

Hernandez v 225 5th Ave. (NY), LLC
2022 NY Slip Op 33370(U)
October 7, 2022
Supreme Court, New York County
Docket Number: Index No. 155211/2021
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 155211/2021

RIGOBERTO HERNANDEZ,
Plaintiff,

MOTION SEQ. NO. 002

- v -

225 5TH AVENUE (NY), LLC, 225 CONDOMINIUM, THE
UNIT OWNERS OF 225 CONDOMINIUM FIRST SERVICE
RESIDENTIAL, CIM GROUP LLC, COLLIERS PROJECT
LEADERS USA NE, LLC, QUEST BUILDERS GROUP,
INC., AND EVEREST SCAFFOLDING,

DECISION + ORDER ON
MOTION

Defendants.

-----X

QUEST BUILDERS GROUP, INC.
Plaintiff,

Third-Party
Index No. 596110/2021

-against-

RJB CONTRACTING CARTING CORP. DOING BUSINESS
AS ARMTECK CONSTRUCTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52,
53, 54, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT.

In this Labor Law action commenced by plaintiff Rigoberto Hernandez, defendants 225 5th
Avenue (NY) LLC and CIM Group, LP move: 1) pursuant to CPLR 3212, for summary judgment
dismissing the complaint and all cross claims against them; 2) motion costs, attorneys' fees, and
sanctions against plaintiff for maintaining a frivolous action; and 3) such other relief as this Court
deems just and proper. Plaintiff opposes the motion. 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 case arises from an incident on February 6, 2021 in which plaintiff was allegedly injured at 4 East 27th Street in Manhattan (“the premises”) during the course of his employment by Armtech Construction, which was hired to perform work at the condominium located there. In his complaint, filed May 28, 2021, plaintiff alleged that he was injured due to the negligence of, and the violations of Labor Law sections 200, 240(1), and 241(6) by, defendants 225 5th Avenue (NY), LLC (“225 5th”), 225 Condominium, The Unit Owners of 225 Condominium First Service Residential, CIM Group, LLC (“CIM”), Colliers Project Leaders USA NE, LLC (“Colliers”), Quest Builders Group, Inc. (“Quest”), and Everest Scaffolding (“Everest”).

Everest joined issue on or about June 15, 2021, denying all substantive allegations of wrongdoing and asserting cross claims against, inter alia, 225 5th and CIM. Doc. 7. 225 5th and CIM joined issue on or about July 16, 2021, denying all substantive allegations of wrongdoing and asserting various affirmative defenses. Doc. 11. Quest joined issue on or about July 27, 2021, denying all substantive allegations of wrongdoing and asserting cross claims against, inter alia, 225 5th and CIM. Doc. 13.

On or about December 15, 2021, Quest impleaded RJB Contracting Carting Corp. d/b/a Armteck Construction (“RJB”). Doc. 35. RJB joined issue in the third-party action on or about January 12, 2022, denying all substantive allegations of wrongdoing and cross-claiming against, inter alia, 225 5th and CIM. Doc. 41.

On or about January 28, 2022, Colliers filed an answer denying all substantive allegations of wrongdoing against it and cross-claiming against, inter alia, 225 5th and CIM. Doc. 42.

225 5th and CIM now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint arguing that they did not own, lease, or control the premises where plaintiff was

allegedly injured, and did not contract with anyone to perform work at the premises. Docs. 48-52. In an affidavit in support of the motion, Erik Johnson, Regional Vice President of CIM Group, L.P., a real estate investment company affiliated with CIM, attests, inter alia, that: CIM has no employees; 4 East 27th Street is the same building as 225 5th Avenue; neither CIM nor 225 5th owned, leased, repaired, or contracted with others to perform work at the premises; pursuant to a deed dated December 21, 2012, 225 5th acquired two commercial condominium units at the premises, C1N and C2S; and that the condominium's declaration provides that "the Commercial Units will be located on a portion of the ground floor and a portion of the cellar level of the Building which are not part of the Common Elements." Doc. 51.

In opposition, plaintiff argues that Johnson admits in his affidavit that 225 5th and CIM had ownership interests in the premises; that the movants failed to establish that they were not proper Labor Law defendants, and that the motion is premature because virtually no discovery, including depositions, has been conducted in this matter. Doc. 66.

In reply, 225 5th and CIM argue that their motion must be granted since they established their prima facie entitlement to summary judgment and plaintiff fails to raise an issue of fact in opposition. Doc. 69.

LEGAL CONCLUSIONS

A party moving for summary judgment pursuant to CPLR 3212 "must make 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]). The "facts must be viewed 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]). Once the moving party has met this prima facie burden, the burden shifts to the non-

moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Plaintiff submits Johnson's affidavit in an attempt to establish that neither 225 5th nor CIM were Labor Law defendants since they did not have any ownership interest in the premises, did not hire anyone to perform work at the premises, and did not supervise the work done at the site. However, Johnson's affidavit does not conclusively establish that the movants are entitled to summary judgment as a matter of law. With respect to 225 5th, Johnson represents in his affidavit that the condominium's declaration provides that the commercial units purchased by the said defendant "are not part of the Common Elements" (Doc. 51 at par. 6), in which case they would be the responsibility of the board of managers of the condominium and not of the unit owner (*see Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 44 [1st Dept 2016]). However, the declaration is not annexed to his affidavit. Johnson further represents that photographs annexed to his affidavit reflect that the work which gave rise to plaintiff's injury occurred outdoors, and was thus not the responsibility of the movants. However, such photographs also are not attached to his affidavit. Thus, the motion is denied as to 225 5th.

Nor has CIM established its prima facie entitlement to summary judgment. In his complaint, the plaintiff alleged, in the alternative, that CIM owned the premises, was a tenant at the premises, benefited from work performed at the premises, was a general contractor at the site, was a contractor at the site, was a construction manager at the site, and/or hired other companies to work at the site. Doc. 1 at pars. 40-49. In his affidavit, Johnson attests that CIM: did not own the premises; did not contract for work to be performed at the premises; and was not obligated to maintain the premises or to provide safety equipment to those working there pursuant to a contract

or otherwise. Doc. 51 at pars. 8-11. However, Johnson does not address the allegation that CIM acted as a construction manager. Nor does he explain the connection, or lack thereof, between CIM and 225 5th. The motion is thus denied as to CIM as well.

Moreover, the motion is premature insofar as no preliminary conference has been held and no depositions have been conducted (*See Robb v Knights Collision & Auto Care Ctr. Inc.*, 2018 NY Misc LEXIS 2750, 2018 NY Slip Op 31400[U], * 3 [Sup Ct, NY County 2018] [Freed, J.] ["Since no preliminary conference has been held and no discovery has been conducted in this matter, [the] motion for summary judgment is clearly premature"] [citations omitted]).

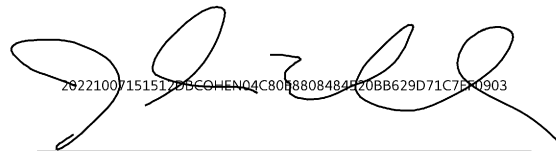
The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion by defendants 225 5th Avenue (NY) LLC and CIM Group, LP seeking summary judgment dismissing all claims and cross claims against them pursuant to CPLR 3212 is denied in its entirety with leave to renew after the completion of discovery; and it is further

ORDERED that the parties are to appear for a preliminary conference via Microsoft Teams on December 6, 2022 at 9:30 (a Teams invite will be emailed by the Part 58 Clerk) unless the parties complete a preliminary conference form (available on this court's website) and email the same to the Part 58 Clerk at sfc-part58-clerk@nycourts.gov at least two business days before the scheduled conference.

10/7/2022
DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE