Supreme Court of New York
County of Kings
Part LL1

Index Number 502741/2018
(Seqs. 003 & 004)

JOHN DIMICELI,

Plaintiff,

against

CREDIT SHELTER TRUST, A. OTTAVINO PROPERTY CORP., SKANSKA USA INC., BOWLING CONSERVATION AUTHORITY, AND IRONSIDE CONTRACTING INC.

Defendants.

DECISION/ORDER

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	1–2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3–5
Replying Affidavits	4
Exhibits	
Other	

Upon review of the foregoing papers,[1] plaintiff John DiMiceli's motion (1) permitting plaintiff to amend the complaint *nunc pro tunc* to add Skanksa USA Civil Northeast Inc. (Skanska NE) as a defendant pursuant to CPLR 3025 under the doctrine of relation back/united in interest, or (2) substituting Skanska NE for Skanska USA Inc. (Skanska USA) (Seq. 003), and defendant Skanska USA's cross-motion for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it (Seq. 004) are hereby decided as follows.

Introduction & Procedural History

This action claiming violations of Labor Law §§ 200, 240 (1), and 241 (6) was commenced on February 9, 2018. A. Ottavino Property Corp. (Ottavino), Credit Shelter Trust (Credit), Skanska USA, Bowling Green Conservation Authority (Bowling Green), and Ironside Contracting, Inc. (Ironside) were named as defendants. Defendants Bowling Green and Ironside have never appeared in the action.

[1] Affirmations in further reply of cross-motions are not permitted by the CPLR and will not be considered here.

Skanska USA filed for summary judgment and dismissal of the complaint on February 22, 2022. Plaintiff filed a cross-motion for an order (a) substituting Skanska NE for Skanska USA; or in the alternative, (b) permitting Plaintiff to amend his complaint to add Skanska NE as a Defendant pursuant to CPLR 3025 *nunc pro tunc* under the doctrine of relation back/united in interest on June 10, 2022.

This Court denied Skanska USA's motion and plaintiff's cross-motion without prejudice, citing missing or improper papers, on June 15, 2022 (*see* Order). Plaintiff renewed his motion on July 7, 2022, attaching more complete papers. Skanska USA made a new motion for summary judgment and dismissal of the complaint on October 26, 2022.

Factual Background

This action arises from plaintiff's workplace accident on August 10, 2015, at Ottavino's work site located at 80-60 Pitkin Avenue, Ozone Park, NY (the yard). Plaintiff was employed and supervised by Ottavino (Plaintiff EBT at 19). Ottavino is a masonry company focusing on stone construction and restoration (Plaintiff EBT at 19).

Skanska NE was the general contractor at Moynihan (Sub-contract Agreement at 1). Skanska NE sub-contracted with Ottavino to restore stone taken from the Moynihan Train Station renovation project (Moynihan) (Plaintiff EBT at 48; *see* Sub-contract Agreement).

Initially, Plaintiff alleged Skanska USA was the general contractor at Moynihan. Skanska USA contends "it has nothing to do with Moynihan, with whatever was going on at Ottavino's yard, or for that matter with any aspect of any work under way anywhere in connection with the claim in the case at bar" (Affidavit of Carrie Key). Further, Skanska USA alleges it is legally distinct from Skanska NE.

Plaintiff cites Justice Phillip Hom's decision in *Dombek v Skanska USA, Inc.* on the issue of delineating the "Skanska" corporate structure (*Dombek v Skanska USA, Inc.* 2021 NY Slip Op 32751[U] [Sup Ct, NY County 2021]). In that case, the court held the general contractor at Moynihan was Skanska Moynihan Train Hall Builder, a joint venture d/b/a "Skanska." The joint venture was comprised of Skanska NE and Skanska USA *Building* [emphasis added], Inc. (Skanska Building).

Plaintiff also attaches the deposition transcript of Jason Blinn, Environmental Health and Safety Area Manager for Skanska NE, upon which Justice Hom relied in the *Dombek* decision. Mr. Blinn testified that Skanska USA is the parent company of the subsidiaries Skanska Building and Skanska NE, supported the claim that Skanska USA was also a contractor at Moynihan (Blinn EBT at 21).

Plaintiff delineates the Skanska corporate structure using data from the New York Department of State, Division of Corporations database (Plaintiff's Notice of Motion to Renew at 8; Plaintiff's Exhibits C, D & E):

- Skanska USA
  - Chief Executive Officer (CEO): Richard Kennedy
  - Principal Executive Office (PEO): 350 Fifth Avenue, 32nd Floor, New York, NY, United States, 10118.
- Skanska Building
  - CEO: Paul Hewins
  - PEO: 350 Fifth Ave, 32nd Floor, New York, NY, United States, 10118
  - Subsidiary of Skanska USA.

- Skanska NE
    - CEO: Michael Viggiano
    - PEO: 75-20 Astoria Blvd, Suite 200, Queens, Ny, United States, 11370
    - Subsidiary of Skanska USA.

Plaintiff also submits a press release page titled, "*Behind the scenes look inside the Skanska-built Moynihan Train Hall in New York City.*" At the beginning and end of this article Skanska USA's name and address of its PEO is listed. Additionally, on January 29, 2022, Skanska USA responded to plaintiff's May 19, 2021, amended notice to produce by exchanging a copy of the October 25, 2012, sub-contract between Skanska NE and Ottavino. Lastly, plaintiff testified that "Skanska" personnel (albeit he does not state which entity), a Mr. Lek, came to the yard and inspected the stone condition, crane mechanism, and other equipment (Plaintiff EBT at 27–29; 119).

The October 25, 2012, sub-contract describes how Ottavino receives old stone from Moynihan, cleans and refurbishes it at the yard, then sends it back to Moynihan (Plaintiff EBT at 28, see Sub-contract Agreement). The stones are transported by Ironside trucks to and from Moynihan. Ottavino employees were involved with hoisting and lifting the stone out of the Ironside flatbed trucks so the stone could be positioned in the yard for refurbishment. After Ottavino performed refurbishments, the stone was again hoisted and lifted back into a flatbed truck for transport back to Moynihan.

The hoisting and lifting of these heavy stone slabs, some as much as seven feet long twenty inches wide and two feet deep, required the use of a crane mechanism (Plaintiff EBT at 46). This crane mechanism moves around the site on steel tracks suspended around twenty feet

in the air. It has cables which hang down and can be attached to straps. These straps are then rigged to the stone slabs for hydraulic hoisting. This crane mechanism is controlled remotely (Plaintiff EBT at 39–42).

Plaintiff testified he was put on notice that "there were [sporadic] hiccups and glitches with the down button" on the crane mechanism (Plaintiff EBT at 70; 73). Plaintiff complained to his supervisors at various points in time about this issue (Plaintiff EBT at 70–74).

Plaintiff alleges he was injured when a stone slab fell and pinned him after the crane mechanism failed. Plaintiff was using the crane mechanism to move a rigged slab of stone to a holding area in the yard (Plaintiff EBT at 69). The crane control allegedly malfunctioned as plaintiff used the down button on the remote. Plaintiff testified as he took his thumb off the button, the stone did not stop but continued to move (Plaintiff EBT at 77–78; 89). Consequently, he was pinned by the stone slab and received injuries to his legs. (Plaintiff EBT at 77–78; 89).

Analysis

Plaintiff's Motion (Seq. 003)

Plaintiff's motion requests that the court (1) substitute Skanska NE for Skanska USA under the misnomer doctrine or, alternatively, (2) add Skanska NE under the relation back doctrine.

1. *Substitution*

Plaintiff alleges that Skanska USA was named in the original summons and complaint due to a misnomer, occasioned, *inter alia*, by Skanska USA's public statements. Plaintiff offers the press release titled, "*Behind the scenes look inside the Skanska-built Moynihan Train Hall in New York City*." On that website, Skanska USA is the entity named, specifically in the website

URL. In addition, plaintiff contends that the holding in *Dombek* and the New York Department of State records identifying the various Skanska entities created confusion when naming the defendants in this action.

"[A]n amendment [correcting the complaint with the intended defendant] will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that two criteria are met [:] [1] the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect . . . [and] [2] the intended but misnamed defendant would not be prejudiced" (*Simpson v Kenston Warehousing Corp.*, 154 AD2d 526, 527 [2d Dept 1989]; *Connell v Hayden*, 83 AD2d 30 [2d Dept 1981]). Importantly, the presiding court must initially have jurisdiction over the misnamed defendant before considering the two criteria.

The misnomer doctrine is appropriate when service is made on a defendant, but that defendant is simply misnamed or misspelled in the summons and complaint (*see e.g. Stuyvesant v Weil*, 167 NY 421 [1901]). In the case at bar, the Court does not have jurisdiction over Skanska NE, the alleged misnamed defendant. Service was made on Skanska USA, not Skanska NE. These are two distinct legal entities. Moreover, plaintiff has not provided evidence that even the instant motion was served on Skanska NE. The failure to establish proof of the court's jurisdiction is fatal to plaintiff's substitution arguments. Plaintiff's motion to substitute Skanska NE for Skanska USA under the misnomer doctrine is denied.

2. *Doctrine of Relation Back*

As to his alternative request, the relation back doctrine requires that: (1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is united in interest with

the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well (*Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 677 [2d Dept 2007]).

First, there is no dispute that both of plaintiff's claims against Skanska NE and Skanska USA arise out of the same occurrence—plaintiff's accident at Ottavino's yard.

Second, the question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties and (2) the nature of the claim asserted against them by the plaintiff. In other words, when because of some legal relationship between the defendants they necessarily have the same defenses to the plaintiff's claim, they will stand or fall together and are therefore united in interest. Unity of interest is a question of law (*Connell v Hayden*, 83 AD2d 30, 41 [2d Dept 1981]). In "an action to recover for the torts of negligence . . . the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other" (*Connell v Hayden*, 83 AD2d 30, 45 [2d Dept 1981]).

The record indicates that Skanska USA and Skanska NE form a parent-subsidiary relationship. Additionally, the plaintiff relies on the testimony of Mr. Blinn, which confirms the parent-subsidiary relationship between Skanska USA and Skanska NE (Blinn EBT at 21). For a subsidiary corporation to be considered the alter ego of the parent corporation, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored. The

parent corporation must exercise *complete dominion and control* [emphasis added] of the subsidiary's everyday operations (*Sweeney v City of NY*, 4 Misc 3d 834, 835 [Sup Ct, Kings County 2004]).

In the case at bar, plaintiff has presented no evidence to support his contention that Skanska USA exercises direct and complete control over Skanska NE. As a result, there is no evidence of that required jural relationship between the two entities which would cause them to "stand and fall together" in the present litigation. Plaintiff has failed to demonstrate that the two entities would have identical defenses available to them in the instant litigation. The Court declines to go further in the relation back analysis as this element is not met.

For these reasons, plaintiff's motion to apply the relation back doctrine to Skanska USA and Skanska NE is also denied.

Defendant's Motion (Seq. 004)

Defendant Skanska USA moves for summary judgment on the Labor Law §§ 200, 240 (1), and 241 (6) claims and to dismiss the complaint. Skanska USA alleges that there is no issue of material fact as to whether Skanska USA is an owner, contractor, or agent in the case at bar. Skanska USA carries the initial burden of proving that it was not negligent, did not contribute to the happening of plaintiff's accident, that it was not responsible for or involved in any way in whatever work was underway at the time of the loss, and that it was not an owner, general contractor, or agent thereof, as defined in the Labor Law of the State of New York.

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 movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

For there to be a finding of a violation of Labor Law §§ 200, 240 (1), and 241 (6) – Skanska USA must initially be found to be an owner, contractor, or agent (*cf. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

No evidence is presented in the record that Skanska USA was an owner or tenant of the subject premises.

The determinative factor as to whether a party is a contractor, as contemplated by the Labor Law, is whether that party had the right to exercise supervision and control over the work, and not whether it actually exercised that right (*Mogrovo v HG HDFC Inc.*, 207 AD3d 457 [2d Dept 2022]; *see also Kim v Kirchoff-Consigli Construction Management LLC*, 197 AD3d 1289 [2d Dept 2021]).

In the instant case, there are questions of fact outstanding as to Skanska USA's involvement with and authority over the Moynihan Project. Skanska USA held itself out in public press releases as related to the project. While not dispositive in this action, Justice Hom held that the relationship between Skanska NE, Skanska Building, and Skanska USA for this project was sufficient to hold Skanska USA liable to an injured worker (*Dombek* at 6). Additionally, Mr. Lek, identified by plaintiff as a "Skanska" worker, was allegedly present at the yard (Plaintiff EBT at 119). Finally, discovery remains incomplete in this action. In light of the foregoing, Skanska USA's motion is denied.

Conclusion

Plaintiff's motion (Seq. 003) is denied.

Defendant Skanska USA's motion (Seq. 004) is also denied.

The matter is referred to the Central Compliance Part for all discovery matters..

This constitutes the decision of the court.

July 14, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court