

Garcia v SOHO AOA Owner, LLC

2023 NY Slip Op 33631(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 161262/2017

Judge: William Franc Perry

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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. W. FRANC PERRY

PART

Justice

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MARILYN S. GARCIA,

Plaintiff,

- v -

SOHO AOA OWNER, LLC, PLAZA CONSTRUCTION
LLC, MEL MANAGEMENT CORP. D/B/A STELLAR
MANAGEMENT, LINEAR CONTRACTING, INC., LIBBY
MANAGEMENT SERVICES CORP., T.G. NICKEL &
ASSOCIATES, LLC, SPRING SCAFFOLDING LLC, OSS
2016 LLC, 2016 SOHO LLC,

Defendant.

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SOHO AOA OWNER, LLC, PLAZA CONSTRUCTION LLC

Plaintiff,

-against-

CONSTRUCTION REALTY SAFETY GROUP, INC.

Defendant.

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INDEX NO. 161262/2017

MOTION DATE 05/27/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595443/2018

The following e-filed documents, listed by NYSCEF document number (Motion 005) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 296, 297, 310, 311, 317 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Defendant, T.G. Nickel, moves pursuant to CPLR § 2221(e) to renew this Court’s September 26, 2019 denying without prejudice T.G. Nickel’s motion for summary judgment on the basis that such motion was premature at the time it was originally brought. (See NYSCEF DOC. NO. 101 and Doc. No. 200.) In denying the summary judgment motion without prejudice, the Court noted that some depositions were needed and stated “[w]e need some more information before the Court can come to a concrete conclusion as to T.G. Nickel's relationship to the sign at

the site and whether their actions did or did not cause the Plaintiff's injury.” (*See* NYSCEF Doc. No. 200.) This is a motion to renew T.G. Nickel’s prior summary judgment motion dated May 9, 2019 which sought dismissal of all of plaintiff’s claims, any cross claims by co-defendants, and affirmative summary judgment by TG Nickel against SOHO on its contractual indemnity claims including for defense costs. The instant motion to renew comes before this Court by an April 24, 2023 transfer order of the Honorable Eric Schumacher whom before this matter is currently pending.

A CPLR § 2221(e) motion for leave to renew is based on new facts not included in the underlying motion and such motion must include reasonable justification for not including such facts in the underlying motion. *See* CPLR § 2221(e).

This Court’s September 26, 2019 order was based on the premature nature of T.G. Nickel’s request. In fact, that was the exact basis of the parties’ opposition to it at that time and that discovery needed to occur, namely depositions, before such a decision could be made. (*See* NYSCEF Doc. No. 200.) Since such time there has been discovery and now the plaintiff is in agreement to discontinuing his claims against T.G. Nickel. (NYSCEF Doc. No. 286 at pg. 2.)

T.G. Nickel’s services were terminated in March 2016 which was fourteen months before the injury at issue in this matter. After terminating T.G Nickel’s services, SOHO secured PLAZA CONSTRUCTION LLC (“PLAZA”) services as construction manager sometime in March or April of 2016. After depositions, the evidence before this Court establishes that after PLAZA took over the job site in March or April 2016: (1) work was never stopped at the site due to the sign; (2) PLAZA’s senior superintendent at the time of the alleged injury to the plaintiff testified that he never saw the sign being loose, hanging or anything else wrong with it; (3) that PLAZA completed an inspection of the site and no safety concerns were discovered and that the

site safety manager would conduct thorough inspections of the site; (4) plaintiff inspected the sign every day to make sure it was attached to the building; and lastly, and most importantly in this Court's view, (5) the wall that held the sign was taken down and reinstalled on numerous occasions to allow for contractors and subcontractors to get materials and equipment into the building (*See* NYSCEF Doc. No. 310, deposition of William Rogers, PLAZA's senior superintendent at time of incident and Doc. 202, deposition of plaintiff taken 2/27/20). All these facts occurred after T.G. Nickel was let go from the project some fourteen months before the accident alleged in this action.

SOHO's conclusory and speculative statement that T.G. Nickel may have possibly been negligent when it ordered and installed the sign is not a basis to defeat summary judgment dismissing the common law negligence claim against T.G. Nickel which Plaintiff is now agreeing to dismiss. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131, 133 (1974) (finding that summary judgment should not be denied in order to just "ferret out speculative issues"). Summary judgment is appropriate here as there has been no evidence put forth of any negligence by T.G. Nickel and the accident occurred fourteen months after the sign's installation and when the sign has been dismantled and reinstalled on numerous occasions during the fourteen-month period after TG Nickel's contract and involvement in the project had been terminated and before the May 15, 2017 incident occurred.

