

Morris v Freewheelin Ansko, LLC

2023 NY Slip Op 32116(U)

June 27, 2023

Supreme Court, Broome County

Docket Number: Index No. EFCA2021002681

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 12th day of May 2023.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

TREVOR MORRIS,

Plaintiff,

vs.

DECISION AND ORDER

Index No. EFCA2021002681

FREEWHEELIN ANSCO, LLC, PAULUS
DEVELOPMENT COMPANY, LLC, MATTHEW
PAULUS, HEUBER-BREUER CONSTRUCTION CO.
INC., SCE ENVIRONMENTAL GROUP, INC. and
LION CONSTRUCTION SUPPLY & SERVICES, LLC,

Defendants.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to address the motion of Defendant SCE Environmental Group, Inc. (“SCE”) for summary judgment dismissing the Complaint of Plaintiff Trevor Morris (“Morris”). The motion has been opposed by Freewheelin AnSCO, LLC (“Freewheelin”) and Heuber-Construction Co., Inc. (“Heuber”)¹, as well as by Morris. Oral argument was conducted on May 12, 2023. The only appearance at oral argument was by counsel for SCE. The other parties who opposed the motion did not avail themselves of oral argument, but their papers in opposition will still be considered. After due deliberation, this constitutes the Court’s Decision and Order.²

BACKGROUND FACTS

Freewheelin is the owner of real property located at 6 Emma Street in Binghamton, N.Y. In 2018, Freewheelin undertook to perform restoration work on its building and hired Heuber to serve as General Contractor and Construction Manager. Eastern Roofing Systems, Inc. (“Eastern”) was hired as a sub-contractor, and Morris worked for Eastern. Eastern is not a party to this action. Part of the work included removal of asbestos flashing at the edge of the roof, and Eastern retained SCE to complete that work.

¹ Freewheelin and Heuber are represented by the same firm, and the opposition was filed jointly for both Defendants.

² All the papers filed in connection with the motion and cross-motion are included in the NYSCEF electronic case file, and have been considered by the Court.

Morris alleges that he fell through an unmarked hole in the roof on December 3, 2018. He filed a Summons and Complaint on November 8, 2021 containing causes of action for negligence, as well as violations of Labor Law §§ 200, 240(1) and 241(6) and Industrial Code Rule 23. He claims that Defendants created the hole, failed to guard the hole and did not provide safety devices or warn of the dangerous condition.

The Court conducted a preliminary conference on March 8, 2022 and issued a Scheduling Order. An additional conference was held on January 12, 2023 and the Court issued an Amended Scheduling Order directing, among other things, that depositions should be completed by July 17, 2023 and a Note of Issue filed by August 17, 2023.

On March 27, 2023, SCE filed the instant motion for summary judgment, and included an affirmation from William J. Greagan, Esq., with Exhibits, an affidavit of Lenin Velez (project manager for SCE), a Statement of Undisputed Facts and Memorandum of Law. In brief, SCE argues that it was not an owner or general contractor and cannot be liable under the Labor Laws, and that it did not create the hole, which existed before SCE was hired; and that the hole was located outside of SCE's work area. SCE submitted pictures of the roof that showed a perimeter flag line a few feet from the outside wall. SCE's work removing the flashing was being performed on the side of the line closer to the outside wall. SCE contends that the hole was within the flag perimeter and that all of SCE's work was done outside of that perimeter.

Freewheelin and Hueber filed opposition papers to SCE's motion for summary judgment, consisting of an affirmation from Andre J. Major, Esq., with exhibits and a Counter-Statement of Material Facts. The opposition papers argue that the motion is premature as discovery is not complete and no depositions have taken place. Freewheelin and Hueber also point out that the hole in question is located very near the perimeter flag line and there exists an issue of fact as to SCE's role in the creation of the hole and SCE's proximity to the opening where Plaintiff fell.

SCE's motion has also been opposed by Plaintiff, who submitted an attorney affirmation from Lino Demasi, Esq., with Exhibits, a Response to SEC's Material Statement of Facts, and a Memorandum of Law. Plaintiff's opposition is likewise based on the fact that discovery has not yet been completed and he is seeking to schedule necessary depositions. Plaintiff relies upon CPLR 3212 (f) and its directive that the Court may deny a motion for summary judgment if it appears that facts essential to justify opposition may exist but cannot be stated at the time, or may be in the possession of another party. Therefore, per Plaintiff, he should be permitted to

complete discovery including depositions. Plaintiff also argues that there are questions of fact precluding summary judgment and that the photographs show the hole outside of the perimeter flag, within the zone where SCE was working. In reviewing the photographs, the Court has also observed that the hole seems to be on the side closer to the outside wall, but deposition testimony might clarify that.

SCE submitted reply papers to the opposition filed by Plaintiff and to the opposition filed by Freewheelin and Heuber. Included with those reply papers were daily work logs from Heuber, for the day of the accident and two weeks prior. SCE argues that the co-defendants did not assert any cross-claims against SCE so they have no basis to oppose SCE's motion. SCE also argues that the co-Defendants have not made a sufficient evidentiary showing that opposition to the motion may exist but would be in SCE's control. Lastly, SCE maintains that Plaintiff has failed to offer any evidence to overcome Lenin's affidavit that the hole pre-existed SCE's arrival on the site, and that the evidence shows that SCE was not the owner, general contractor or agent and was not responsible for safety of workers on the jobsite.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); see *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, *Sillman v. Twentieth Century-Fox Film Corp.*, 3

NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact.” *Boston v. Dunham*, 274 AD2d 708, 709 (3rd Dept. 2000) (citation omitted). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

The various arguments made by SCE in support of summary judgment have already been mentioned above. Assuming *arguendo*, that SCE has met its *prima facie* burden, the Court concludes that summary judgment is premature.

Pursuant to CPLR 3212, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.” The determination as to whether to permit additional discovery is within the discretion of the trial court. *Svoboda v. Our Lady of Lourdes Mem. Hosp., Inc.*, 20 AD3d 805 (3rd Dept. 2005); *see, Stubbs v. Ellis Hosp.*, 68 AD3d 1617 (3rd Dept. 2009). The party opposing summary judgment “must demonstrate how further discovery might reveal material facts in the movant’s exclusive knowledge; mere speculation will be insufficient.” *Scofield v. Trustees of Union College in Schenectady*, 267 AD2d 651, 652 (3rd Dept. 1999) (internal and end citations omitted). “The ‘mere hope’ that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough.” *Mazzafarro v. Barterama Corp.*, 218 AD2d 643, 644 (2nd Dept. 1995), *quoting Jones v. Gameraay*, 153 AD2d 550, 551 (2nd Dept. 1989); *Clochessy v. Gagnon*, 58 AD3d 1008, 1010 (3rd Dept. 2009); *see e.g. Williams v. Village of Endicott*, 202 AD2d 885 (3rd Dept. 1994).

In considering Plaintiff’s position, the Court is also guided by general rules and principles regarding discovery, and “New York has long favored open and far-reaching pretrial discovery.” *DiMichel v. South Buffalo Ry. Co.*, 80 NY2d 184, 193 (1992) *rearg denied sub nom. Poole v. Consol. Rail Corp.*, 81 NY2d 835, *cert denied* 510 US 816 (1993); *Kavanagh v. Ogden Allied*

Maint. Corp., 92 NY2d 952 (1998); *Lau v. Margaret E. Pescatore Parking, Inc.*, 105 AD3d 594 (1st Dept. 2013). As noted by the Court of Appeals:

Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 235 NE2d 430, 288 NYS2d 449 [1968]; see also *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746, 731 NE2d 589, 709 NYS2d 873 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party (see CPLR 3101 [a] [1]) or a nonparty (CPLR 3101 [a] [4]; see e.g. *Matter of Kapon v Koch*, 23 NY3d 32, 988 NYS2d 559, 11 NE3d 709 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376, 581 NE2d 1055, 575 NYS2d 809 [1991]).

Forman v. Henkin, 30 NY3d 656, 661 (2018).

"Under [relevant] discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party." *Kavanagh v. Ogden Allied Maint. Corp.*, 92 NY2d at 954. In the present case, the considerations are Plaintiff's interest in obtaining disclosure prior to the drastic remedy of summary judgment, against SCE's interest in not going through what it views as needless, and pointless, discovery.

It is a particularly salient fact that SCE's motion was made prior to the court-imposed deadline for completion of depositions. See, *Cunningham v. Keehfus*, 112 AD3d 1272 (3rd Dept. 2013). The Amended Scheduling Order of January 12, 2023 directs paper discovery to be completed by March 15, 2023, depositions by July 17, 2023 and a Note of Issue by August 17, 2023. SCE's summary judgment motion was made on March 27, 2023, prior to the expiration of the time for depositions. Per Plaintiff's opposition papers, no depositions have been conducted but Plaintiff was in the process of scheduling depositions when this motion was filed. Plaintiff also claims that SCE has not produced any documents in response to his Combined Demand for Discovery, Notice to take Deposition or Notice for Discovery and Inspection all dated May 2,

2022. Plaintiff is seeking additional time for disclosure of responses to its initial request, and had SCE responded, then perhaps Plaintiff would not be seeking to invoke CPLR 3212(f).

From all appearances, Plaintiff has acted diligently and timely in proceeding with discovery. SCE seems to want to be let out of the case without engaging in any discovery-both with respect to prior discovery requests and also regarding any future depositions. To grant SCE's motion at this point would be tantamount to stripping Plaintiff of any discovery from SCE, and make this more like a motion to dismiss, which motion goes to the sufficiency of pleadings without the benefit of discovery. The disclosure rules are intended to permit the parties a fair opportunity to obtain information supportive of their claim. After disclosure, a party is free to make a motion to dismiss, but at this point, it is clear that discovery is incomplete.

As to the evidence presented with this motion, SCE submitted a photograph of the job site and a photograph of the hole. Both photographs were purportedly taken by Mr. Velez, but his affidavit does not contain the customary language that the photos are a true and accurate representation, nor does it say when they taken, or even if the conditions in the pictures are the same as they were on the day of the accident. That information would be required to make the photographs admissible at trial, and the Plaintiff should at least be allowed an opportunity to depose Mr. Velez about the facts surrounding those pictures. The pictures themselves are also not entirely clear as to what they show. The second picture seems to show the hole near the outside wall and on the side of the perimeter flag where SCE would be doing work. The affidavit is not clear as to what is actually depicted in that picture, and testimony could shed light on that. Moreover, the affidavit of Mr. Velez contains statements that SCE did not create the hole and that it existed before SCE was hired. Although Morris has not come forward with any particular evidence that contradicts the statements made by Mr. Velez, Plaintiff should have an opportunity to depose Mr. Velez in regard to the affidavit.

SCE stresses that there is absolutely no suggestion that SCE was an owner, general contractor, or Plaintiff's employer, and therefore it cannot be liable for claims under New York State Labor Laws. Even if that were true, Plaintiff's complaint also alleges negligence and Plaintiff should be afforded an opportunity to obtain information as to whether SCE created the hole, uncovered the hole or took any actions which may have created a more dangerous condition. The facts are likely only in SCE's possession and merit additional investigation. Plaintiff has identified ambiguities in the evidence submitted and the request for further

disclosure is not a “fishing expedition” and is more than a “mere hope” that favorable evidence may be forthcoming through disclosure. There are real issues that need to be resolved. The fact that Plaintiff has not specifically identified what he might find through further discovery should not foreclose him from some discovery from SCE. To paraphrase former Secretary of Defense Donald Rumsfeld, sometimes “you don’t know what you don’t know.” In this context, Plaintiff cannot be expected to know what evidence might be available and how it might benefit his position. That is the reason why disclosure is, and should be, given a liberal and broad scope. At this preliminary stage, it is not a “fishing expedition” simply because Plaintiff does not know what might be revealed if SCE responded to the discovery demands and/or engaged in depositions of relevant witnesses. Plaintiff has not obtained any discovery from SCE, and SCE cannot be heard to complain of Plaintiff’s inability to be more specific as to details that might be supportive of Plaintiff’s claim. This case is at an early stage; which is much different than cases where discovery has been conducted and a party seeks to delay summary judgment upon a weak claim of possible additional relevant evidence.

Additionally, SCE relies exclusively on the Labor Law arguments and makes no acknowledgment of the negligence claim. Even if there is some merit to SCE’s argument that it is not liable for Labor Law violations, it did not move for dismissal of just those causes of action against it. Instead, it sought summary judgment on all claims against it so that it could avoid participating in the litigation entirely. That request is premature in light of the additional discovery needed on the claim of negligence.

SCE also objected to the co-defendants filing opposition to SCE’s motion since the co-Defendants have not asserted cross-claims against SCE. The Court need not address that argument as the Court’s determination is based on the opposition filed by Plaintiff.

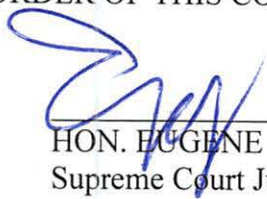
CONCLUSION

Based on all the foregoing, SCE’s motion seeking summary judgment is denied without prejudice and with leave to renew following the completion of discovery.

This Decision and Order is being electronically uploaded to the NYSCEF system. Counsel remains responsible for ensuring proper compliance with any service upon the other parties of the Decision and Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 27, 2023
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice