

Varon v FPG CH 349 Henry, LLC

2024 NY Slip Op 33444(U)

September 17, 2024

Supreme Court, Kings County

Docket Number: Index No. 520065/2020

Judge: Devin P. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York
County of Kings**

Index Number 520065/2020
Seqs. 012

Part LL1

DECISION/ORDER

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

PAULA ANDREA GUTIERREZ VARON,

Plaintiff,

against

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, RAY BUILDERS, INC., AND MENOTTI ENTERPRISE LLC,

Defendants.

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, AND RAY BUILDERS, INC.,

Third-Party Plaintiffs,

against

UNITED CONSTRUCTION INDUSTRIES, LLC A/K/A QUAD CONSTRUCTION OF NEW YORK, LLC,

Third-Party Defendant.

FPG CH 349 HENRY, LLC, FORTIS PROPERTY GROUP, LLC, AND RAY BUILDERS, INC.,

Second Third-Party Plaintiffs,

against

F-KAM CONSTRUCTION LLC,

Second Third-Party Defendant.

Papers Numbered

Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u>2-3</u>
Answering Affidavits	<u>4</u>
Replying Affidavits	<u>Var.</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

Based on the foregoing papers, defendant Menotti Enterprises (Menotti)'s motion to re-argue the April 1, 2024 decision (Seq. 012) is decided as follows:

Introduction

Plaintiff commenced this action to recover for damages she claims to have sustained on August 13, 2020 when she fell down a flight of stairs at a construction site. On April 1, 2024, this court denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment solely as to Labor Law § 240 (1) and the alleged violations of Industrial Code 23-1.7 (e) and 2.7 (e); the motion was otherwise denied. Now, defendant Menotti moves to re-argue.

Analysis

To establish a basis for re-argument, defendant must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998 1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]; CPLR 2221 [d])

Menotti advances two arguments as to what the court misapprehended in the prior decision. First, Menotti contends that the court improperly found that there was a question of fact as to whether Menotti was a statutory agent because it was a site safety contractor that did not have the requisite authority to control the work. However, the kinds of task that Menotti was contracted to perform, and that the testimony indicates Joseph Falquecee performed, have been found by the Appellate Division to be those undertaken by a statutory agent (*see Barrios v City of New York*, 75 AD3d 517, 518-519 [2d Dept 2010] [contractual obligation to inspect, report, develop a quality control plan, and to meet with/direct contractors regarding their safety plans was, *inter alia*, enough to render Skanska a statutory agent]). Menotti contracted to perform site

safety management as required by the NYC Department of Buildings (Andrew Feigenbaum, principal of Ray Builders, EBT at 71), and Menotti participated in creating the site safety plans (*id.* at 72). Mr. Falquecee was continuously present at the site, performed daily walk throughs of the site, and worked daily alongside the site superintendent (*id.* at 74, 78). Mr. Falquecee also was responsible for conducting safety orientations and collected evidence from the trades that they had performed toolbox talks (*id.* at 81, 121–122). Michael Menotti, president of Menotti Enterprise, testified that Menotti was contractually obligated to have a site safety manager on site to “insure that there is [DOB] compliance and OSHA compliance with the different trades and their foremen to make sure that their workers are following the pre task [sic] plan and pre huddles that their foremen are supposed to provides to us” (Menotti EBT at 25). Mr. Falquecee was also contractually obligated to “identify any hazards and mitigate them, and basically [make] sure that everybody is working in a safe manner” (*id.* at 47). Finally, despite some equivocating testimony about what might be appropriate triggering circumstances, Mr. Menotti also testified that Mr. Falquecee maintained the authority to stop work if he observed “imminent danger to life or limb” (*id.* at 48). These facts taken together are sufficient to constitute questions of fact as to, *inter alia*, the extent of Menotti’s authority and control at the site, and therefore whether it was a statutory agent of the owner. As to this point, Menotti’s motion was properly denied, and therefore re-argument is denied.

Second, Menotti argues that the daily log for the day of plaintiff’s accident was authenticated as a business record by Michael Menotti, principal of Menotti, and was therefore admissible as an exception to the rule against hearsay. First, Mr. Feigenbaum confirmed that the signature at the bottom of a daily log did not necessarily indicate who created the log (Feigenbaum EBT at 98–99). The actual contents of the daily log and the accident report cannot

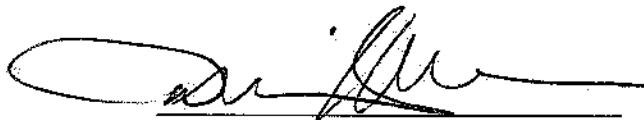
be attributed to a specific source. Therefore, even if the daily log is admitted as a business record pursuant to CPLR 4518 *arguendo* based on the testimony of Mr. Menotti, the statements contained within which have an undisclosed origin remain inadmissible hearsay and cannot be admitted unless they fit within one of the cognizable exceptions or exemptions to the rule (*see Yassin v. Blackman*, 188 AD3d 62 [2d Dept 2020]). Therefore, the court did not misapprehend the facts or the law in declining to award Menotti summary judgment on the basis of the daily log and accident report without the authentication of Mr. Falqueee to identify the provenance of the statements in the daily log.

Defendant Menotti's motion to re-argue (Seq. 012) is denied.

This constitutes the decision of the court.

September 17, 2024

DATE



DEVIN P. COHEN

Justice of the Supreme Court