

**Fuhrman v Lane Towers Owners Inc.**

2023 NY Slip Op 34697(U)

February 28, 2023

Supreme Court, Queens County

Docket Number: Index No. 704120/2018

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
MICHAEL FUHRMAN,

Plaintiff,

-against-

LANE TOWERS OWNERS INC., M.W.  
EXPEDITING, INC., C3D ARCHITECTURE, PLLC,  
THE CITY OF NEW YORK, MAGNUMOPUS  
ARCHITECTURE, P.C., XINOS CONSTRUCTION  
CORP., EMPIRE ECS, LLC, MIGUEL RAMIREZ  
d/b/a MIGUEL RAMIREZ PAINTING and PILLAR  
CONSTRUCTION, INC.,

Defendants.

-----X  
EMPIRE ECS LLC,

Third-Party Plaintiff,

-against-

MIGUEL RAMIREZ d/b/a MIGUEL RAMIREZ  
PAINTING,

Third-Party Defendant.

-----X  
LANE TOWERS OWNERS, INC., and EMPIRE ECS,  
LLC,

Second Third-Party Plaintiffs,

-against-

PILLAR CONSTRUCTION, INC.,

Second Third-Party Defendant.

-----X

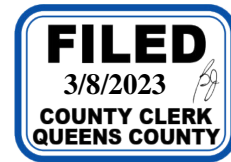
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Part 6

Motion Date: January 23, 2023

Calendar No. 9

Sequence No. 8



Third Party Action discontinued

The following papers numbered 1 to 37 read on this motion by Defendant/Second Third-Party Defendant PILLAR CONSTRUCTION, INC. for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims and third-party actions pursuant to CPLR §3212, this cross-motion by defendant MIGUEL RAMIREZ d/b/a MIGUEL RAMIREZ PAINTING to strike defendant/second third-party defendant Pillar Construction, Inc.’s Answer for failure to comply with court ordered discovery pursuant to CPLR §3126, and this cross-motion by defendants/second third-party plaintiffs LANE TOWERS OWNERS INC. and EMPIRE ECS, LLC to strike defendant/second third-party defendant Pillar Construction, Inc.’s Answer for failure to comply with court ordered discovery pursuant to CPLR §3126.

Papers  
Numbered

Notice of Motion, Affirmation, Exhibits.....1-4

Notice of Cross-Motion, Affirmation, Exhibits.....5-8

Notice of Cross-Motion, Affirmation, Exhibits.....9-12

Lane Towers/Empire’s Affirmation in Opposition, Exhibits.....13-15

Ramirez’s Affirmation in Opposition, Exhibits.....16-18

Plaintiff’s Affirmation in Opposition, Exhibits.....19-21

Pillar’s Affirmation in Opposition to X-Motion.....22-23

Reply Affirmation, Exhibits.....24-26

Reply Affirmation, Exhibits.....27-29

Reply Affirmation, Exhibits.....31-33

Reply Affirmation.....34-35

Reply Affirmation.....36-37

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendant/Second Third-Party Defendant Pillar Construction Inc.’s motion for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims and third-party actions pursuant to CPLR §3212 is denied, as there are issues of fact as to liability for the fence collapse that caused plaintiff’s accident. Defendant Miguel Ramirez d/b/a Miguel Ramirez Painting and defendants/second third-party plaintiffs Lane Towers Owners Inc. and Empire ECS, LLC’s cross-motions to strike defendant/third-party defendant Pillar Construction Inc.’s Answer for failure to comply with court ordered discovery pursuant to CPLR §3126 is denied, as they failed to demonstrate Pillar’s failure to comply with court orders was wilful and contumacious. Plaintiff commenced this action for personal injuries sustained on October 30, 2017, when a fence collapsed on him while walking on the sidewalk abutting 107-40 Queens Boulevard, Queens, New York. Plaintiff filed the Summons and Complaint on March 19, 2018, and issue was joined on June 8,

2018.

Pursuant to CPLR 3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

The duty to maintain property free of dangerous or defective conditions is imposed upon those who own, occupy, or control the property, or who put the property to a special use or derive a special use from it. (*Guzov v. Manor Lodge Holding Corp.*, 13 A.D.3d 482, 483 [2d Dept. 2004].) However, a contractor may be liable for an act of negligence which results in the creation of a dangerous condition on a public street. (*Malayeva v. City of New York*, 180 A.D.3d 888, 890 [2d Dept. 2020].)

Defendant/Third-Party Defendant Pillar Construction, Inc. (hereinafter referred to as “Pillar”) established a prima facie case for summary judgment, by demonstrating there is no evidence that it removed any supports from the fence that caused plaintiff’s accident. It presented the pleadings, parties’ deposition testimonies, photographs, contract between Lane Towers and Pillar, weather report and violation details in support of its motion. Plaintiff testified that he was walking on the sidewalk in the rain, and he heard a loud noise when the fence on his right fell on him. Pillar demonstrated that none of the deposition testimony proved that it was responsible for removing any supports before plaintiff’s accident. Pillar presented the DOB violation that stated the fence was free standing at the time of plaintiff’s accident. Pedrag Grandic, Pillar’s foreman, testified that Pillar’s waterproofing work did not require the removal of any supports in erecting the blue vapor barrier, nor did it remove any supports, before plaintiff’s accident. Grandic testified that on his first date at the construction site, he observed holes in the condominium’s façade to the left and right entrance of the building. He further testified that on his second visit, the fence had

been erected and he only observed one support in the fence, and did not observe any supports anchoring the fence to the exterior façade of the condominium. Grandic testified that the fence supports would not have hindered Pillar's work in installing a blue vapor barrier. Jaime Cedillos testified that he was defendant Empire's supervisor and was retained as general contractor on the project. Cedillos also testified Empire subcontracted co-defendant Ramirez to build the construction fence. Cedillos testified that he did not receive any complaints about the fence supports, and did not see whether fence supports were present when the fence fell, but that he believed the fence fell due to strong winds that day. Dominic Lio testified that he is the owner of Empire and visited the site once per week, but did not observe any fence supports. Miguel Ramirez testified that the fence was secured with metal brackets installed on the top corners of the main entrance. He further testified that the fence was secured to the ground, and he did not observe anyone remove the fence supports. He also testified that Cedillos told him the fence fell because it had been very windy that day, and he also inspected the condominium doorway and observed the brackets anchored to the fence were missing. Angel Sanchez testified that he was the condominium's superintendent and observed that the day of plaintiff's accident was very windy when the fence had toppled over. Sanchez testified that he did not know how the fence was secured to the building or why the fence fell. Spiro Kyrou testified that he was the condominium's building manager and was informed the fence had fallen on someone on a windy and stormy day, but had no knowledge as to the cause of the fence collapse. Based upon the above, Pillar demonstrated prima facie that there was no evidence it removed any fence supports prior to plaintiff's accident, or performed work that would render it liable for the fence's collapse.

However, defendants Lane Towers Owners, Inc. and Empire ECS, LLC (hereinafter referred to "Lane Towers") raised a triable issue of fact, by demonstrating Pillar may have caused the fence to fall when it was installing a blue waterproof membrane on the building facade. Defendants established that there is an issue of fact whether the fence collapse was due to both the high winds and the removal of fence supports prior to plaintiff's accident. Lane Towers presented a weather report that showed high winds occurring in the days before plaintiff's accident. They also presented differing deposition testimony as to whether supports were attached to the building, which Pillar denies but co-defendants Ramirez's deposition testimony supports, as he attested he had put the supports in and identified the location the supports were placed in a photograph. Ramirez also attested that after plaintiff's accident, he observed the fence and observed the supports were missing and Pillar's blue waterproofing material was present, as shown in photographs. Lane Towers also presented the expert affidavit of Kristopher Seluga, an engineer who examined the evidence and determined that there were fence supports prior to Pillar performing any work. Seluga also attested that based upon the photographs, Pillar did not work

around the fence brackets, as there were no gaps in the Blueskin material application that would have indicated the presence of fence supports. Lio also testified that after plaintiff's accident, he was advised by Cedillos that the fence fell because the supports had been removed by Pillar.

Ramirez and plaintiff also raised an issue of fact with regard to Pillar's liability for plaintiff's accident. They adopt and rely on co-defendant Lane Towers' submissions and evidence in support of their opposition. Ramirez demonstrated that Pillar relied solely upon its own employee's testimony, as opposed to the conflicting deposition testimony, photographs and expert affidavits presented by co-defendants. They also argued that the DOB violation is inadmissible hearsay, and does not eliminate all issues of fact. Cedillos and Ramirez's deposition testimony established that fence supports had been erected prior to Pillar performing the waterproofing work, and that the supports were missing when the fence fell. Lio also testified that Pillar was the only entity working on the building façade behind the fence.

Pillar's argument in reply is insufficient to eliminate all issues of fact as to liability. Pillar's submission of the affidavit of Michael Dasaro and accompanying evidence is improperly submitted in reply, as it was not exchanged prior to motion practice. Further, Pillar failed to explain why it could not have been presented in the original motion, and Dasaro's affidavit is insufficient to rebut Seluga's expert affidavit. The conflicting testimony by the deponents, in addition to the expert affidavit and photographs, demonstrates that there are issues of fact in dispute as to whether the fence supports were removed prior to plaintiff's accident, and whether the failure to have fence supports caused or contributed to plaintiff's accident.

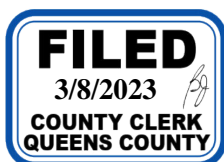
Defendants Ramirez and Lane Tower's cross-motions to strike defendant/second third-party defendant Pillar's Answer pursuant to CPLR §3126 are denied, as they failed to demonstrate Pillar's noncompliance was wilful and contumacious. While the Court prefers to resolve actions on the merits whenever possible, a court may strike the pleadings as a sanction against a party who 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.' (CPLR §3126; *Maiorino v. City of New York*, 39 A.D.3d 601, 601 [2d Dept. 2007].) However, the drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands was wilful and contumacious. (*Nieves v. City of New York*, 35 A.D.3d 557, 557 [2d Dept. 2006].)

Although the Court is cognizant of Pillar's failure to produce Dasaro and the photographs to plaintiff and co-defendants in discovery, there is insufficient evidence of wilfulness to warrant striking the Answer.

Accordingly, defendant/second third-party defendant Pillar Construction Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims and third-party actions pursuant to CPLR §3212 is denied. Defendant Miguel Ramirez d/b/a Miguel Ramirez Painting and defendants/second third-party plaintiffs Lane Towers Owners Inc. and Empire ECS, LLC's cross-motions to strike defendant/third-party defendant Pillar Construction Inc.'s Answer for failure to comply with court ordered discovery pursuant to CPLR §3126 are denied.

This constitutes the decision and Order of the Court.

Dated: February 28, 2023



*Tracy Catapano-Fox*  
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Hon. Tracy Catapano-Fox, J.S.C.