T.G. Nickel's request for summary judgment on the Labor Law claims against it must also be granted for the same reasons previously outlined. Namely, that the plaintiff is agreeing to such and that at the time of the accident, T.G. Nickel had no involvement, oversight or control of the job site and had not had any such involvement for the preceding fourteen months. Labor Law claims apply to those entities who have the authority to supervise, control or direct work at the

job site. *See Kosovrasti v. Epic* (217) LLC, 96 A.D.3d 695 (1st Dep't 2012). For a defendant to be liable under the Labor Law, such "defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." *See Damlani v. Federated Department Stores, Inc.* 23 A.D.3d 329, 332 (2d Dep't 2005). Here any control or presence by T.G. Nickel on the job site ended on or about March 10, 2016 when a different company, PLAZA, took over as construction manager. The accident that spurred this action occurred on May 15, 2017, a full fourteen months later. During those fourteen months, T.G. Nickel had no control, involvement or connection to the job site. In addition, the depositions establish that the wall holding the sign was moved numerous times during the fourteen months preceding the accident and after T.G. Nickel's contract had been terminated by SOHO. The speculation that the sign, which was repeatedly taken down and put back up, may have been negligently installed fourteen months prior, is not enough to defeat T.G. Nickel's request for summary judgment. In addition, T.G. Nickel cannot be liable under the Labor Law under the facts that it had no control over the job site for fourteen months prior to the May 15, 2017 incident date and when the sign T.G. Nickel ordered and had installed was taken down and reinstalled by others during such fourteen month period. (*See* NYSCEF Doc. No 202 at p. 50-54).

The Court now addresses T.G. Nickel's request for summary judgment against defendants, SOHO, Plaza, Mel, Linear., Libby Management Services Corp., Scaffolding, OSS 2016 LLC and 2016 SOHO LLC, in their cross claims for contribution and indemnification and T.G. Nickel's action for indemnification against SOHO.

For T.G. Nickel to have to contribute or indemnify these defendants, it must be shown that T.G. Nickel was negligent. *See Leone v. BJ's Wholesale Club, Inc.*, 89 AD3d 406 (1st Dep't

2011) (finding that a third-party plaintiff must establish negligence against the party from whom indemnity is sought.)

The defendants have provided no such evidence and instead just point to the fact that T.G. Nickel ordered the sign and had it installed. However, the scaffolding holding the sign at issue was repeatedly taken down and reinstalled over the year and four months after T.G. Nickel had no connection with or access to the job site. Such scaffolding was moved numerous times during those fourteen months, sometimes on a daily basis. (*See* NYSCEF Doc. No 202 at p. 54). Thus, T.G. Nickel's request for summary judgment against the cross claims for contribution and indemnification must also be granted.


T.G. Nickel also seeks contractual indemnification from SOHO based on SOHO's March 10, 2016 termination letter which stated in pertinent part:

"Owner shall defend, indemnify and hold harmless TGN (including but not limited to TGN's reasonable attorneys' fees and other costs and expenses) from any and all claims, judgments, liens, costs, losses, damages, obligations and expenses of any nature whatsoever asserted by any third-party arising from work performed or claimed to be performed for or on behalf of Owner and/or Plaza and/or materials ordered or claimed to have been ordered on behalf of Owner and/or Plaza in connection with the Project in either case only for events occurring after the date that TGN is terminated for convenience." (*See* NYSCEF Doc. No. 68.)

Based on this indemnification clause, T.G. Nickel sent numerous letters to both SOHO and Plaza and their respective defense and insurance attorneys requesting defense and indemnity in this matter. (*See* NYSCEF Doc. No. 69.) SOHO did not grant these requests to defend and indemnify T.G. Nickel as SOHO promised in its termination letter. Because there is no proffered evidence of negligence by T.G. Nickel in this matter and because the defend and indemnification language in the termination could not be clearer, T.G. Nickel's request for summary judgment seeking contractual indemnification and defense costs from SOHO must also be granted.

Therefore, T.G. Nickel is granted leave to renew and considering arguments made upon renewal and opposition to such, T.G. Nickel’s motion for summary judgment against plaintiff and co-defendants is granted. The Court also grants affirmative summary judgment by T.G. Nickel against SOHO on its contractual indemnity claims including for reasonable defense costs.

This constitutes the decision and order of this Court.

<u>10/17/2023</u> DATE		 WILLIAM FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE