

Varona v Story Ave. E. Residential, LLC

2023 NY Slip Op 34199(U)

November 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 509734/2017

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of November, 2023.

PRESENT:
HON. INGRID JOSEPH, J.S.C.

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LENIN VARONA and ELIZABETH CARRASCO,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 509734/17

Mot. Seq. No. 16

STORY AVENUE EAST RESIDENTIAL, LLC,
STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
STORY AVENUE HOLDCO, LLC,
L&M STORY AVENUE MANAGERS, LLC,
STORY AVENUE EAST AFFORDABLE LLC,
STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Defendants.

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STORY AVENUE EAST RESIDENTIAL, LLC,
STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
STORY AVENUE HOLDCO, LLC,
L&M STORY AVENUE MANAGERS, LLC,
STORY AVENUE EAST AFFORDABLE LLC,
STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Third-Party Plaintiffs,

- against -

4MATIC CONSTRUCTION, CORP.,

Third-Party Defendants.

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 STORY AVENUE EAST RESIDENTIAL, LLC,
 STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
 STORY AVENUE HOLDCO, LLC,
 L&M STORY AVENUE MANAGERS, LLC,
 STORY AVENUE EAST AFFORDABLE LLC,
 STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
 HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
 FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Second Third-Party Plaintiffs,

- against -

PRO SAFETY SERVICES LLC
and LIBROS MASONRY CORP.,

Second Third-Party Defendants.

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 STORY AVENUE EAST RESIDENTIAL, LLC,
 STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
 STORY AVENUE HOLDCO, LLC,
 L&M STORY AVENUE MANAGERS, LLC,
 STORY AVENUE EAST AFFORDABLE LLC,
 STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
 HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
 FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Third Third-Party Plaintiffs,

- against -

4MATIC CONSTRUCTION, CORP.,

Third Third-Party Defendants.

The following e-filed papers read herein:

NYSEF Doc Nos.:

Notice of Motion, Affirmation, and Exhibits Annexed
 Opposing Affirmations and Exhibits Annexed
 Reply Affirmation

537-578
651-656; 658-659
662

Upon the foregoing papers in this personal injury action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), second third-party defendant Libros Masonry Corp. (“Libros”) moves (Mot. Seq. No. 16) for an order, pursuant to CPLR 3212, for summary judgment, dismissing as against it: (1) the second third-party complaint of defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs Story Avenue East Residential, LLC (“Story Avenue Residential”), Story Avenue East Residential Managers, LLC, Story Avenue Holdco, LLC, L&M Story Avenue Managers, LLC, Story Avenue East Affordable LLC (“Story Avenue East Affordable”), Story Avenue East Affordable Managers, LLC, HP Lafayette Boynton Housing Development Fund Company, Inc., and L&M Builders Group Inc. (“L&M”) (collectively, “direct defendants”), as well as all related cross claims; (2) the counterclaims of third third-party defendant 4Matic Construction Corp. (“4Matic”); and (3) cross claims of second third-party Pro Safety Services, LLC (“Pro Safety”). Direct defendants and 4Matic separately object to Libros’s motion, whereas Pro Safety (which has been dismissed from the second third-party action, by order, dated July 26, 2022, NYSCEF Doc No. 644) does not object to it.

Plaintiff Lenin Varona (“plaintiff”)¹ alleges that he suffered injuries to his left ankle and hip on April 13, 2017 when the plank platform of the pipe scaffold on which he was then working collapsed.² Direct defendants Story Avenue Residential and Story Avenue Affordable each admitted that they were the building’s owners.³ In addition, direct defendant L&M, the general contractor for the project,⁴ subcontracted with 4Matic to perform masonry and cement work on the project.⁵ 4Matic, in turn, retained the second Libros to provide additional laborers to 4Matic for the project at the actual labor cost incurred, plus a 5% for overhead and another 5% for profit.⁶

At the time of the accident, plaintiff, a long-term employee of 4Matic, was employed by 4Matic as a laborer and was supervised by 4Matic’s two foremen.⁷ According to plaintiff’s pretrial testimony, his task at the time required him to pour grout into the cinderblock holes in a wall under

¹ All singular references to plaintiff are to plaintiff Lenin Varona because co-plaintiff Elizabeth Carrasco’s claims are derivative in nature only.

² See Plaintiff’s initial and supplemental bills of particulars, dated November 27, 2017 and March 21, 2018 (NYSCEF Doc Nos. 203 and 204, respectively).

³ See Direct Defendants’ joint answer, dated July 17, 2017, ¶¶ 4-5, 27-28 (NYSCEF Doc No. 11).

⁴ See Defendants’ joint answer, ¶ 46.

⁵ The original third-party action commenced by direct defendants against 4Matic was discontinued without prejudice by stipulation, dated September 3, 2019 (NYSCEF Doc No. 84). The third third-party action against 4Matic was commenced by direct defendants on March 10, 2021 (NYSCEF Doc No. 310).

⁶ See AIA Document A401-2007, Standard Form of Agreement Between Contractor and Subcontractor, dated December 28, 2016, between 4Matic as contractor and Libros as subcontractor, § 10.2 (NYSCEF Doc No. 571).

⁷ See Decision/Order, dated July 13, 2021, at 4 n 5 (NYSCEF Doc No. 471).

construction. To perform this task, plaintiff was standing on a pipe scaffold whose plank-based platform was 18 to 20 feet above the ground. After working for approximately 30 minutes on the platform, plaintiff took a step when the platform planks unexpectedly came out of the scaffold frame, causing him to fall to the ground.⁸ L&M's project supervisor and 4Matic's project manager both averred that 4Matic owned the scaffold, and this is uncontradicted by the record.⁹

On September 28, 2020, direct defendants commenced a second third-party action against Libros and others, alleging causes of action sounding in contractual and common-law indemnification, contribution, breach of the insurance-procurement provisions of its contract, and for defense/indemnity.¹⁰ On November 16, 2020, Pro Safety, as the codefendant of Libros in the second third-party action, interposed its answer to the second third-party complaint, alleging cross claims against Libros for common-law contribution and indemnification.¹¹ On February 2, 2021, Libros interposed its answer to the second third-party complaint.¹²

On February 3, 2021, direct defendants commenced the third third-party action against 4Matic.¹³ On April 1, 2021, 4Matic joined issue, asserting counterclaims against Libros for contractual and common-law indemnification, as well as for contribution and breach of contract to obtain insurance.¹⁴

By decision/order, dated September 22, 2020, as amended by decision/order, dated July 13, 2021,¹⁵ the Court granted the branch of plaintiff's motion which was for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against direct defendants Story Avenue Residential, Story Avenue Affordable, and L&M. In addition, the Court granted the branch of direct defendants' motion which was for dismissal of plaintiff's claim under Labor Law § 241 (6), with the exception of Industrial Code § 23-1.16, as against them.¹⁶ Further, the Court granted the remaining branch of direct defendants' motion which was for dismissal of plaintiff's Labor Law § 200 and common-law negligence claims as against them.¹⁷

Thereafter, by decision/order, dated December 21, 2021, the Court granted the branch of direct defendants' motion which was for contractual indemnification against 4Matic.¹⁸ In addition,

⁸ See Decision/Order, dated July 13, 2021, at 4-5.

⁹ See Decision/Order, dated July 13, 2021, at 4.

¹⁰ See NYSCEF Doc No. 133.

¹¹ See Pro Safety's answer, ¶¶ 43-44 (NYSCEF Doc No. 212).

¹² See Libros's answer (NYSCEF Doc No. 292).

¹³ See Direct Defendants' third third-party complaint (NYSCEF Doc No. 310).

¹⁴ See 4Matic's answer to the third third-party complaint, ¶¶ 29-32 (NYSCEF Doc No. 350).

¹⁵ See NYSCEF Doc No. 132 and 471, respectively.

¹⁶ See Decision/Order, dated July 13, 2021, at 9.

¹⁷ See Decision/Order, dated July 13, 2021, at 9-11.

¹⁸ See Decision/Order, dated December 21, 2021, at 9-10 (NYSCEF Doc No. 497).

the Court extended the parties' time to move for summary judgment with respect to (among other matters) the second third-party complaint until May 9, 2022.¹⁹

Libros now moves for summary judgment dismissing, in part, direct defendants' cross claims and 4Matic's counterclaims as against it. In this regard, Libros has demonstrated, prima facie, that it had nothing to do with plaintiff's accident or the scaffold. The speculation and conjecture of direct defendants and 4Matic (collectively, the objecting parties) to the contrary are insufficient to raise a triable issue of fact (*see Bockstruck v Town of Islip*, 219 AD3d 439, 442 [2d Dept 2023]). The objecting parties' contention that Libros might have been involved "in the erection of the allegedly defective scaffolding of[f] which Plaintiff purportedly fell and sustained injuries"²⁰ is factually unsupported and thus insufficient to defeat summary judgment (*see Rivera v City of NY*, 210 AD3d 544, 545 [1st Dept 2022]; *see also Lawrence v City of Phila., Pa.*, 527 F3d 299, 318 [3d Cir 2008] ["Theoretical possibilities are not evidence."], *cert denied* 555 US 1085 [2008]).

Direct defendants' further contention that "in its December 21, 2021 Decision, the Court acknowledged 4Matic's assertion that Libros might bear some responsibility in causing Plaintiff's alleged accident and did not find to the contrary,"²¹ misreads the Court's decision. Rather, the Court held that "[e]ven if the *supposition of 4Matic's counsel* that 4Matic's subcontractor Libros bears some responsibility for the accident *were* correct, that would not alter 4Matic's contractual obligation to indemnify defendants[,] since the contract expressly makes 4Matic responsible for all work, acts and omissions of its subcontractors for all purposes under the contract."²² Notwithstanding the Court's clear warning of the error in relying on counsel's "supposition," however, the objecting parties have failed to support their extant objections to Libros' motion with their own affidavit or an affidavit from a person with personal knowledge of the facts (*see Lazarre v Gragston*, 164 AD3d 574, 575 [2d Dept 2018]).

Direct defendants' next contention that Libros breached the insurance-procurement provision of its subcontract with 4Matic, fares no better. The ineligibility of direct defendants and 4Matic to the additional insured status under Libros's commercial general liability policy stems

¹⁹ See Decision/Order, dated December 21, 2021, at 12.

²⁰ See Direct Defendants' Affirmation in Opposition, dated November 16, 2022, ¶ 3, and 4Matic's Affirmation in Opposition, dated November 17, 2022, ¶ 3 (NYSCEF Doc Nos. 651 and 658, respectively). The objecting parties' additional contention that "while [the witnesses] stated that the scaffolding was owned by 4Matic, neither [witness] testified as to who erected the scaffolding, [thus] *raising the possibility* of Libros's involvement in its erection" – is likewise factually baseless. See Direct Defendants' Memorandum of Law, dated November 16, 2022, at 8; 4Matic's Affirmation in Opposition, ¶ 26 (NYSCEF Doc Nos. 656 and 658, respectively [emphasis added]).

²¹ See Direct Defendants' Memorandum of Law, at 8.

²² See Decision/Order, dated December 21, 2021, at 9 (emphasis added).

from their failure to make any showing that the accident was caused in whole or in part by Libros's negligent acts or omissions.²³

Contrary to the objecting parties' final contention, Libros's motion is not premature. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying [it]" (*Niyazov v Hunter EMS, Inc.*, 154 AD3d 954, 955 [2d Dept 2017]).

Accordingly, dismissal of direct defendants' and 4Matic's claims and counterclaims against Libros is warranted. The remaining branch of Libros' motion for summary judgment dismissing Pro Safety's cross claims as against it is granted without opposition. Accordingly, it is

ORDERED that in Mot. Seq. No. 16, Libros's motion for summary judgment is *granted in its entirety*, and all claims, counterclaims, and cross claims as against it are dismissed; and it is further

ORDERED that to reflect the prior stipulated dismissal of the first third-party action and of the second third-party defendant Pro Safety from the second third-party action, as well as the instant dismissal of the remaining second third-party defendant Libros from the second third-party action, the caption of the remaining actions is amended to read in its entirety as follows:

-----X
LENIN VARONA and ELIZABETH CARRASCO,

Plaintiffs,

- against -

Index No. 509734/17

STORY AVENUE EAST RESIDENTIAL, LLC,
STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
STORY AVENUE HOLDCO, LLC,
L&M STORY AVENUE MANAGERS, LLC,
STORY AVENUE EAST AFFORDABLE LLC,
STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Defendants.

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STORY AVENUE EAST RESIDENTIAL, LLC,
STORY AVENUE EAST RESIDENTIAL MANAGERS, LLC,
STORY AVENUE HOLDCO, LLC,
L&M STORY AVENUE MANAGERS, LLC,
STORY AVENUE EAST AFFORDABLE LLC,

²³ See Disclaimer Letter, dated September 17, 2020, from Libros's carrier, at 1-2 (NYSCEF Doc No. 654).

STORY AVENUE EAST AFFORDABLE MANAGERS, LLC,
HP LAFAYETTE BOYNTON HOUSING DEVELOPMENT
FUND COMPANY, INC, and L&M BUILDERS GROUP INC.,

Third Third-Party Plaintiffs,

- against -

4MATIC CONSTRUCTION, CORP.,

Third Third-Party Defendants.

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All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice