

Giovanniello v BFC Partners, LP

2022 NY Slip Op 34872(U)

August 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 505307/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At Part 99 of the Kings County Supreme Court
of the State of New York, located at 360
Adams Street, Brooklyn, NY 11201 on the
_____ day of _____ 2022.

AUG 29 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION and
ORDER**

-----X
THEODORE J. GIOVANNIELLO,

Plaintiff,
-against-

Index No.: 505307/2019
Motion Date: 8/3/2022
Motion Cal. No.: 21-25
Mot. Seq. 6, 7, 9, 10

BFC PARTNERS, LP, EMPIRE OUTLET BUILDERS LLC and
ST. GEORGE OUTLET DEVELOPMENT LLC,

Defendants.

-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Third-Party Plaintiffs,

- against -

SCHINDLER ELEVATOR CORPORATION,

Third-Party Defendant,

-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Second Third-Party Plaintiffs,

-against-

DIFAMA CONCRETE INC. and DFC STRUCTURES LLC,

Second Third-Party Defendants.

-----X

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-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Third Third-Party Plaintiffs,

-against-

CONSTRUCTION RESOURCES CORP OF NEW YORK,

Third Third-Party Defendant.

-----X
EMPIRE OUTLET BUILDERS LLC and ST. GEORGE
OUTLET DEVELOPMENT LLC,

Fourth Third-Party Plaintiffs,

-against-

COMMERCIAL PAYROLL, INC.,

Fourth Third-Party Defendant.

-----X
The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause/Affidavits/Affirmations/Exhibits(MS#6)	111-141
Answering Affirmations/Affidavits/Exhibits.....(MS#6)	180-185
Reply Affirmations/Affidavits/Exhibits.....(MS#6)	189-201
Other.....	
Notice of Motion/Order to Show Cause/Affidavits/Affirmations/Exhibits(MS#7)	121-137
Answering Affirmations/Affidavits/Exhibits.....(MS#7)	163-166
Partial Opposition to Motion.....(MS#7)	176-179
Partial Opposition to Motion.....(MS#7)	
Reply Affirmations/Affidavits/Exhibits.....(MS#7)	202-206
Other.....	
Notice of Motion/Order to Show Cause/Affidavits/Affirmations/Exhibits(MS#9)	187-188, 226
Answering Affirmations/Affidavits/Exhibits.....(MS#9)	227
Fourth Third-Party Defendant Commercial Payroll, Inc. Cross-Motion to dismiss the claims against it dated May 31, 2022; Affidavits in support and other supporting papers (MS#10).....	207-214

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Opposition by Defendants/Third-Party Plaintiffs/Second third-Party Plaintiffs/Third Third-Party Plaintiffs and Fourth Third-Party Plaintiffs (Empire)(MS#10).....	215-220
Opposition by Third-Party Defendant Schindler Elevator Corp. ("Schindler") (MS#10)...	221-222
Reply of Fourth Third-Party Defendant Commercial Payroll, Inc. and supporting papers (MS#10).....	224-225

This case involves claims under the Labor Law and was commenced on March 11, 2019. Issue was joined on April 26, 2019.

Schindler Elevator Corporation's Motion for Summary Judgment
(MS#6)

Schindler Elevator Corporation ("SEC"), Third-Party Defendant, moves pursuant to CPLR 3212 for summary judgment to dismiss the third-party action against it by Defendants/Third-Party Plaintiffs Empire Outlet Builders LLC and St. George Outlet Development LLC (collectively "Empire"). Empire was the owner of the Premises and the building where plaintiff allegedly sustained injuries. SEC entered into a contract with Empire on or about July 11, 2016, as a subcontractor for the construction of elevators. Plaintiff is SEC's employee who was assigned to work on installing an elevator in the parking garage and on the date of the accident his workstation was on the top floor of the parking garage. On the date of plaintiff's accident, plaintiff took a lunch break whereupon he left the premises and upon his return to the premises and before he had returned to his workstation it is alleged that he tripped on construction debris. The subcontract between Empire and SEC provides for SEC indemnifying and holding Empire harmless regarding claims "arising out of or resulting from the performance of the Subcontractor's work...but only to the extent caused in whole or in part by the negligence, acts, errors or omissions of the Subcontractor." The subcontract also provides that "subcontractor...shall indemnify and hold harmless the (defendants) to the fullest extent permitted by applicable law in the event of a loss...suffered by an employee of the subcontractor...regardless of whether such loss is caused in part by (defendants)..."

SEC argues there is no liability to a third party based upon liability for injuries sustained by an employee unless such third party proves through competent medical evidence that such employee has sustained a grave injury under NY Workers Comp §11. Empire concedes there is no grave injury, and its second cause of action is therefore dismissed. SEC further argues that any indemnification clause is limited to its own negligence, which is completely lacking here, citing *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 210 (2008). SEC further argues that Labor Law §240 claims are inapplicable because there was neither a gravity-related, elevation-related risk nor a common law negligence cause of action as defendants did not have actual or constructive notice of any alleged dangerous condition causing an alleged injury, nor under Labor Law § 241(6) because no applicable industrial code provision applies.

Third-party plaintiff Empire argues that under the subcontract it has no responsibility over the subcontractor's employees with regard to safety and health conditions arising out of the subcontractor's work and under Article 9.1 of the subcontract, SEC was "solely responsible" for the safety of its employee.

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Empire Outlet Builders LLC and St. George Outlet Development LLC's ("Empire") Motion for Summary Judgment (MS#7)

Empire, Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs/Third Third-Party Plaintiffs and Fourth Third-Party Plaintiffs, seeks dismissal of Labor Law §240 claims because these claims are inapplicable as the accident was neither a gravity-related, elevation-related risk nor a common law negligence cause of action as defendants did not have actual or constructive notice of any alleged dangerous condition causing an alleged injury, nor under Labor Law § 241(6) because no applicable industrial code provision applies.

Plaintiff argues that an issue of fact is raised as to defendants' violation of 12 NYCRR § 23-1.7[e][1] or 12 NYCRR § 23-1.7[e][2] which regulates tripping hazards in a passageway. Plaintiff does not address the applicability of 12 NYCRR § 23-1.5, 1.7(d), 1.8(c), 1.30, 1.32, 1.33(a), 1.33(d), 1.33(e), 2.1(b), 2.2(a), 2.2(b), 2.2(c), 2.2(d), 2.3, 2.4(a), 2.4(b) and 2.4(c). Movant argues that "based upon the photographic evidence and testimony that the subject wire mesh herein was neatly center-piled in the corner," but the photograph (only identified as "Exhibit 9" without the NYSCEF no. (131) does not appear to this court to be dispositive.

Empire's Motion to Reargue Court's determination to Severe (MS#9)

Empire seeks to reargue the court's decision dated April 13, 2022 which granted plaintiff's cross motion to sever the action regarding Fourth Third Party Defendant Commercial Payroll.

Fourth Third-Party Defendant Commercial Payroll, Inc. Cross-Motion to dismiss the claims against it dated May 31, 2022 (MS#10)

Based on the foregoing, it is

ORDERED that the summary judgment motion by Schindler Elevator Corporation, Third-Party Defendant, is GRANTED (MS#6) and all claims against it are DISMISSED in their entirety including claims for common law contribution, indemnity and contractual indemnity; and it is further

ORDERED that the summary judgment motion by Empire Outlet Builders LLC and St. George Outlet Development LLC is GRANTED only to the extent of dismissing plaintiff's Labor Law § 240(1) claim and defendants' motion for summary judgment as to the remainder of plaintiff's claims, and in all other respects, is DENIED (MS#7); and it is further

ORDERED that Empire's motion to reargue the court's decision severing the action regarding Fourth Third Party Defendant Commercial Payroll is DENIED (MS#9) as no issue of fact or law was overlooked by the court; and it is further

ORDERED that Fourth Third-Party Defendant Commercial Payroll, Inc. Cross-Motion to dismiss the claims against it is DENIED (MS#10) as premature; and it is further

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ORDERED that any and all applications for relief requested are otherwise DENIED.

This constitutes the decision and order of the Court.

Dated: **AUG 29 2022**



Hon. Richard J. Montelione

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