

Morocho v 323 Houston St. Corp.

2023 NY Slip Op 32007(U)

June 15, 2023

Supreme Court, New York County

Docket Number: Index No. 150847/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X

DIEGO H. TUBA MOROCHO,
Plaintiff,

- v -

323 HOUSTON STREET CORPORATION,
Defendant.

-----X

323 HOUSTON STREET CORPORATION
Plaintiff,

-against-

FPS CONTRACTING INC.
Defendant.

-----X

INDEX NO. 150847/2022
MOTION DATE 10/24/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595495/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 28, 29, 30, 31, 32, 38, 40, 41

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on April 4, 2023, where Jonathan Noble, Esq. appeared on behalf of Plaintiff Diego H. Tuba Morocho ("Plaintiff"), Stephen Donahue, Esq. appeared for Defendant/Third-Party Plaintiff 323 Houston Street Corporation ("Houston"), and Jonathan Egielski, Esq. appeared on behalf of Third-Party Defendant FPS contracting Inc. ("FPS"), FPS' motion to dismiss the Third-Party Complaint is denied.

I. Background

This case arises out of Plaintiff's accident on a construction site which took place on January 12, 2022 (*see* NYSCEF Doc. 1). The construction site was located at 323 East Houston

Street, New York, New York (the “Premises”) (*id.* at ¶ 11). It is alleged that Houston supervised, controlled, maintained the Premises (*id.* at ¶¶ 9-12). It is also alleged that Houston was the general contractor and/or project manager for work being done at the Premises (*id.* at ¶¶ 20-21). Plaintiff alleges that Houston hired other entities to perform work at the Premises (*id.* at ¶ 24). Plaintiff alleges that he was working at the premises when he fell from a “height/ladder” which has caused him to be “severely injured, bruised and wounded...sick, sore, lame and disabled” (*id.* at ¶¶ 28 and 33). Plaintiff initiated this action on January 28, 2022 alleging violations of New York Labor Law §§ 240(1) and 241(6) (*id.* at ¶¶ 38-42).

Houston filed its Answer on May 20, 2022 (NYSCEF Doc. 6). Houston filed a Third-Party Summons and Complaint on June 20, 2022 (NYSCEF Doc. 10). Houston named FPS, Plaintiff’s employer, as a Third-Party Defendant and alleged common law indemnity, contribution, contractual indemnity, and breach of contract for failure to procure insurance (*see generally, id.*). On October 7, 2022, FPS filed the instant pre-answer motion to dismiss (NYSCEF Doc. 15). FPS argues dismissal is appropriate because it did not contract with Houston but contracted with a separate entity named “The Bridge” (*see* NYSCEF Doc. 16 at ¶¶ 10-11). Therefore, FPS argues the claims for contractual indemnity and breach of contract must be dismissed. FPS also argues that since Plaintiff does not allege he suffers a “grave injury” as defined by the New York Workers’ Compensation Law, the claims for common law indemnification and contribution are barred (*id.* at ¶¶ 26-27).

On January 4, 2023, Houston filed its opposition (NYSCEF Doc. 30). Houston did not address FPS’ argument related to whether or not a “grave injury” has been alleged. However, Houston provided the affidavit of Carole Gordon (“Gordon”), who is vice president of The Bridge (NYSCEF Doc. 31). Attached to Gordon’s affidavit was a full copy of the contract between FPS

and The Bridge. Gordon affirmed that Houston was the owner's representative pursuant to the contract between The Bridge and FPS Contracting (*id.* at ¶ 4). She also affirmed that The Bridge and Houston share directors and officers, including a CEO (*id.* at ¶ 3). Indeed, Article 2 of the Contract provided that “[t]he term “Owner” means the Owner of the Owner’s authorized representative” (*id.*). The Bridge was defined as the Owner. Section 3.18 of the contract titled “Indemnification” states, in pertinent part:

“the Contractor shall indemnify and hold harmless the Owner..from and against claims, damages, losses and expenses...arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury...but only to the extent caused in whole or in part by negligence acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable...” (*id.*).

FPS filed its reply on February 17, 2023 (NYSCEF Doc. 41). FPS argued that the affidavit did not go into detail regarding the relationship between Houston and the Bridge (*id.* at ¶ 13). FPS also argued that Houston failed to address whether a statutorily defined “grave injury” was alleged in Plaintiff’s Complaint.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim

will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

B. The Contractual Indemnification and Breach of Contract Claims

FPS' motion to dismiss the contractual indemnification and breach of contract claims is denied. The documentary evidence does not utterly refute the factual allegations. If anything, the affidavit of Gordon creates an issue of fact as to whether or not Houston was indeed The Bridge's representative on the Premises, thereby entitling Houston to contractual indemnification. At this early stage, where FPS has not even submitted an Answer, and discovery has barely been exchanged, dismissal would be premature. Since it remains to be flushed out in discovery whether Houston fits the definition of the "Owners Representative" pursuant to the contract at issue, it would also be premature to dismiss the breach of contract for failure to procure insurance claim.

C. The Common-Law Claims

The Court finds that FPS has failed to show it is entitled to dismissal of Houston's common-law claims. The First Department has held that a "grave injury" within the meaning of the workers' compensation statute permitting third-party actions against an employer for contribution or

indemnity includes injuries resulting in permanent disability (*see Alulema v ZEV Electrical Corp.*, 168 AD3d 469, 470 [1st Dept 2019] [denying dismissal of third-party common law contribution claims on summary judgment motion]).

As this is a motion to dismiss for failure to state a claim, as opposed to a motion for summary judgment, Houston is entitled to all favorable inferences that flow from the complaint, and the allegations must be accepted as true. The Complaint explicitly alleges that Plaintiff is now disabled as a result of his injuries. Without the benefit of medical records, expert testimony, or Plaintiff's deposition, the Court is unable to resolve, on a pre-answer motion to dismiss, whether the alleged disability constitutes a grave injury. Rather, this is an issue better suited for summary judgment after the completion of discovery (*cf. Purcell v Visiting Nurses Foundation Inc.*, 127 AD3d 572, 574 [1st Dept 2015] [dismissing common law contribution claims on summary judgment based on report of a neurologist who examined the Plaintiff]). Thus, even though Houston did not submit formal opposition to FPS' motion, based on the law, the facts, and the procedural posture of this motion, FPS has failed to show how it is entitled to dismissal of Houston's common law claims at this juncture.

Accordingly, it is hereby,

ORDERED that FPS' motion to dismiss is denied in its entirety; and it is further

ORDERED that FPS' shall submit a Third-Party Answer to Houston's Third-Party Complaint within twenty days of entry of this Decision and Order; and it is further

ORDERED that the parties are directed to appear for an in-person discovery conference with the Court on August 9, 2023 at 9:30 a.m. in Room 442, 60 Centre Street. If the parties agree to a proposed discovery schedule prior to the conference, they are directed to submit it via e-mail

to SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear for the conference; and it is further

ORDERED that within ten days of entry, counsel for Houston shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action.

This constitutes the Decision and Order of the Court.

6/15/2023
DATE

Mary V Rosado Jsc
HON. MARY V. ROSADO, 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