

Borjas v Gladden Props. LLC

2024 NY Slip Op 34766(U)

July 18, 2024

Supreme Court, Queens County

Docket Number: Index No. 715845/2020

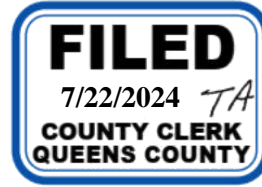
Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: HONORABLE CHEREÉ A. BUGGS

IAS PART 30

Justice

-----X
ROBERTO BORJAS,

Index No.:715845/2020

Motion Date: 5/20/2024

Plaintiff,
-against-

Motion Cal. No.: 4

Motion Sequence No.: 10

GLADDEN PROPERTIES LLC, BOSTON
PROPERTIES, INC., SOROS FUNDING
MANAGEMENT LLC, and REIDY
CONTRACTING GROUP LLC,

Defendants.

-----X
REIDY CONTRACTING GROUP LLC,

Third-party Plaintiff,
-against-

TECHNO ACOUSTICS HOLDINGS, LLC,
d/b/a TECHNO ACOUSTICS,

Third-party Defendant.

-----X

GLADDEN PROPERTIES LLC, BOSTON
PROPERTIES, INC., SOROS FUND MANAGEMENT
LLC, incorrectly sued as SOROS FUNDING
MANAGEMENT, LLC,,

Second Third-party Plaintiffs,

-against-

TECHNO ACOUSTICS HOLDINGS, LLC,
d/b/a TECHNO ACOUSTICS,

Second Third-party Defendant.

-----X

REIDY CONTRACTING GROUP LLC, GLADDEN PROPERTIES LLC, BOSTON PROPERTIES, INC., SOROS FUND MANAGEMENT LLC, incorrectly Sued as SOROS FUNDING MANAGEMENT LLC,

Third Third-party Plaintiffs,

-against-

CHELSEA FLOOR COVERING ACQUISITION CORP.,

Third Third-party Defendant.

-----X
CHELSEA FLOOR COVERING ACQUISITION CORP.,

Fourth Third-party Plaintiffs,

-against-

COMMERCIAL FLOORING MANAGEMENT, LLC,

Fourth Third-party Defendant.

-----X

The following efiled papers numbered 126-147, 155-161, 163 submitted and considered on this motion by Fourth Third-Party Defendant Commercial Flooring Management, LLC (hereinafter CFM), seeking an Order of summary judgment pursuant to CPLR §3212, dismissing the Fourth Third-Party Complaint against them by Chelsea Floor Covering Acquisition Corp (hereinafter Chelsea). The motion is **denied** as set forth below:

Motion Sequence 10	<u>Papers Numbered</u>
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 126-147
Affirmation in Opposition-Affidavits Exhibits.....	EF 155-157, 158, 161
Affirmation in Reply-Affidavits-Exhibits.....	EF 163

Relevant Factual and Procedural Background

This action arises from an incident on April 15, 2015, wherein the plaintiff, Roberto Borjas (hereinafter “Borjas”), sustained personal injuries while working on a construction project at 250 West 55th Street, New York, New York. Borjas, employed by Techno Acoustic Holdings, LLC (hereinafter “Techno”), was applying compound to sheetrock on the 38th floor using a scaffold provided by his foreman from Techno. Borjas claims he was injured when the scaffold moved due to faulty wheel locks and fell into a cracked, uneven floor area, causing him to fall and sustain injuries. Borjas brought claims against Gladden Properties LLC (hereinafter “Gladden”), Boston Properties Inc. (hereinafter “Boston”), Soros Fund Management LLC (hereinafter “Soros”), and Reidy Contracting Group LLC (hereinafter “Reidy”), alleging violations of New York State Labor Law §§ 200, 240(1-3), 241(6), and common law negligence.

Chelsea Floor Covering Acquisition Corp. (hereinafter “Chelsea”), the fourth third-party plaintiff, was subcontracted by Reidy, the general contractor, to perform the flooring work at the premises. Chelsea, in turn, subcontracted the flooring work to Commercial Flooring Management, LLC (hereinafter “CFM”), the fourth third-party defendant. Chelsea seeks common law and contractual indemnification from CFM.

CFM has moved for summary judgment to dismiss all claims against it. CFM contends that it was not negligent and did not control the plaintiff’s work activities. In opposition, Chelsea, Gladden, Boston, Soros, and Techno argue that CFM’s work created a hazardous condition contributing to Borjas’ accident.

Law and Application

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the

cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Summary judgment is a drastic measure 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 (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2nd Dept. 2004]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d at 335 [2011]; *see also Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]).

“In sum, *Moch, Eaves Brooks* and *Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm”; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]; citing *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY at 168 [1928]; *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d at 226 [1990]; *Palka v Servicemaster Mgt. Services Corp.*, 83 NY2d

at 589 [1994]; *see also Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781 [2d Dept 2023]). In this case, conflicting testimonies and evidence raise issues of fact as to whether CFM's work created a dangerous condition and whether the area was properly barricaded.

Borjas testified that he inspected the scaffold before using it and found that the wheel locks were not working properly. He stated that the scaffold moved because of the faulty wheel locks and ended up where the floor was cracked, causing the scaffold to collapse. The photographs identified by Borjas during his deposition showed the cracked floor area and its proximity to where the scaffold was set up. The cracked floor created by CFM's work was substantial and significant. Photographs in the record show a large, uneven area that could reasonably be seen as contributing to the instability of the scaffold. Borjas further stated that there were no visible warning signs or barricades at the time of the accident.

CFM argued that it performed its work properly and left the site after barricading the area of the floor it had chopped up. CFM supports its motion with the deposition testimony of Richard Caruso, CFM's foreman, who stated that the chopped-up floor area was barricaded with cones and caution tape by Reidy personnel when CFM left the site, and that the accident was not due to the cracked floor.

Here, this Court finds that in light most favorable to the non-moving party, CFM failed to establish *prima facie* that they did not launch a force or instrument of harm in relation to the incident. The deposition testimony of Richard Caruso, CFM's foreman, indicated that CFM performed overnight work on the floor, which involved chopping up the existing floor surface. While Caruso asserted that the area was barricaded with cones and caution tape by Reidy personnel when CFM left the site, other evidence suggests that this barricading might not have been sufficient or effective. Photographs of the site show a substantial and significant cracked floor area, which could have contributed to the instability of the scaffold. The proximity in time between CFM's work and the accident further suggests a potential causal link between the work performed and the hazardous condition. Additionally, testimony from various witnesses confirms that the condition of the floor was a critical factor in the accident, which undermines CFM's assertion that the area was properly secured and safe for subsequent work activities.

Furthermore, Caruso and Borjas provided conflicting testimony regarding the manner in which the accident occurred (*see Golovnya v Artemchenko*, 210 AD3d 1058, 1059 [2d Dept 2022]). Caruso claimed that the area was properly barricaded and that the accident was solely due to the faulty wheels, while Borjas claimed that there were no visible warning signs or barricades at the time of the accident, and that the accident is due to both the faulty wheels and the cracked and uneven floor. These conflicting accounts create a material issue of fact regarding whether the accident was caused solely by the faulty wheel locks or whether the cracked and uneven floor, allegedly created by CFM's work, also contributed to the accident (*see Brunson v Korkovilas*, 208 AD3d 842, 843 [2d Dept 2022]; *Cho v Demelo*, 175 AD3d 1235, 1236 [2d Dept 2019]).

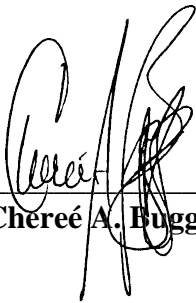
Since CFM failed to sustain their *prima facie* burden, we need not consider the sufficiency of the opposition papers (*see Id.* at 843; citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851,

853 [1985]). Accordingly, it is hereby

ORDERED, that the Fourth Third-party Defendant Commercial Flooring Management, LLC's motion for summary judgment is **denied** in its entirety

This constitutes the decision and Order of the court.

Dated: July 18, 2024



Hon. Chereé A. Buggs, JSC

