

**Egoavil v First Magyar Refm. Church of N.Y. City**

2022 NY Slip Op 32714(U)

August 11, 2022

Supreme Court, New York County

Docket Number: Index No. 154944/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 154944/2020

MICHELLE EGOAVIL,

Plaintiff,

MOTION SEQ. NO. 004

- v -

FIRST MAGYAR REFORMED CHURCH OF NEW YORK CITY, TRIBOROUGH CONSTRUCTION SERVICES INC., JJSL DEVELOPMENT INC., BAILEY'S ENGINEERING, P.C., and AE DESIGN SOLUTION, INC.,

Defendants.

DECISION + ORDER ON MOTION

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FIRST MAGYAR REFORMED CHURCH OF NEW YORK CITY,

Def./TP Plaintiff,

Third-Party Index No. 596053/2020

-against-

ELLITE GROUP LLC and TRIBOROUGH SCAFFOLDING & HOISTING SERVICES, INC. D/B/A TRIBOROUGH SCAFFOLDING & HOISTING, INC.,

TP Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury/wrongful death action commenced by plaintiff Michelle Egoavil, as Administrator of the Estate of Bacilio Egoavil, deceased, defendant Bailey's Engineering, P.C. ("Bailey's") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. The motion is opposed by plaintiff, defendant/third-party plaintiff First Hungarian Reformed Church, sued incorrectly herein as First Magyar Reformed Church of New

York City a/k/a First Hungarian Reformed Church of New York City (“the Church”), and defendant Triborough Construction Services Inc. (“Triborough”). After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This action arises from an incident on October 18, 2017, in which plaintiff’s decedent, an employee of Triborough, allegedly sustained injuries, and eventually passed away, as the result of an accident on a construction project at the Church, which was located at 344 East 69<sup>th</sup> Street in Manhattan (“the site” or “the premises”). Doc. 1. In the complaint, filed in July 2020, plaintiff alleged that the defendants were negligent and that they violated sections 200, 240(1) and 241(6) of the Labor Law. Doc. 1. Plaintiff did not allege any defect in the design of the pipe scaffolding in either the complaint or bill of particulars. Doc. 1, 105. The Church and Triborough joined issue by their answers dated November 23, 2020 and February 1, 2021, respectively, in which they denied all allegations of wrongdoing and asserted cross claims against Bailey’s, among others. Docs. 96-97. Bailey’s joined issue by its answer dated February 25, 2021, in which it denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 99.<sup>1</sup>

On or about December 16, 2020, the Church commenced a third-party action against Ellite Group LLC (“Ellite”) and Triborough. Doc. 127. In their third-party answers, Ellite and Triborough denied all allegations of wrongdoing against them and Ellite asserted a cross claim against Bailey’s. Doc. 128.

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<sup>1</sup> A default judgment was entered against defendant JJSL Development Inc. July 19, 2021. Doc. 88. The claims against defendant AE Design Solution Inc. were dismissed by order entered September 30, 2021. Doc. 90.

On or about December 16, 2021, Bailey's responded to plaintiff's combined discovery demands. Doc. 119.

On January 7, 2022, Bailey filed the instant motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Doc. 92. In support of the motion, Bailey's argues that it is entitled to summary judgment dismissing all claims and cross claims against it because it was not negligent and did not violate Labor Law sections 200, 240(1), or 241(6). Doc. 93. More specifically, Bailey's asserts that: it had no duty to plaintiff's decedent; committed no act or omission which led to the alleged incident; plaintiff's decedent was not a third-party beneficiary of any contract it had with Triborough; it did not create or have notice of any hazardous condition at the site; and it did not direct or control plaintiff's work or have the authority to do so. Doc. 93.

In support of the motion, Bailey's submits the affidavit of Paul Bailey (Mr. Bailey"), its President and CEO, who avers, inter alia, that: Bailey's is an engineering firm which provides consulting, engineering and inspection services for builders; Triborough verbally retained Bailey's to prepare plans for pipe scaffolding and a sidewalk shed for the premises; Bailey's work was limited to conducting one site visit to draw up plans for the scaffolding and shed; in September 2017, Bailey's submitted a permit application for the proposed pipe scaffolding and sidewalk shed to the New York City Department of Buildings ("the DOB"); the plans submitted by Bailey's were approved by the DOB and Bailey's was not aware of any deficiency in the plans that were submitted and approved; Bailey's had no employees at the site at the time of the alleged accident; Bailey's was not involved in the erection or use of the pipe scaffolding or sidewalk shed; Bailey's had no authority to control the means or methods of any construction or any other work at the site; the General Notes included in the diagrams that Bailey's provided to Triborough, a true copy of

which was attached to this motion, explicitly limited Bailey's role to "design of scaffold and not for installation or use" and also explicitly stated that Bailey's was "not responsible for monitoring safety at this project site and shall not be held liable for any accidents or injuries resulting from the contractor's work"; Bailey's did not supervise, direct and/or control the work of the decedent, his employer, or any other contractor at the site; Bailey's was not responsible for providing any safety equipment to the decedent, his employer, or any other contractor at the site; Bailey's did not create or have notice of any hazardous condition(s) on the site; Bailey's did not own, operate, maintain, supervise, inspect, repair or otherwise control the sidewalk shed or scaffolding used at the site; and that Bailey's had no control over the work or the means and methods of the work at the site. Doc. 104.

In opposition, plaintiff argues that the motion must be denied because Mr. Bailey's self-serving affidavit fails to establish Bailey's prima facie entitlement to summary judgment. Doc. 108 at par. 6. Plaintiff further asserts that the motion is premature pursuant to CPLR 3212(f) given that there is a great deal of discovery outstanding, questions of fact exist regarding whether Bailey's caused or contributed to the alleged accident, and information regarding causation is "clearly" within Bailey's sole knowledge. Doc. 108 at pars. 6, 40. Further, plaintiff maintains that Bailey's is not entitled to summary judgment since the plans annexed to its motion are not properly authenticated. Doc. 108 at pars. 15-21. Additionally, plaintiff argues that a representative of Triborough "may" raise an issue of fact by testifying that there was a written contract between that entity and Bailey's. Doc. 108 at par. 20.

The Church also opposes the motion, asserting that the motion is premature since discovery remains in its early stage. Doc. 112. Specifically, the Church maintains that it has not obtained any discovery from Triborough or Bailey's and that "issues of fact currently exist in connection

with the possibility that the negligent design of the scaffold and/or sidewalk bridge by Bailey's in some manner caused or contributed to the alleged accident." Doc. 112 at pars. 2, 9. Triborough further asserts that "[i]t cannot be said at this time with 100% certainty that the alleged accident was not caused or contributed to by the negligent design of the scaffolding and/or sidewalk bridge." Doc. 112 at par. 10.

Relying on several decisions which it represents are "well settled [law] in the Second Department", Triborough also asserts that the motion is premature since issues of fact exist regarding whether Bailey's is liable based on its preparation of the plans. Doc. 113 at pars. 3, 6, 8. Triborough further maintains that Bailey's has failed to establish that the alleged accident "had nothing to do with [the] potential negligent design and preparation of plans" by Bailey's. Doc. 113 at par. 12.

In reply to plaintiff's opposition, Bailey's reiterates that Mr. Bailey's affidavit establishes its prima facie entitlement to summary judgment dismissing all claims against it. Doc. 118. It maintains that it cannot be liable for injuries sustained by the plaintiff's decedent since it had no employees at the site and did not supervise and/or direct his work. Doc. 118. Bailey's also asserts that the claims against it must be dismissed since its sole role at the site was to design the scaffolding and sidewalk shed, and neither plaintiff nor any other party has adduced evidence linking such design to the injuries sustained by plaintiff's decedent. Doc. 118. Further, Bailey's insists that its motion is not premature pursuant to CPLR 3212(f) since plaintiff has not established that there are facts in its sole possession which would warrant denial of the motion. Doc. 118.

In reply to the Church's opposition, Bailey's argues that its motion is not premature and that the Church has failed to submit any evidence raising a material issue of fact. Doc. 116.

Bailey's also maintains that the Church's speculation that discovery will raise a material issue of fact is insufficient to defeat the motion. Doc. 116.

In reply to Triborough's opposition, Bailey's argues, inter alia, that Triborough does not raise any material issue of fact warranting the denial of the motion but also merely speculates that discovery may uncover evidence of its negligence in designing the scaffolding. Doc. 114.

### LEGAL CONCLUSIONS

The burden is on a party moving for summary judgment to establish "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 NY2d 320, 324 [1986]; see *Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020]). Where "the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Trustees of Columbia Univ.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). In considering a summary judgment motion, a court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

Here, as noted above, Mr. Bailey represents in his affidavit that, among other things, Bailey's role at the premises was limited to designing plans for pipe scaffolding and a sidewalk shed; made only one visit to the site, which was for the sole purpose of drafting the plans; plans were approved by the DOB; had no employees at the site; did not supervise, direct, or control, or have the authority to supervise, direct, or control, any of the work at the site; did not provide any equipment to the site; did not own the scaffolding or sidewalk shed; and did not create or have

notice of any hazardous condition at the site. Thus, Mr. Bailey's affidavit establishes Bailey's prima facie entitlement to summary judgment dismissing all claims against it (*See Lopez v Dagan*, 98 AD3d 436, 437-439 [1st Dept 2012] [engineer made a prima facie showing of entitlement to summary judgment dismissing claims pursuant to Labor Law sections 240[1] and 241[6] where it did not have the authority to direct, supervise or control the injury-producing work, and, thus, was not liable as an agent of the owners, and made a prima facie showing of entitlement to summary judgment dismissing plaintiff's common-law negligence claim and claim pursuant to Labor Law section 200 since there was no evidence that it had the contractual right to control the injury-producing work or that it failed to use due care in the exercise of its professional services [citations omitted]).

Since Bailey's established its prima facie entitlement to summary judgment dismissing all claims against it, the burden shifted to the parties opposing the motion to raise a material issue of fact. It is incumbent upon a party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980] [citations omitted]). The only evidence submitted in opposition to the motion were the combined discovery demands annexed to the affirmation of plaintiff's counsel (Doc. 109) which clearly do not raise an issue of fact but rather pertain to the arguments by counsel opposing the motion that the application is premature because discovery is outstanding. Since "an opposing attorney's assertions, unsupported by any proof whatsoever, are of no probative value, and therefore, fail to raise a triable issue of fact" (*Lewis v Safety Disposal Sys. Of Pa., Inc. Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013]; *see*

also *Bailey v NY City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000] [citations omitted]), the affirmations submitted by counsel fail to defeat Bailey's motion.

Although counsel for the plaintiff, the Church and Triborough all assert that Bailey's motion must be denied as premature pursuant to CPLR 3212(f) because there is discovery outstanding, this Court rejects their arguments. CPLR 3212(f) provides as follows:

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

A party seeking to defeat or delay a motion for summary judgment by invoking CPLR 3212(f) is required to:

demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof.

(*Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007] [citations omitted]).

Counsel for the plaintiff, the Church and Triborough fail to demonstrate that the proof they need to defeat the motion is within Bailey's exclusive knowledge, and their claims that such evidence will surface during discovery is based on sheer speculation (*See Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] citing *Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). Additionally, counsel's affirmations are, in effect, silent regarding whether they have made "at least some attempt" to obtain the discovery which they claim is needed (*Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d at 557). Although plaintiff's counsel represents that Bailey's never responded to plaintiff's combined discovery demands dated May 18, 2021 (Doc. 109), counsel for Bailey's emailed its responses to the said demands to all parties

on December 16, 2021, prior to the filing of the instant motion on January 7, 2022. Docs. 92, 109, 119. Additionally, neither counsel for the plaintiff nor counsel for the Church states what efforts, if any, they made to obtain information about Bailey's role at the site from Triborough, which, according to Mr. Bailey, had an oral contract with Bailey's. Nor does Triborough explain why it was unable to submit an affidavit of one of its employees in opposition to the motion.

Although counsel for plaintiff, the Church and Triborough assert that discovery will reveal evidence which could be used to oppose Bailey's motion, they do not specify what information would be revealed by such discovery or how it would be essential to oppose Bailey's motion (*See Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014] [summary judgment denied on ground discovery was outstanding where party opposing motion failed to specify information in possession of potential deponents]). Thus, it is impossible for the Court to determine that discovery could raise an issue of fact regarding Bailey's claimed wrongdoing. Although counsel opposing the motion assert that further discovery could lead to information regarding Bailey's negligent design of the scaffold or sidewalk shed, plaintiff does not allege in the complaint or bill of particulars that Bailey's negligent design caused or contributed to the alleged incident.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment of defendant Bailey's Engineering, P.C. is granted and the complaint and all cross claims against it are dismissed; and it is further

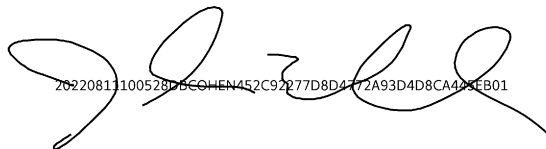
ORDERED that the said claims and cross claims against defendant Bailey's Engineering, P.C. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Bailey's Engineering, P.C. dismissing the claims and cross claims made against said defendant in this

action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

8/11/2022

DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE