019 decision denying Plaintiff's motion sequence 004 for partial summary judgment on the issue of liability against Defendants. (NYSCEF Doc No. 212, Ms004 Decision.)

Defendants oppose the motion. (NYSCEF Doc No. 228, Defs.' Opposition.) Plaintiff also opposes FQM's motion and improperly cross-moves for partial summary judgment on the issue of liability against Defendants. (NYSCEF Doc No. 238, Pl.'s Memo.) Defendants and FQM both oppose the cross-motion. (NYSCEF Doc No. 246, Defs.' Opp. to Cross-Motion; NYSCEF Doc No. 254, FQM's Opp. to Cross-Motion.)

Background

Plaintiff David Morera alleges that, on February 1, 2014, he sustained injuries while standing on a ladder washing windows at the premises located at 825 8th Avenue, New York, NY, when a tile fell from the ceiling and struck him, causing him to fall off the ladder. Plaintiff was employed by FQM, which provided cleaning services at the premises.

Plaintiff commenced this action on August 1, 2014, setting forth causes of action arising under Labor Law §§ 200, 240[1][2][3], and 241[6] against Defendants George Comfort & Sons LLC, the property manager of the premises, and WWP Office LLC, the premises owner. (NYSCEF Doc No. 1, Complaint.)

On August 6, 2015, Defendants filed the third-party complaint against FQM, Plaintiff's employer, setting forth causes of action for contractual indemnity and breach of contract for failure to procure insurance. (NYSCEF Doc No. 25, Third-Party Complaint.)

After the Note of Issue was filed on April 27, 2018 (NYSCEF Doc No. 108), Plaintiff filed motion sequence 004 for partial summary judgment on the issue of liability on his cause of action arising under Labor Law § 240[1]. (NYSCEF Doc No. 109.) By decision and order dated June 14, 2019, this court denied the motion, holding that there were issues of fact regarding whether the

tile falling from the ceiling constituted an intervening act that precluded a finding of proximate cause. (NYSCEF Doc No. 212, Ms004 Decision.)

FQM also moved for summary judgment, arguing that the third-party complaint must be dismissed because it provided Plaintiff with all required safety devices and equipment with which to perform the window washing. (NYSCEF Doc No. 145.) By decision and order also dated June 14, 2019, the court denied the motion, holding that there were issues of fact regarding whether an act or omission of FQM caused Plaintiff's accident, as evidenced by the conflicting expert affidavits. (NYSCEF Doc No. 211, Ms007 Decision.)

Plaintiff appealed the Ms004 Decision and FQM appealed the Ms007 Decision. (NYSCEF Doc Nos. 216 and 217.)

On April 30, 2020, the Appellate Division, First Department unanimously affirmed this court's Ms004 Decision denying Plaintiff's motion for partial summary judgment. (NYSCEF Doc No. 220, Ms004 Affirmance.)

Now, FQM moves for renewal of its motion sequence 007, based on dicta contained in the Ms004 Affirmance. (NYSCEF Doc No. 222, FQM's Memo.) Specifically, FQM cites to the portion of the decision stating that:

The conflicting expert testimony also raises an issue of fact as to whether other adequate devices could have been provided. Plaintiff's reliance *on Ortega v City of New York* (95 AD3d 125 (1st Dept 2012)) is misplaced, as that case does not address the situation where, as here, the accident is precipitated by an unforeseeable external force that is unrelated to the work being performed.

(FQM's Memo at ¶ 19.)

FQM argues that "the Appellate Division, First Department's determination that the plaintiff's accident resulted from an 'unforeseen external force' and that it was 'unrelated to the work that was being performed' by FQM is law of the case." (*Id.* at ¶ 52.) FQM states that this

statement “constitutes ‘a change in the law that would change the prior determination’ ... and is binding upon the parties and this Honorable Court.” (*Id.* at ¶ 49.)

Discussion

A motion for leave to renew shall be based upon new facts not offered on the prior motion. The new facts must be those that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination. (CPLR 2221[e][2].) Movant must provide reasonable justification for the failure to present such facts on the prior motion. (CPLR 2221[e] [3].) Any alleged new facts must accompany a party's application to renew. (*Reyes v Sequeira*, 64 AD3d 500, 512-13 [1st Dept 2009].)

The motion is denied. FQM fails to present any new facts or demonstrate that there has been a change in the law that would change this court's prior determination.


Notably, after FQM filed the instant motion, the Appellate Division, First Department issued its decision on FQM's motion sequence 007 appeal. The December 22, 2020 decision unanimously modified this court's decision by dismissing the Defendants' claim against FQM for breach of contract for failure to procure insurance. (NYSCEF Doc No. 260, Ms007 Modification.) In that decision, the Appellate Division, First Department clarified that “there were questions as to whether the equipment provided to [Plaintiff] by FQM was adequate ... [t]hus, issues of fact exist as to whether the indemnity clause in the Consulting Agreement between the parties was triggered.” (*Id.* at 2.) As such, there was no “change in the law” upon which FQM may properly base its motion for renewal, and it is denied.

Plaintiff's cross-motion is likewise denied, as the court has already denied his prior motion seeking identical relief, which was unanimously affirmed on appeal. Plaintiff's reliance on *res ipsa loquitur* as an alternative basis for summary judgment, fails to resolve any of the identified

outstanding issues of material fact and demonstrates that plaintiff is not entitled to summary judgment on liability. Thus, it is hereby

ORDERED that Third-Party Defendant FQM's motion sequence 008 for renewal of its prior motion sequence 007 seeking summary judgment dismissal of the third-party complaint is denied; and it is further

ORDERED that Plaintiff's cross-motion for partial summary judgment on liability against Defendants is denied.

<u>5/3/2022</u> DATE					 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE