

Mohammed v Heartshare Human Servs. of N.Y.

2023 NY Slip Op 34935(U)

April 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 509507/2020

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 10th day of April, 2023.

PRESENT: CARL J. LANDICINO, J.S.C.
-----X
CHRISTOPHER MOHAMMED,

Index No. 509507/2020

Plaintiff,
-against-

DECISION AND ORDER

HEARTSHARE HUMAN SERVICES OF
NEW YORK and 62-10 NORTHERN
BOULEVARD LLC,

Motion Sequence #2, #3

Defendants.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	28, 30-39, 44-58,
Opposing Affidavits (Affirmations).....	40-42, 73-79,
Reply Affidavits (Affirmations)	85,
Memorandum of Law.....	29, 59

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff Christopher Mohammed (hereinafter “the Plaintiff”) on November 28, 2018. The Plaintiff alleges that he was injured while he was working at a property owned by Defendant 62-10 Northern Boulevard, LLC (“Defendant 62-10”), at which Defendant Heartshare Human Services of New York (“Defendant Heartshare”) was purportedly a lessee, located at 62-10 Northern Boulevard, Queens, New York (hereinafter “the Property” or “Premises”). At the time of the alleged incident, the Plaintiff was apparently at the Property in furtherance of his employment with non-party MHA Realty Co. The Plaintiff alleges that he was injured after he fell off a ladder at the Premises.

Defendant Heartshare moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment in its favor and dismissing all causes of action against them. Defendant Heartshare argues that the Plaintiff's Labor Law § 200, § 240(1) and § 241(6) claims against Defendant Heartshare should be dismissed as it did not direct or control the Plaintiff's work and insofar as it is not otherwise liable given that it is a lessee at the Premises. Defendant Heartshare also seeks an order pursuant to CPLR §8303-a, awarding costs and fees associated with filing this motion. In support of this motion, Defendant Heartshare relies on the lease agreement it had with Defendant 62-10, (the "Lease") and an affidavit of Robin Adams, Assistant Program Coordinator for Defendant Heartshare.

The Plaintiff opposes Heartshare's motion. The Plaintiff argues that Heartshare's motion is premature because depositions have not been conducted. The Plaintiff also argues that Defendant Heartshare has not met its *prima facie* burden given that it relies on an affidavit of an employee of Defendant Heartshare who acknowledges that it provided the Plaintiff with the ladder that he was using when he was injured. Defendant 62-10 partially opposes Heartshare's motion.

Defendant 62-10 cross-moves (motion sequence #3) for an order pursuant to CPLR 3212 for partial summary judgment granting its cross-claims against Heartshare for contractual indemnification and breach of contract for failing to procure insurance coverage in accordance with the terms of the Lease. Defendant 62-10 also seeks the conversion of its cross claims to third party claims.

Defendant Heartshare opposes this motion. Defendant Heartshare argues that the motion should be denied as it was not negligent and also because Defendant 62-10 has failed to provide evidence of the absence of its own negligence. Defendant Heartshare also argues that the motion by Defendant 62-10 should be denied as Heartshare has tendered a Certificate of Insurance that shows that Heartshare had procured a \$3,000,000 general liability policy covering the relevant period. Therefore, Heartshare argues that it did not breach its agreement with Defendant 62-10.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Motion Sequence #2

Turning to the merits of the motion by Defendant Heartshare (motion sequence #2), the Court is of the opinion that the motion should be denied without prejudice to renew upon the completion of discovery. In support of its application, Defendant Heartshare relies on the affidavit of Robin Adams, who states that she is the Assistant Program Coordinator for Defendant Heartshare. Ms. Adams stated that “[m]y duties and responsibilities for Heartshare generally include assisting Program Coordinator with oversight of individual's programmatic needs and facility management.” Ms. Adams also states that “on November 28, 2018, plaintiff, worker for MHA Realty, retained by the Landlord, 62-10 Northern

Boulevard LLC, appeared at our office to repair the interior wall.” Ms. Adams then stated that, “[w]hile working, plaintiff inquired whether we possessed a ladder he could utilize. As such, we offered our spare ladder in good faith.” (See Defendant Heartshare’s Motion, Affidavit of Robin Adams, NYSCEF Doc. 35). The parties should be able to conduct depositions. Motions for summary judgement have been denied as premature when a party opposing summary judgment is entitled to further discovery and “when it appears that facts supporting the position of the opposing party exist but cannot be stated.” *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 81 [2nd Dept, 2010]; see *Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724 [2nd Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd Dept, 2006]. Moreover, “where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.” *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2nd Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792–793, 533 N.Y.S.2d 143 [2nd Dept, 1988].

Moreover, Ms. Adams states that “[u]pon review of records and based upon personal knowledge” and “upon my personal knowledge and review of records, books, and affairs of Heartshare.” Ms. Adams refers to one document which is annexed to her affidavit. The document is titled “Second Renewal Option Fourth Amendment to Lease.” Ms. Adams makes no further reference, nor does she annex, any of the records and books she allegedly states she reviewed. As such, her statements are generally not probative. See *Nationstar Mortgage, LLC v. Jean-Baptiste*, 178 AD3d 883, 114 N.Y.S.3d 402, 2019 N.Y. Slip Op. 09011 [2d Dept 2019]. In the instant proceeding, the Plaintiff and Defendant 62-10 should have an

opportunity to conduct further discovery, including depositions. Accordingly, the motion is denied, without prejudice to renew upon good cause shown.

As such, Defendant Heartshare's application for sanctions is denied. "Conduct during litigation is frivolous and subject to sanction and/or the award of costs under 22 NYCRR 130-1.1 if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or ... it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *Miller v. Cruise Fantasies, Ltd.*, 74 A.D.3d 919, 920-21, 903 N.Y.S.2d 481, 482 [2d Dept 2010], quoting *Astrada v. Archer*, 71 A.D.3d 803, 805, 898 N.Y.S.2d 149, 151 [2d Dept 2010]. In the instant matter, it has not been established that the Plaintiff's actions were without merit, willful or malicious. As a result, sanctions would not be appropriate at this time. See *Providence Washington Ins. Co. v. Munoz*, 85 AD3d 1142, 1144, 926 N.Y.S.2d 630, 632 [2d Dept 2011].

Motion Sequence #3

Defendant 62-10 argues that summary judgment should be granted on its cross-claims for contractual indemnification and breach of contract for failing to procure insurance coverage pursuant to the terms of the Lease. In support of 62-10's motion, it relies on the Lease between the parties and the affidavits of Monica Ruiloba and Albert Louzoun. In her affidavit, Ms. Ruiloba states that "I am employed by Louzoun Enterprises Inc. d/b/a Queensboro Toyota [hereinafter "62-10"] at 62-10 Northern Boulevard Woodside N.Y. and have knowledge of certain knowledge of documents and business practices of 62-10." Ms. Ruiloba then states that "[a]ttached as Exh. "1" is a letter from the insurance carrier for 62-10 Northern Boulevard LLC. regarding coverage." Ms. Ruiloba also states that "Mr. Mohammed's accident occurred in the leased premises of Heartshare Human Services of New York. He used a ladder owned by Heartshare Human Services of New York." (See Defendant 62-10's Motion, Affidavit of Monica Ruiloba,

NYSCEF Doc. 53). Mr. Albert Louzoun provides an affidavit stating that he is a member of Defendant 62-10 and identifies an annexed copy (incomplete) of the Lease.

The Lease Agreement between Defendant Heartshare and Defendant 62-10 provides in pertinent part in Paragraph 8:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees, or licenses, of improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees.

Paragraph 43.01 of the Lease Agreement provides as follows:

Tenant covenants to provide on or before the Commencement Date of the term hereof and to keep in force during the term hereof for the benefit of Landlord and Tenant: (a) a comprehensive policy of liability insurance protecting Landlord and tenant against any liability whatsoever occasioned by accident on or about the Demised Premises or any appurtenances thereto, with limits of liability thereunder not less than the amount of THREE MILLION and 00/100 (\$3,000,000.00) DOLLARS combined single limit coverage on a per occurrence basis including property damages and (b) fire and extended coverage, vandalism malicious mischief, water damage and special extended coverage insurance in an amount adequate to cover the cost of replacement of all Tenant's Changes, fixtures, equipment and decorations and other improvements in the Demised Premises. Such policies are to be written by good and solvent insurance companies licensed to do business in the State of New York and which are reasonably satisfactory to landlord.

Generally, "[a] party's right to contractual indemnification depends upon the specific language of the relevant contract." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. What is more, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its

negligence contributed to the accident, it cannot be indemnified therefor.” *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010].

As an initial matter, Ms. Ruiloba’s affidavit is unclear as to her relationship with Defendant 62-10 and lacks support for the basis of her knowledge of the events at issue. In addition, Mr. Louzoun does not explain the basis for his knowledge of certain facts he presents. Moreover, in relation to contractual indemnification, Defendant Heartshare’s liability has not yet been determined, and as a result, the issue of contractual indemnity cannot be resolved. As stated above, the indemnification clause provides that the Tenant shall indemnify the Owner for any breach or improper conduct by the Tenant or it’s agents, contractors, employees, invitees or licensees. In addition, there is also an issue of fact regarding Defendant 62-10’s motion for summary judgment on its cross-claim for breach of contract. Defendant Heartshare, in its affirmation in opposition, has attached a letter from AmTrust North America as the third-party administrator for Wesco Insurance Company. As part of that letter, AmTrust states that, “Wesco will agree to assume the defense of Northern in the Mohammed Action, subject to the express reservation of rights set forth herein.” Accordingly, there is an issue of fact regarding the breach of contract claim for Heartshare’s failure to procure insurance. There are issues of fact that prevent the Court from granting summary judgment. *See Nationstar Mortgage, LLC v. Jean-Baptiste*, 178 AD3d at 883. The motion by Defendant 62-10 is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant Heartshare’s motion (motion sequence #2) for summary judgment and sanctions is denied.

Defendant 62-10’s motion (motion sequence #3) for summary judgment on its cross-claims is denied.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino, J.S.C.
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