

Juarez v Primework Constr. Corp.

2024 NY Slip Op 34649(U)

November 13, 2024

Supreme Court, New York County

Docket Number: Index No. 160728/2017

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

-----X

JOSE MANUEL JUAREZ,

Plaintiff,

- v -

PRIMEWORK CONSTRUCTION CORP., AVACON
MANAGEMENT LLC D/B/A AVACON BUILDERS
DEVELOPERS, 45 JOHN NY LLC,

Defendant.

-----X

AVACON MANAGEMENT LLC D/B/A AVACON BUILDERS
DEVELOPERS

Plaintiff,

-against-

SKITTLES SERVICES CORP.

Defendant.

-----X

INDEX NO. 160728/2017
MOTION DATE 06/03/2024
MOTION SEQ. NO. 017

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595635/2018

The following e-filed documents, listed by NYSCEF document number (Motion 017) 330, 331, 332, 333,
334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354,
355, 356, 357, 358, 359, 360, 361, 362, 363, 364

were read on this motion to/for JUDGMENT - SUMMARY

This action arises out of injuries allegedly sustained during construction. Third-party
defendant, Skittles Services Corp. (Skittles), now moves for summary judgment to dismiss the
third-party action. Defendant/third-party plaintiff, Avacon Management LLC D/B/A Avacon
Builders Developers (Avacon), opposes the motion and cross-moves for summary judgment on
its claims against Skittles and for dismissal of Skittles counterclaims. For the reasons set forth
below, Skittles motion for summary judgment is granted and Avacon's cross-motion is denied.

Background

On November 22, 2017, plaintiff was employed by Skittles while working at 45 John Street New York, New York. Defendant, Avacon, was hired by defendant 45 John NY LLC (45 John), owners of the subject location, to be the general contractor/construction manager of the project. Avacon then hired Skittles to perform general labor at the site.

Plaintiff testified that at the time of the accident, he was standing on a scaffold while removing bricks from a wall to expose the beams. Plaintiff was not provided any protective gear, specifically plaintiff was neither given a harness nor a hardhat. Plaintiff testified that the scaffold, which was 12 to 14 feet high, collapsed causing plaintiff to sustain severe injuries¹.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

In support of its motion, Skittles contends that the third-party action against it should be dismissed as it is barred by the Worker's Compensation Law, as plaintiff was its employee, and

¹ This is a recitation of the facts as previously detailed by the Court in its decision and order dated September 16, 2022.

no grave injury has been alleged. Further, Skittles contends that there is no contract between it and Avacon thus there can be no contractual indemnification.

Skittles contends that although there was a written agreement between the parties, entitled subcontract agreement rider, it only requires Skittles to defend, indemnify, and maintain additional insured coverage for “Work covered by this Contract Agreement”, and since there is no underlying contract agreement specifying the scope of work, the rider is invalid.

During oral argument, defendant 45 John, sought to argue that Skittles argument that there is no contract between it and Avacon, is barred by the law of case doctrine. Although 45 John did not submit opposition, this Court allowed the parties additional briefing on this limited issue. The argument both Avacon and 45 John seek to advance is that based on this Court’s prior order that denied the portion of 45 John’s motion seeking summary judgment as against Skittles finding that “there is a question of fact as to whether plaintiff was injured, not in the scope of his employment with Skittles, but within the scope of the work in the contract between Avacon and Skittles.” Both Avacon and 45 John seek to have this statement read as a determination that this Court has already found there to be a valid contract between Skittles and Avacon. The Court does not agree. For the purposes of the other motion, the validity of an underlying contract was not at issue, rather the rider specifically provides that there is underlying contract between the parties. The issue of the validity of said contract was neither briefed nor relevant to the determination of the 45 John’s motion. Accordingly, the Court agrees with Skittles, that the law of the case doctrine is inapplicable to the instant issue.

In opposition to Skittles motion and in support of its own motion, Avacon contends that there was a “meeting of the minds” with respect to the work that was required to be performed

by Skittles, thus the subcontract agreement rider is valid, and Skittles is required to indemnify Avacon pursuant to the terms of the indemnification provision of the rider.

The testimony of Mr. John Andicoechea, the principal of Avacon, is clear, the scope of Skittles' work was not defined. *See* NYSCEF Doc. 336, pp. 16, 18, 27, 33.

The contentions that the longstanding relationship between the parties and the paid invoices somehow establish definite terms of the scope of work to trigger the indemnification provision of the subcontract rider agreement are without merit. The law is clear with respect to the parties intent and indemnification “[a] court will not find a duty to indemnify unless a contract manifests ‘a clear and unmistakable intent to indemnify’ for particular liabilities.” *Millennium Holdings LLC v. Glidden Co.*, 146 AD3d 539, 545 [1st Dept 2017].

Here, even assuming, as Avacon contends, that Skittles work was assigned daily, thus no scope of work was established, there can be no meeting of the minds as to give the indemnity provision any meaning. The testimony of Skittles supervisor was that Skittles work at the project would be limited to painting, compound and cleaning, *see* NYSCEF Doc. 337, p.61, while Mr. Andicoechea of Avacon, contends that they were to do “just about anything the project manager tells them to do” *See* NYSCEF Doc. 336, p. 16. As such, as a matter of law, the material terms of the indemnification provision, specifically the scope of the work, were not defined nor understood by the parties, thus lacking the unmistakable intent to indemnify for the work that plaintiff was engaged in at the time of the accident. Accordingly, Skittles motion for summary judgment is granted and Avacon's cross-motion is denied. As to the counterclaims asserted by Skittles, the Court deems those claims abandoned as Skittles did not oppose Avacon's motion seeking dismissal of those claims.

Lastly, as to the allegations of grave injury, Skittles has established that plaintiff has not suffered a grave injury, neither plaintiff nor Avacon has submitted any competent medical evidence to rebut that showing. Accordingly, it is hereby

ORDERED that the third-party action is dismissed in its entirety.

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11/13/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE