

Alonso v Cabgram Dev. LLC

2023 NY Slip Op 31777(U)

May 26, 2023

Supreme Court, New York County

Docket Number: Index No. 151105/2019

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

-----X

FELIX BARRADO ALONSO,

Plaintiff,

- v -

CABGRAM DEVELOPER LLC, GRAMERCY SQUARE
LLC, KSK CONSTRUCTION CORP.,

Defendant.

-----X

CABGRAM DEVELOPER LLC

Plaintiff,

-against-

ZENCO GROUP INC.

Defendant.

-----X

CABGRAM DEVELOPER LLC

Plaintiff,

-against-

ZNKO CONSTRUCTION INC., SONY DESIGN LTD

Defendant.

-----X

INDEX NO. 151105/2019

MOTION DATE 01/05/2023,
01/24/2023

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595692/2019

Second Third-Party
Index No. 596079/2019

The following e-filed documents, listed by NYSCEF document number (Motion 009) 191, 192, 193, 194, 195, 196, 197, 198, 199, 220, 222, 223, 224, 225, 226, 228, 230

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 221, 227, 229, 231, 232, 233, 234, 235, 237, 238

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of allegations of violations of various provisions of the labor law. Plaintiff suffered injuries while assisting in the assembly of a scaffold.

Defendant/third-party plaintiff/second-third party plaintiff, Cabgram Developer LLC (“Cabgram”) was the owner of the project that contracted with plaintiff’s employer, Zenco Group Inc. (“Zenco”), to conduct painting work at the location.

On January 2, 2019, the date of the incident, plaintiff testified that he was handing up a wooden plank, that was approximately five feet long and two feet wide, to another worker that was standing on the scaffold. The testimony is inconsistent and unclear as to the occurrence of the accident and the events immediately after the accident. Much of plaintiff’s testimony regarding the accident and the moments after are a recitation of what was told to him by the employees on the scaffold. *See* NYSCEF Doc. 195, pgs. 37, 44, 83, 84, 86. These witnesses, however, were never deposed.

Plaintiff now moves for partial summary judgment and Cabgram moves separately to dismiss plaintiff’s complaint and all crossclaims as well as an order granting contractual indemnification from second third-party defendant. The Court will discuss the motions in turn.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a

motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Motion Sequence 009

Plaintiff moves for partial summary judgment for his claims pursuant to Labor Law § 240 (1). Cabgram opposes the instant motion. For the reasons set forth below, plaintiff's motion is denied.

Labor Law § 240(1)

It is well established law that “an accident alone does not establish a Labor Law § 240 (1) violation or causation.” (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See id.*

As indicated above the cause of the accident is unclear from the record before this Court. While plaintiff's counsel repeatedly contends that the scaffold fell or tipped over and that was the cause of plaintiff's injuries, that is simply not supported by plaintiff's own testimony. The Court need not reach the sufficiency of the opposition papers as plaintiff has failed to establish a *prima facie* case, specifically that safety mechanism failed and caused plaintiff's injuries.

Motion Sequence 010

Cabgram moves for summary judgment seeking dismissal of plaintiff's complaint in its entirety as well as dismissal of second third-party defendant's, Sony Design LTD (“Sony”), crossclaims for indemnification and contribution. Additionally, Cabgram seeks contractual indemnification against Sony. Sony and plaintiff oppose the instant motion. For the reasons set forth below, Cabgram's motion is granted in part.

Preliminarily, plaintiff does not oppose the portion of Cabgram's motion that seeks dismissal of the Labor Law § 200 claims, accordingly that portion of the motion is granted without opposition. As to the portion of the motion that seeks dismissal of plaintiff's Labor Law §241(6) claims, plaintiff only opposes the motion as it relates to an alleged violation of Industrial Code 12 NYCRR 23-1.7(a) (1). Industrial Code 12 NYCRR 23-1.7(a) (1) entitled Overhead hazards provides in pertinent part:

Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size[...].

Cabgram avers that this specific industrial code is not applicable in this case. In opposition to Cabgram's motion plaintiff contends that the happening of plaintiff's accident requires the denial of Cabgram's motion. Plaintiff cites to a case where there was a question of fact as to whether the location of the injured worker in a location normally exposed to falling material. At this point, Cabgram offers little more than conclusory statements that the location of plaintiff's accident is not a location normally exposed to falling material. Accordingly, the Court finds that Cabgram has failed to meet its burden to establish that that this industrial code provision does not apply.

As to its contractual indemnification claims, Cabgram asserts that pursuant to the assignment and assumption of the contract from ZNKO to Sony, Sony is now bound to the terms of the original contract. However, in opposition, Sony points out discrepancies in the documents that preclude a finding of summary judgment in Cabgram's favor. First, the contract that is between Zenco and Cabgram reference the address of the project at 227 East 19th Street, while the assignment and assumption of liabilities to Sony references a project located at 209 East 19th

St, New York, NY. Additionally, the assignment and assumption of liabilities is from an entity named ZNKO to Sony, while the contract is between an entity named Zenco and Cabgram. Cabgram attempts to rectify the discrepancy regarding the address of the project using Mr. Lichtman’s testimony, however not all factual issues have been resolved. Mr. Lichtman testified that he was an officer and owner of ZNKO, which is no longer active, however there was no testimony elicited regarding the underlying contract with Cabgram, listing Zenco as the entity to provide services. The record before this Court is unclear whether Zenco and ZNKO are in fact that same entities and whether the assignment and assumption of liabilities from ZNKO to Sony was supposed to include the contract with Cabgram. As there are factual issues that preclude a finding of summary judgment it is hereby

ADJUDGED that plaintiff’s motion for partial summary judgment is denied; and it is further

ADJUDGED that Cabgram’s motion for summary judgment as to plaintiff’s Labor Law § 200 claims is granted without opposition and the remainder of the motion is denied.

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5/26/2023

DATE

LYLE E. FRANK, 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