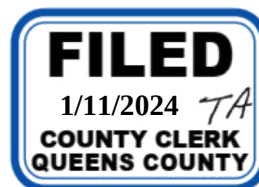


Banal v Lakite Contr. Inc.
2024 NY Slip Op 35227(U)
January 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 711170/2019
Judge: Denis J. Butler
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
JusticeIAS Part 12

-----X
 MELINDA P. BANAL, Individually, and as Index
 Administratrix of the Estate of RICARDO Number: 711170/2019
 R. BANAL, deceased,

Plaintiffs,

Motion Date:

-against-

November 28, 2023Motion Seq. No.: 001

LAKITE CONTRACTING INC., PRO DESIGN
 INC., AND 'JOHN DOE', first and last
 name being Fictitious and unknown to
 Plaintiffs,

Defendants.

-----X
 PRO DESIGN, INC.,

Third-Party Plaintiff,

-against-

MICHAEL ANGELO MARBLE & STONE, LLC,

Third-Party Defendant.

-----X

The following papers were read on this motion by
 defendant/third-party plaintiff, Pro Design, Inc. for an order,
 pursuant to CPLR §3212 (1) granting summary judgment dismissing the
 plaintiff's complaint and all cross-claims/third-party claims
 against it.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....E42-57
 Affirmation In Opposition by Plaintiff, Exhibits.....E58-63
 Reply Affirmation.....E65

Affirmation In Opposition by Michael Angelo Marble &
 Stone, LLC.....E68
 Reply Affirmation.....E69

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff in this labor law/negligence action seeks damages for personal injuries plaintiff decedent Ricardo R. Banal's sustained on April 15, 2019, when marble slabs tipped over and fell onto plaintiff decedent Ricardo R. Banal, resulting in the death of Mr. Banal when plaintiff decedent Ricardo R. Banal was making a delivery of marble stone slabs on behalf of third-party defendant Michael Angelo Marble & Stone, LLC (hereinafter "Michael Angelo") to defendant/third-party plaintiff Pro Design Inc's (hereinafter "Pro Design") warehouse located at 23-21 48th Street, Astoria, New York. Defendant Lakite Contracting, Inc. (hereinafter "Lakite") admits in the verified answer of defendant Lakite that defendant Lakite is the owner of the property 23-21 48th Street, Astoria, New York.

Plaintiff's amended complaint filed on or about alleges that defendant Lakite and defendant/third-party plaintiff Pro Design were negligent and that they violated New York Labor Law §§ 200, 240, 241, 241a, 241[6], common law negligence and wrongful death. Defendant/third-party plaintiff Pro Design filed a third-party complaint against third-party defendant Michael Angelo alleging a cause of action for contribution and indemnification. Defendant/third-party plaintiff Pro Design moves for summary judgment in favor of defendant Pro Design dismissing plaintiff's claims against Pro Design; or in the alternate, summary judgment in favor of defendant/third-party plaintiff Pro Design against third-party defendant Michael Angelo. Plaintiff opposes defendant/third-party Pro Design's motion and third-party defendant Michael Angelo opposes the branch of defendant/third-party Pro Design's motion which seeks summary judgment against third-party defendant Michael Angelo.

A proponent for summary judgment must make a prima facie showing of entitlement to summary judgment through the submission of sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 24 [1986]). Once the movant establishes prima facie entitlement to summary judgment, it is incumbent upon the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact (see Zuckerman v City of New York, 49 NY2d 557, 63 [1980]). Summary judgment is "a drastic remedy which should only be employed when there is no doubt

as to the absence of triable issues" (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

Defendant/third-party plaintiff Pro Design contends plaintiff decedent Ricardo R. Banal's was engaged in the delivery of materials to defendant/third-party Pro Design facility at the time of the accident and that as plaintiff decedent Ricardo R. Banal was not engaged in the erection, demolition or repair of a building or structure and was not frequenting an area in which construction, excavation or demolition work was being performed, the protected activities enumerated by Labor Law §§ 240(1) and 241(6), plaintiff decedent Ricardo R. Banal's labor law claims must be dismissed. see Guevarra v. Wreckers Realty, LLC, 169 AD3d 652 (2d Dept 2019). In plaintiff's affirmation in opposition, plaintiff's counsel "concedes dismissal of their labor law claims". (Affirmation of Nicholas Wise, Esq, dated July 20, 2023, NYSCEF Doc. No. 59, ¶7). As plaintiff concedes that plaintiff's labor law claims cannot be legally and factually supported, plaintiff's labor law claims are dismissed as against defendant/third-party plaintiff Pro Design.

The second branch of defendant/third-party plaintiff Pro Design which seeks summary judgment on plaintiff's cause of action for common law negligence is **DENIED**, as Defendants have failed to meet their prima facie burden of demonstrating the absence of any triable issue of fact. The evidence submitted, including the deposition testimony of the Pro Design defendants and the video of the accident, demonstrates that there are conflicting accounts of the happening of the accident. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate." Ellarbe v Port Auth. of N.Y. & N.J., 91 AD3d 441 [2d Dept 2012] (internal citations omitted).

The third branch of defendant/third-party plaintiff Pro Design Pro Design seeking summary judgment for defendant/third-party Pro Design against third-party defendant Michael Angelo is also **DENIED**, as defendant/third-party plaintiff Pro Design has failed to demonstrate it is free from negligence in the happening of the accident. To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work (see McCarthy v Turner Constr., Inc., 17 N.Y.3d 369 [2011]; Reilly v DiGiacomo & Son, 261 AD2d 318 [1st Dept 1999]).

Accordingly it is

ORDERED, the branch of defendant/third-party plaintiff Pro Design's motion seeking summary judgment pursuant to CPLR § 3212 on plaintiff's Labor Law §§ 200, 240, 241, 241a, 241[6] is GRANTED, and it is further

ORDERED, the branch of defendant/third-party plaintiff Pro Design Inc.'s motion seeking summary judgment pursuant to CPLR § 3212 on plaintiff's negligence claims is DENIED, and it is further

ORDERED, the branch of defendant/third-party plaintiff Pro Design Inc.'s motion seeking summary judgment pursuant to CPLR § 3212 on defendant/third-party plaintiff's cause of action for common law indemnification against third-party defendant, Michael Angelo Marble & Stone, LLC is DENIED.

This constitutes the decision and order of the court.

Dated: January 11, 2024



Denis J. Butler, J.S.C.

