Supreme Court of the State of New York
County of Kings

Index Number 520889/2017
Seqs. 008

Part LL1

DECISION/ORDER

ADRIANO NETO AND LARA GOMES NETO,

Plaintiff,

against

MAGELLAN CONCRETE STRUCTURES CORP., BROOKLYN GC, LLC AND EVERGREEN I, LLC,

Defendants.

MAGELLAN CONCRETE STRUCTURES CORP.,

Third-Party Plaintiff,

against

EXTREME BUILDING LLC,

Third-Party Defendant.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2–4
Replying Affidavits	5
Exhibits	
Other	

Upon the foregoing papers, defendants Brooklyn GC, LLC (Brooklyn GC)'s and Evergreen Gardens I LLC (Evergreen)'s motion for summary judgment dismissing the plaintiff's complaint and for summary judgment on its cross-claims is decided as follows:

Introduction

On July 2, 2021, Justice Mark Partnow issued a decision resolving the plaintiffs'[1] motion for summary judgment in this action. That decision awarded the plaintiffs partial summary judgment on liability as to their Labor Law § 240 (1) claim and denied summary judgment on their Labor Law § 241 (6) claim. Third-party defendant Extreme Building LLC (Extreme)

[1] When used in the singular, "plaintiff" in this decision shall refer solely to Adriano Neto.

thereafter sought reargument of Justice Partnow's order, which was denied. Now, Brooklyn GC and Evergreen move for summary judgment on the plaintiffs' Labor Law §§ 200 and 241 (6) claims, as well as on their indemnification claims against Magellan and Extreme.

Factual Background & Procedural History

On September 15, 2017, plaintiff's co-workers dropped a reshoring post (or "jack") on plaintiff's shoulder and neck. The accident occurred while the plaintiff, a carpenter, was working with his co-workers to lower the jacks from the ground floor of the building under construction to the basement through a hole in the floor. At the time that the post fell, it was three to four feet above the plaintiff's head.

The note of issue was filed on January 1, 2021, before depositions had been completed. Thereafter, third-part defendant Extreme and defendants Brooklyn GC and Evergreen moved to vacate the note of issue and compel discovery (Seqs. 005 and 006). Justice Lawrence Knipel issued an order on March 9, 2021, which "granted [those motions] only to the following extent," and then provided a schedule for the completion of outstanding discovery (Knipel, J. order at ¶¶ 1–5). The order does not strike the plaintiffs' note of issue, and the court's records system does not indicate that the note of issue was stricken. Therefore, the new filing date for the note of issue appears to have been included inadvertently (Knipel order at ¶ 6).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movants' showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Summary judgment motions must be

timely made in accordance with local rules and court orders (CPLR 3212; *see also Brill v City of New York*, 2 NY3d 648 [2004]). An untimely motion for summary judgment must be accompanied by a showing of "good cause" for the delay in making the motion (*Brill*, 2 NY3d at 652).

Pursuant to the CPLR, absent local rules setting a shorter date, summary judgment motions "shall be made no later than one hundred twenty days after the filing of the note of issue" (CPLR 3212 [a]). In Kings County, the local rules do shorten the period in which summary judgment motions can be made, requiring such motions to "be made no later than sixty (60) days after filing the Note of Issue."[2] Here, the note of issue was filed on January 1, 2021. Although Justice Knipel's order inadvertently provided a new date by which the note of issue needed to be filed, it did not vacate the note of issue filed by the plaintiffs. Moreover, Justice Knipel's order was neither appealed nor did any party move to reargue that order, or otherwise seek clarification. That order is, therefore, the law of the case. This motion was filed on September 13, 2021, 255 days after the note of issue was filed, and therefore well past the longer deadline afforded by the CPLR. The movants provide no argument for good cause pursuant to *Brill*.

Additionally, CPLR 3212 (a) says that the court may set a date "after which *no such motion* may be made" (emphasis added). At oral argument, the parties raised the possibility of deeming the motion untimely as to the primary claims but timely as to the cross-claims, as no judgment has been entered and the cross-claims have not accrued. There is no statutory basis to differentiate the timeliness of requests for summary judgment on primary claims and cross-claims. Accordingly, this motion is universally untimely.

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[2] https://ww2.nycourts.gov/courts/2jd/kings/civil/KingsCivilSupremeRules.shtml

Furthermore, the defendants' evidentiary submissions are also inadequate to "eliminate all issues of fact as to whether the area in which the plaintiff was standing when he was struck was not normally exposed to falling material or objects" (*Podobedov v East Coast Constr. Group Inc.*, 133 A.D.3d 733, 736 [2d Dept 2015). The plaintiff was injured in the basement of a new multi-story construction project and was receiving materials through an opening above him. There are also questions of fact as to whether the manner in which plaintiff and the other workers on site were directed to move, or were observed by supervisors to actually be moving, the jacks was unsafe. If so, this unsafe manner of work could provide a predicate for Labor Law § 200 liability against the moving defendants and, by extension, bar summary judgment on their indemnification claims.

Conclusion

Defendants' motion (Seq. 008) is denied on the merits and as untimely. The action is scheduled for trial on September 18, 2023, and the parties shall appear in the Labor Law Mediation Settlement Part on June 7, 2023.

This constitutes the decision of the court.

June 1, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court