

Hernandez v 140 W. 28 Owner LLC

2023 NY Slip Op 34058(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 156603/2019

Judge: Richard Latin

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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. RICHARD LATIN PART 46M

Justice

-----X

ALLAN P. HERNANDEZ,

Plaintiff,

-against-

140 WEST 28 OWNER LLC and OMNIBUILD
CONSTRUCTION INC.,

Defendants.

-----X

140 WEST 28 OWNER LLC and OMNIBUILD
CONSTRUCTION INC.,

Third-Party Plaintiffs,

-against-

NERES WOOD FLOORING, LLC,

Third-Party Defendant.

-----X

INDEX NO. 156603/2019

MOTION DATE 02/14/2023,
04/04/2023

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595791/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 129, 130, 131, 132, 133, 134, 135

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149

were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 004 and 005 are consolidated for disposition and are determined as follows:

In this action arising out of a construction site accident, third-party defendant Neres Wood Flooring LLC (Neres) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint in its entirety (motion sequence number 004).

Defendants 140 West 28 Owner LLC (Owner) and Omnibuild Construction Inc. (Omnibuild) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 200 claims (motion sequence number 005).

BACKGROUND

On June 4, 2019, plaintiff Allan P. Hernandez (plaintiff) was allegedly injured on a construction site located at 140 28th Street in Manhattan (the premises) when he tripped and fell on "construction debris and garbage" (NY St Cts Elec Filing [NYSCEF] Doc No. 94, verified complaint ¶¶ 8-18). On April 26, 2017, Owner hired Omnibuild to perform, monitor, supervise, and administer the work, labor, and services necessary to construct a new 46-story hotel located at the premises (NYSCEF Doc No. 98). By agreement dated January 31, 2018, Omnibuild retained nonparty Big Apple Designers Inc. (Big Apple) as the drywall/carpentry contractor on the project (NYSCEF Doc No. 118). Big Apple hired Neres in a two-page subcontract agreement dated April 3, 2019 "for the construction at the project located at Neres . . . ," which contained contractual indemnification and insurance procurement requirements (NYSCEF Doc No. 97).

Plaintiff testified, when asked who his employer was, that "[w]e would always sign with the name Big Apple," and had been working for that entity for two years (NYSCEF Doc No. 103, plaintiff tr at 16). He was doing metal framing work (*id.* at 17). Plaintiff testified that he got his job at Big Apple through a friend; "[a] friend of [his] took [him] there," who was working with Big Apple (*id.* at 21). Plaintiff had never heard of a company named Neres (*id.* at 22). According to plaintiff, Big Apple had two or three supervisors at each job (*id.* at 24). He testified that he had previously used stilts on jobs for Big Apple, which were given to him by a coworker named Paolo (*id.* at 25). Plaintiff described how he used the stilts as follows: "[y]ou get on top of them in order to reach the higher areas in order to screw" (*id.* at 28). Paolo taught him how to use the stilts during lunch breaks (*id.* at 28, 30). Plaintiff used the stilts every day after his training (*id.* at 30).

According to plaintiff, he had an accident on June 4, 2019 at 28th Street between Seventh and Eighth Avenues in Manhattan (*id.* at 31). He was working on the 35th floor that day (*id.* at 63). The project entailed building walls for the hotel (*id.* at 32). His accident happened at about 2:45 p.m. (*id.* at 87). When he first arrived at the site, he went to the shanty on the third floor to pick up his tools (*id.* at 88). The 35th floor was completely wide open space (*id.* at 90). The workers were finishing up with that floor; the frames had already been erected (*id.* at 91). At the time of the accident, plaintiff was finishing up the walls on the "upper part" (*id.* at 106). Plaintiff

was holding his tools and drill with his right hand (*id.*). He stated that he was “going to insert the nail using the pistol,” but did not notice that there was a piece of plastic on the floor, which he described as “a cover that’s placed on the lights with the yellow cable” (*id.* at 120-121). He tripped and fell with the plastic and fell off his stilts (*id.*). Plaintiff stated that the first time that he noticed the plastic cover was when he was standing on it with his stilts (*id.* at 122). He recalled that there were three plastic covers on the floor but they were further back (*id.* at 124-125).

Plaintiff also recalled that he worked with Raymond, Ramon Nunez, Nixon Banegas (Banegas), Edgardo Lara, Onasis Pichardo, Jose Luis, and Fernando Gomez (*id.* at 34-35). Plaintiff testified that he used stilts every day on the project (*id.* at 37). He stated that he was not instructed to use stilts; “We were simply told that there had been a company before our company, they used a ladder and they did the job too slow and that’s why they were taken out” (*id.* at 38). Plaintiff testified that his boss’s name was Joel Vazquez (Vazquez), and that he was Big Apple’s subcontractor (*id.* at 39). Vazquez did not give him any instructions on the 28th Street job site (*id.* at 40). Vazquez also performed work on stilts (*id.* at 41). Randy was the only supervisor on the job, and was there every day (*id.* at 42, 43). Randy “simply came by to supervise” the workers but not for the entire day (*id.* at 43). Plaintiff testified that, at one point, the workers “explained to Randy that [they] didn’t want to use stilts but Randy said they could not use a ladder because that would delay them too much” (*id.* at 50).

Omnibuild’s superintendent, John Moore (Moore), testified that he walked the job, checked the progress and condition of the work, manpower, and production (NYSCEF Doc No. 106, Moore tr at 13). As part of his job responsibilities, Moore prepared daily reports (*id.* at 14). Moore testified that a 40-story hotel was being constructed at the site in June 2019 (*id.* at 17). Big Apple was the carpentry trade contractor (*id.* at 49). Moore had never heard of Neres (*id.* at 143). Moore did not recall whether an individual named Vazquez worked on the project (*id.* at 141-142).

Spencer Blatt (Blatt), Omnibuild’s project manager, testified that he had never heard of an entity known as Neres (NYSCEF Doc No. 107, Blatt tr at 98). Blatt testified that the daily report for June 4, 2019 indicates that Big Apple was performing interior framing on the 33rd, 34th, and 35th floors (*id.* at 91). On this project, the subcontractors were permitted to subcontract out the work (*id.* at 99). The subcontractors were required to notify Omnibuild in writing (*id.*). Blatt did not recall whether Big Apple subcontracted out its work to another entity (*id.*).

Banegas testified that plaintiff is his aunt's husband, and that they both worked for Big Apple on the construction project at West 28th Street (NYSCEF Doc No. 105, Banegas tr at 9-10).

Plaintiff commenced this action on July 2, 2019, asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6) (NYSCEF Doc No. 94).

Thereafter, Owner and Omnibuild impleaded Neres, seeking contractual indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 93).

On September 8, 2022, the court issued a self-executing order directing Neres to appear for a deposition by November 9, 2022 or it would be "automatically precluded from offering any evidence in support of" its defense (NYSCEF Doc No. 87 at 1). There is no dispute that Neres did not appear for a deposition by November 9, 2022.

Plaintiff filed the note of issue on September 15, 2022 (NYSCEF Doc No. 88).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Scurry v New York City Hous. Auth.*, 39 NY3d 443, 457 [2023]).

A. Timeliness of Owner and Omnibuild's Motion for Summary Judgment (Motion Sequence Number 005)

Neres asserts that Owner and Omnibuild's motion for summary judgment is untimely. Neres argues that motions for summary judgment were required to be made within 60 days after the filing of the note of issue, pursuant to the court's part rules. Neres maintains that the motion was made on January 14, 2023, and that counsel did not correct an error in the filing until February 13, 2023.

In reply, Owner and Omnibuild contend their motion was timely filed pursuant to the preliminary conference order, which gave the parties 120 days to file motions for summary judgment.

As argued by Neres, Owner and Omnibuild's motion is untimely. The preliminary conference order directed that motions for summary judgment were to be made "per CPLR" (NYSCEF Doc No. 9 at 2), i.e., within 120 days after the filing of the note of issue (*see* CPLR 3212 [a] ["If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown"]; *see also Brill v City of New York*, 2 NY3d 648, 651 [2004]).¹ The note of issue was filed on September 15, 2022 (NYSCEF Doc No. 88). Therefore, summary judgment motions were due by Friday, January 13, 2023 (*see* NYSCEF Doc No. 115 at 3). Owner and Omnibuild made their motion for summary judgment one day late, on Saturday, January 14, 2023 (NYSCEF Doc No. 114).²

Owner and Omnibuild have not offered any good cause for their late motion for summary judgment (*see Brill*, 2 NY3d at 652 ["'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy"]; *see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 727 [2004]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652). Owner and Omnibuild do not provide any explanation in their moving or reply papers as to why their motion is untimely; they only argue that their motion is timely (*cf. Stevens v RX Med. Dynamics, LLC*, 191 AD3d 487, 488 [1st Dept 2021], *lv denied* 37 NY3d 909 [2021] ["In reply to plaintiff's timeliness argument, defendants showed good cause for the delay, explaining that there had been confusion about the deadline for filing the note of issue"]; *Bik-Lung Lee v Nassau Health Care Corp.*, 162 AD3d 628, 630 [2d Dept

¹ The reassignment of this action to this part did not supersede the provision of the preliminary conference order regarding the deadline for motions for summary judgment, given that the court did not issue a further order explicitly providing for a different deadline to move for summary judgment (*see Lopez v Metropolitan Tr. Auth.*, 191 AD3d 508, 508 [1st Dept 2021]; *Waxman v Hallen Constr. Co., Inc.*, 139 AD3d 597, 598 [1st Dept 2016]; *Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 [1st Dept 2014]).

² 22 NYCRR 1250.1 (c) (1) (i) provides that "[f]or the purpose of meeting deadlines imposed by court rule, order, or statute, all . . . motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of the submissions are transmitted to the NYSCEF site."

2018] [hospital's counsel showed "good cause for the delay by submitting an affirmation stating that he was called out of the office for a family emergency the day the motion was due"]. Absent a showing of good cause, the court cannot ignore a de minimus delay in making the motion (*see Milano v George*, 17 AD3d 644, 645 [2d Dept 2005] [one-day delay]). Entertaining a late motion for summary judgment on the merits, without a finding of good cause, is an abuse of the court's discretion (*see Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017]; *Andron v City of New York*, 117 AD3d 526, 527 [1st Dept 2014]).

Accordingly, Owner and Omnibuild's motion for summary judgment is denied.

B. Neres's Motion for Summary Judgment Dismissing the Third-Party Claims for Contractual Indemnification, Breach of Contract, and Contribution (Motion Sequence Number 004)

Neres moves for summary judgment dismissing the third-party complaint, arguing that: (1) it was not plaintiff's employer; (2) it did perform work at the premises; (3) its subcontract is vague in that it fails to provide any specifics as to the project or its scope of work; and (4) it was not negligent, and four witnesses testified that they had never heard of Neres.

In response, Owner and Omnibuild contend that because Neres is precluded from offering any evidence to defend the third-party claims, its motion should be denied. In addition, Owner and Omnibuild assert that there is a material question of fact as to whether Neres's indemnification obligation has been triggered. According to Owner and Omnibuild, it is for the jury to determine whether Neres was negligent. They assert that plaintiff testified that he was hired by Joel Vasquez, who was Big Apple's subcontractor. Even though Omnibuild's project manager and superintendent were not familiar with Neres, Owner and Omnibuild allege that Big Apple hired Neres, and that they are beneficiaries of that sub-tier agreement.

Initially, the court rejects Owner and Omnibuild's contention that Neres's motion for summary judgment should be denied based solely on the preclusion order. "[S]ummary judgment based on an order of preclusion is not automatic in the First Department" (*Mendez v Queens Plumbing Supply, Inc.*, 12 Misc 3d 1064, 1066 [Sup Ct, Bronx County 2006]). "Rather, the Court must analyze the effect of the preclusion order in each particular case" (*id.*).

Here, the status conference order conditionally precluded Neres from offering any evidence *in defense* of the third-party claims upon its failure to appear for a deposition (NYSCEF Doc No.

87 at 1). It did not provide that Neres's answer would be stricken for failure to comply with the order (*cf. Roking Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984] ["a defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages"]).

Moreover, the preclusion order does not prevent Neres from challenging other parties' evidence. In *Mendoza v Highpoint Assoc., IX, LLC* (83 AD3d 1, 5 [1st Dept 2011]), a particularly instructive case, the trial court issued a self-executing order that provided that the defendant's failure to produce a witness for a deposition would result in preclusion of evidence at trial as to liability. The defendant failed to comply with the self-executing order, but thereafter moved for summary judgment on the ground that the plaintiff would not be able to make out a prima facie case of liability against it (*id.* at 5-6). The First Department found no legal impediment to examining the merits of the defendant's motion for summary judgment, explaining that:

“[T]he fact that defendant was defendant was precluded from presenting evidence at trial on liability did not affect its right to move for summary judgment. . . . Summary judgment should be granted where the non-disclosing defendants can establish entitlement to such relief despite the preclusion order barring it from offering its own evidence as to liability”

(*id.* [citations omitted]; *see also Crump v City of New York*, 67 AD2d 634, 635 [1st Dept 1979]).

As a result, Neres can establish entitlement to summary judgment if it can show that such relief should be granted based upon other evidence in the record. Considering that “[t]he purpose of a preclusion order is to make the demanding party whole” (*Northway Eng'g v Felix Indus.*, 77 NY2d 332, 337 [1991]), whatever disadvantage Owner and Omnibuild suffered as a result of Neres's failure to appear for a deposition was cured when the court prohibited Neres from offering its evidence in defense of the third-party claims (*see Mendoza*, 83 AD3d at 8). Preventing Neres from moving for summary judgment would give Owner and Omnibuild more relief than is warranted (*see id.*).

Thus, the court turns to whether Neres is entitled to summary judgment on this record. Viewing the facts in the light most favorable to Owner and Omnibuild (*see Scurry*, 39 NY3d at

457), Neres has failed to make a prima facie showing of entitlement to judgment as a matter of law.

“While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties’ intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact” (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880-881 [1985]; *see also* 11 Richard A. Lord, *Williston on Contracts* § 30:7 [4th ed. 2021]). “Whether such an ambiguity exists is a question for the court” (*Amusement Bus. Underwriters*, 66 NY2d at 881). “Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties’ intent, or when specific language is susceptible of two reasonable interpretations” (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] [internal quotation marks and citations omitted]).

Considered in this light, Neres has failed to demonstrate prima facie that the indemnification and insurance procurement provisions in its subcontract do not apply to the hotel construction project. As argued by Neres, its subcontract is ambiguous as to whether its terms apply to the project (*see Skrok v Grand Loft Corp.*, 218 AD3d 702, 705 [2d Dept 2023]; *Castillo v Big Apple Hyundai*, 177 AD3d 473, 474 [1st Dept 2019]; *Pereira v J.P. Morgan Chase Bank, N.A.*, 159 AD3d 566, 567 [1st Dept 2018]). The agreement does not specify the location of the project other than including a vague reference to Neres, and does not define the scope of its work (NYSCEF Doc No. 97 at 1).

The extrinsic evidence relied upon by Neres from other parties does not resolve the ambiguity as a matter of law (*see Skrok*, 218 AD3d at 705). Neither Omnibuild’s superintendent nor project manager had heard of Neres (NYSCEF Doc No. 106, Moore tr at 143; NYSCEF Doc No. 107, Blatt tr at 98). When asked for whom he worked, plaintiff testified that “[w]e would always sign with the name Big Apple,” and acknowledged that he had never heard of Neres (NYSCEF Doc No. 103, plaintiff tr at 16, 22). However, he also testified that his boss’s name was Vazquez, who was a subcontractor of Big Apple (*id.* at 39). They worked together in three different locations in Brooklyn, Queens, and the Bronx (*id.* at 40). On those other jobs, Vazquez was hired as Big Apple’s subcontractor (*id.*). Omnibuild’s project manager did not recall whether Big Apple subcontracted out its work to another company (NYSCEF Doc No. 107, Blatt tr at 99). While Neres relies on a daily report from the date of the accident, which purportedly shows that it

was not at the site (NYSCEF Doc No. 101), it has not submitted other daily reports from the days leading up to the accident. Furthermore, a Worker’s Compensation Board decision dated October 15, 2021 states that plaintiff suffered a work-related injury to his left knee, that “all evidence points to Big Apple Designers as the employer,” but it also states that a continued hearing was scheduled to determine plaintiff’s employment status (NYSCEF Doc No. 102 at 3-4).

Additionally, plaintiff alleges that he should have been provided with other safety devices to perform his framing work and that this was a proximate cause of his accident, which would trigger the “negligent act[] or omission[]” language of the indemnification provision (NYSCEF Doc No. 97 at 1).

In light of this conflicting evidence, there are questions of fact that preclude summary judgment on the third-party claims for contribution (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv denied* 100 NY2d 614 [2003]).

Therefore, Neres is not entitled to summary judgment dismissing the third-party complaint.


CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of third-party defendant Neres Wood Flooring, LLC for summary judgment dismissing the third-party complaint is denied; and it is further

ORDERED that the motion (sequence number 005) of defendants 140 West 28th Owner LLC and Omnibuild Construction Inc. for summary judgment is denied.

This constitutes the decision and order of the Court.

<u>11/15/2023</u> DATE	 <hr/> RICHARD LATIN, J.S.C.			
CHECK ONE: APPLICATION: CHECK IF APPROPRIATE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE