

Duarez v 2711 Fulton LLC
2024 NY Slip Op 35288(U)
July 3, 2024
Supreme Court, Bronx County
Docket Number: Index No. 801149.2023E
Judge: Myrna Socorro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9-----X
JOSE BUSTAMANTE DUAREZ,
Plaintiff,Index №. 801149/2023E
Motion Seq #1 and #2

-against-

DECISION & ORDER
Hon. Myrna Socorro, J.S.C.2711 FULTON LLC, 2715 FULTON
LLC, THE WYTON LLC, PRIME
PIPING & HEATING INC., YELLOW
HAT CONSTRUCTION INC., JSB
WORKS INC., ACCURATE
ELECTRICAL CORP., CORE
SCAFFOLD SYSTEMS INC., and
SOLAS ELECTRICAL CORP.,Defendants.
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The following papers were read on the motion by defendant JSB Works Inc. (Seq. No. 1) for **summary judgment** noticed for July 26, 2023, and submitted on January 23, 2024; and on the motion by defendant Core Scaffold Systems, Inc. (Seq. No. 2) for **summary judgment** noticed for July 26, 2023, and submitted on January 23, 2024.

Papers	Doc. No.
Motion seq #1	
Notice of Motion by Defendant JSB Works Inc. – Affirmation in Support, Statement of Material Facts and Exhibits	NYSCEF Doc. # 62-75
Defendant Prime Piping & Heating Inc.’s Affirmation in Opposition, Response Statement of Material Facts, and Exhibit	NYSCEF Doc. # 117-119
Defendant JSB Works Inc.’s Reply Affirmation	NYSCEF Doc. # 128
Motion seq #2	
Notice of Motion by Defendant Core Scaffold Systems Inc. – Affirmation in Support, Statement of Material Facts and Exhibits	NYSCEF Doc. # 77-92

Defendant Prime Piping & Heating Inc.'s Affirmation in Opposition and Response Statement of Material Facts	NYSCEF Doc. # 115-116
Affirmation in Opposition by Defendants 2711 Fulton LLC, 2715 Fulton LLC, The Wyton LLC, and Yellow Hat Construction Inc., Response Statement of Material Facts, Affidavit, and Exhibits	NYSCEF Doc. # 120-124
Defendant Core Scaffold Systems Inc.'s Reply Affirmation	NYSCEF Doc. # 125-127

Motion by defendant JSB Works Inc. ("JSB") (Mot. Seq. No. 1), for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint and all cross-claims against it; and motion by defendant Core Scaffold Systems, Inc. ("Core") (Mot. Seq. No. 2), for an order pursuant to CPLR §3212, dismissing the plaintiff's complaint as against it, dismissing all cross-claims against it, and for an order, granting judgment on its cross-claims against co-defendant The Wyton LLC for contractual indemnification and breach of contract with an award of fees and costs, are decided as follows:

Plaintiff commenced this action against the defendants to recover for personal injuries allegedly sustained as a result of violations under Labor Law §§240(1), 241(6) and 200 and/or common-law negligence. According to his amended complaint, plaintiff alleges that his accident occurred while he was descending a temporary wooden ladder or staircase from the second to the first floor at a construction site when he was struck by "construction materials" that fell from above.

In support of its summary judgment motion, defendant JSB submits, *inter alia*, copies of the pleadings and a sworn affidavit of Yoel Landau (principal of JSB). Defendant JSB contends it cannot be held liable under the Labor Law as it did not own the premises and was not the general contractor or the plaintiff's employer.

In support of its summary judgment motion, defendant Core submits, *inter alia*, a sworn affidavit of Valon Pilku (CEO of Core), a copy of an alleged construction contract in which Core was retained to install a sidewalk shed, pipe scaffolding, and horizontal netting at the subject work site, and a letter of tender of Core's defense and indemnification to Wyton Developers. Defendant Core contends it cannot be liable under Labor Law §§240(1), 241(6), and 200 and/or common-law

negligence as it was not the owner, general contractor, or agent of either pursuant to the relevant statute. Core further contends that it was not negligent for the plaintiff's accident as it did not create a hazardous condition that caused his injuries; did not provide any equipment or perform any work at the subject premises; did not hire plaintiff's employer; and did not supervise or control the plaintiff's work.

In opposition, defendant Prime Piping & Heating Inc. ("Prime") argues that it is premature to decide the merits of the motions when no depositions have been held and that much of the facts in this case have yet to be determined. Further, Prime contends that the affidavits of the principals submitted by the movants are self-serving and fail to resolve issues of fact regarding the happening of plaintiff's accident.

Defendants 2711 Fulton LLC, 2715 Fulton LLC, The Wyton LLC, and Yellow Hat Construction Inc. also opposed Core's motion on the grounds that the motion is premature as depositions have not gone forward and at the time of the making of these motions, the plaintiff had not served his bill of particulars or otherwise provided discovery responses with respect to the herein incident.

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]. The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]).

Here, the court finds the summary judgment motions by defendants JSB and Core were prematurely made. A motion for summary judgment is premature when the issues raised would require further discovery, which have not yet been completed, particularly when depositions remain outstanding.

See Mason v City of New York, 121 AD3d 468 [1st Dept 2014]; *see also Blech v West Park Presbyt. Church*, 97 AD3d 443 [1st Dept 2012].

With respect to the Labor Law §§241(1) and 200 claims, the record concerning issues as to the moving defendants' control and/or supervision of the plaintiff's injury-producing work; their knowledge or constructive knowledge of any hazardous or defective conditions at the subject premises remain factually underdeveloped at this juncture. Similarly, what type of "construction materials" fell and struck plaintiff and which trade was involved with said materials are factual issues that remain unresolved. Likewise, the record concerning the moving defendants' applications to dismiss the Labor Law §241(6) claim as it relates to issues of plaintiff's comparative negligence and the applicability of Industrial Codes predicated on this claim are factually underdeveloped.

As to the branches of the moving defendants' summary judgment motions seeking to dismiss all cross-claims against them as well as defendant Core seeking judgment on its cross-claims against co-defendant The Wyton LLC for contractual indemnification, breach of contract, and for an award of fees and costs, said defendants fail to establish *prima facie* their freedom from negligence for the happening of plaintiff's accident. To wit, the record is not factually developed with respect to whether JSB and/or Core caused or contributed to the creation of a dangerous condition at the subject premises and whether JSB and/or Core supervised or controlled the means and methods of the trades responsible for plaintiff's injuries. Thus, any determination on the merits of the cross-claims against JSB and Core and Core's cross-claims against defendant The Wyton LLC is premature at this time.

Therefore, it appearing from the opposition papers that facts essential to said opposition may exist due to the significant discovery still outstanding, and there being no deposition conducted of any party, the applications for summary judgment by defendant JSB and Core must be denied as premature. *See* CPLR §3212 [f].

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either movant was not addressed by the court, it is hereby

denied.

Accordingly, it is hereby,

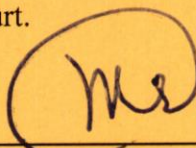
ORDERED, that defendant JSB's motion for summary judgment is **DENIED** (Seq. No. 1); and it is further

ORDERED, that defendant Core's motion for summary judgment is **DENIED** (Seq. No. 2); and it is further

ORDERED, that the parties shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this court.

Dated: July 3, 2024


HON. MYRNA SOCORRO

Hon. Myrna Socorro, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. DEFENDANT JSB WORKS INC.'s MOTION (SEQ. NO. 1)..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. DEFENDANT CORE SCAFFOLD SYSTEMS INC.'S MOTION (SEQ. NO. 2) IS..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 4. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |