

Cedeno v L.S.L. Servs., Inc.
2024 NY Slip Op 35329(U)
March 26, 2024
Supreme Court, Bronx County
Docket Number: Index No. 32127/2019E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

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JOHN CEDENO,

Plaintiff,

-against-

L.S.L. SERVICES, INC., MIGUEL POLANCO
and BRIAN O'CONNOR,

Defendants.

-----X

L.S.L. SERVICES, INC., and MIGUEL POLANCO,
Third-Party Plaintiffs,

-against-

JJS BUILDERS INC.,

Third-Party Defendants.

-----X

L.S.L. SERVICES, INC., and MIGUEL POLANCO,
Second Third-Party Plaintiffs,

-against-

SKYWORX CONSTRUCTION, INC.,

Second Third-Party Defendants.

-----X

Kim Adair Wilson, J.:

"NOTICE OF MOTION" (NYSCEF Doc 131) dated and filed January 10 and 11, 2023, respectively, and signed by one Joseph V. Cambreri, Esq., (Milber Makris Plousadis & Seiden, LLP), counsel for defendant Brian O'Connor, seeking an Order (i) pursuant to CPLR 3212, granting the defendant Brian O'Connor ("O'Connor") summary judgment dismissing the Verified Complaint against O'Connor; (ii) pursuant to CPLR 3212, granting defendant O'Connor summary judgment dismissing all cross-claims against O'Connor in this action;" is decided as set forth below.

The instant matter was commenced on October 16, 2019, by the filing of plaintiff John Cedeno's ("Cedeno" or "plaintiff") Verified Complaint, seeking monetary damages for personal injuries allegedly sustained on or about September 13, 2019, when a building

DECISION AND ORDER

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scaffold located at 2162 Valentine Avenue, in the Bronx, New York, collapsed onto Cedeno, causing injuries including the severing of two fingers. Plaintiff further alleges that the named premises are owned and controlled by defendants L.S.L Services, Inc. ("LSL") and Miguel Polanco ("Polanco"), and that the alleged injuries occurred by reason of the defendant Brian O'Connor's negligence in the construction and maintenance of the scaffolding and poles.

On November 20, 2019, defendants LSL and Polanco filed their Verified Answer (NYSCEF Doc 2), asserting a general denial, ten affirmative defenses, and three cross-claims against defendant Brian O'Connor alleging negligence (first cross-claim), contribution and common law indemnification (second cross-claim), and contractual indemnification (third cross-claim). Subsequently, on January 13, 2020, defendants LSL and Polanco filed their "NOTICE PURSUANT TO CPLR 3402(b)" (NYSCEF Doc 7), impleading third party defendant JJS Builders and alleging three causes of action. Thereafter, defendant O'Connor filed his Verified Answer (NYSCEF Doc 14) asserting a general denial, ten affirmative defenses, and asserting crossclaims for "apportionment, contribution, common law and contractual indemnification, as well as for costs, attorney's fees and disbursements. Then, on October 28, 2021, defendants LSL and Polanco filed a second Third-Party Complaint (NYSCEF Doc 69) impleading second third-party defendants Skyworx Construction, Inc. ("Skyworx"), for five causes of action.

Pursuant to the Decision and Order, dated February 19, 2020 (Donna J. Mills, J.), a default judgment was entered in favor of LSL and Polanco against third-party defendant JJS Builders Inc. Plaintiff filed his Note of Issue seeking a trial by jury of all issues on September 11, 2022.

In support of the instant motion, which pertains solely to the main action, the defendant has submitted an "AFFIRMATION IN SUPPORT" (NYSCEF Doc 132); a Statement of Material Facts (NYSCEF Doc 133), the Affidavits of one Brian O'Connor (NYSCEF Doc 134), of one Frederic Zonsius, AIA (NYSCEF Doc 135), and of one Miguel Kelly (NYSCEF Doc 165). Also annexed as exhibits are the EBT transcript of John Cedeno dated January 18, 2022 (NYSCEF Doc 145); the EBT transcript of Brian O'Connor dated August 16, 2022 (NYSCEF Doc 146); the EBT transcript of John Cedeno dated February 3, 2022 (NYSCEF Doc 149); and

the EBT transcript of Miguel Polanco on behalf of L.S.L. Services dated June 22, 2022 (NYSCEF Doc 150). Finally, movant submits an Invoice describing the services rendered by defendant O'Connor to the building owner, Gerald Leibman, dated May 30, 1919 (possibly intended to be 2019).

In his Affirmation (NYSCEF Doc 132), defendant's counsel contends that O'Connor's "designs met the standard of care, O'Connor did not breach his professional duty of care, to the plaintiff or otherwise, and as such O'Connor cannot be liable to the plaintiff in negligence" and is entitled to the dismissal of all claims and crossclaims asserted against him. Further, O'Connor contends that, as "a party who contracted with the building's owner to provide architectural services," O'Connor owed no duty in tort to the plaintiff. Further, because defendant O'Connor did not launch a force or instrument of harm that caused injury to the plaintiff; nor did the plaintiff detrimentally rely on the continued performance of any duty by O'Connor; and because O'Connor did not any displace the owner's duty to maintain the premises in a safe condition, no circumstances exist such as to establish a third-party duty to the plaintiff. Further, O'Connor argues that, because the Verified Complaint does not allege that defendants LSL and Polanco, are vicariously liable for O'Connor's negligence, and because no indemnification agreement exists between O'Connor and the other defendants, O'Connor cannot be liable to LSL or Polanco for common law or contractual indemnification. By his Statement of Material Facts (NYSCEF Doc 133), O'Connor asserts that he was retained by oral agreement with the building owner to provide drawings for "exterior façade repairs to the building, and to design a sidewalk shed for that work" and that he performed no work related to the construction of the sidewalk shed and did not supervise said construction.

In his signed Affidavit dated January 9, 2023 (NYSCEF Doc 134), O'Connor attests that the sidewalk shed plans contain notes expressly disclaiming liability for accidents or injuries resulting from the contractor's construction of the shed, and that he exercised no supervisory control over the acts or omissions related to the contractor's work. The submitted Affidavit of architect Frederic Zonsius, AIA, states that Mr. Zonsius reviewed the plans submitted by O'Connor, and asserts that those plans "did not depart from the applicable professional standard of care for an architect in the locality (the City of New York), and that such architectural documents, including Sidewalk Shed drawings and specifications

which were both filed with and approved by the New York City Building Department following applicable building codes for such documents, were not a proximate cause of the claimed collapse of the sidewalk shed on September 13, 2019.”

Submitted in opposition is “AFFIRMATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT” (NYSCEF Doc 160), dated and filed April 5, 2023, respectively, and signed by Michael N. David, Esq., counsel for the plaintiff. Submitted in further opposition is the “RESPONSE TO STATEMENT OF MATERIAL FACTS” (NYSCEF Doc 161), dated April 5, 2023, and signed by plaintiff’s aforementioned counsel.

In their opposition papers (NYSCEF Doc 160), plaintiff Cedenno argues, *inter alia*, that, because according to defendant O’Connor’s EBT testimony (NYSCEF Doc 146), the defendant contracted with the building owner by oral agreement, there remains a question of fact as to the extent of services that O’Connor was to provide. Plaintiff additionally asserts that, because all defendants in this action assert non-responsibility for the dangerous condition that caused Mr. Cedenno’s injuries, rendering a judgment in favor of either party would require a “credibility determination” that is inappropriate on a motion for summary judgment. Plaintiff’s “RESPONSE TO STATEMENT OF MATERIAL FACTS” (NYSCEF Doc 161) objects or denies the factual assertions raised by defendant O’Connor as variously self-serving, mere legal opinion, and as unsupported by citations to evidence pursuant to 22 NYCRR 202.8-g(d).

Defendants LSL and Polanco submit no papers in opposition.

In reply (NYSCEF Doc 163), defendant O’Connor argues that plaintiff “fails to tender evidentiary proof (i.e., an expert’s affidavit) in admissible form raising a question of fact as to multiple elements of plaintiff’s negligence (i.e., malpractice) cause of action against O’Connor, including the element of ‘breach’ of a duty of care, as well as the element of ‘proximate cause[.]’” and that such failure with respect to multiple elements of plaintiff’s cause of action warrants the granting of defendant’s motion. O’Connor asserts that the mere existence of a verbal contract does not establish a question of fact, and that plaintiff proffers no proof disputing O’Connor’s statements as to the terms of the agreement.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100N Y2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Turning to the merits of this summary judgment motion, upon review and analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that defendant O’Connor has adequately demonstrated entitlement to summary judgment as a matter of law, dismissing plaintiff’s causes of action against him in the main action. Even where a contractual obligation exists, that obligation will generally not give rise to tort liability in favor of a third party *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002). In order to establish such a duty here, where plaintiff is not in privity to any contract with defendant O’Connor, plaintiff would need to show either that (1) defendant O’Connor launched a force or instrument of harm” (see *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 [1928]); (2) that the plaintiff detrimentally relied on the continued performance of defendant (see *Eaves Brooks, supra* at 226); and (3) that the O’Connor had entirely displaced the owner’s duty to maintain the premises safely (see *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579 [1994]). Here, the defendant has shown that he exercised no control over the construction of the shed, and that his plans adhered to the professional standard of care for an architect in the locality. In rebuttal, plaintiff has proffered only unsubstantiated allegations with respect to the nature of O’Connor’s agreement with the building owner as to the scope of the defendant’s duties, which are insufficient to establish a genuine issue of triable fact. Therefore, this Court determines that that branch of defendant O’Connor’s summary motion to dismiss plaintiff’s Complaint with respect to O’Connor, only, is **GRANTED**.

With respect to that branch of O'Connor's motion for summary judgment, pursuant to CPLR 3212, dismissing all cross-claims interposed against him by defendants LSL and Polanco, defendant O'Connor's demonstration that his architectural plans met the applicable standard of care, and that he exercised no supervisory control over the construction of the shed are unrefuted by any evidence provided by the cross-claimants. Further, O'Connor's assertions as to the non-existence of any contractual indemnification agreement, and as to the absence of any alleged or factual vicarious relationship between defendant O'Connor and defendants L.S.L. and Polanco, are not contested. Therefore, that branch of defendant O'Connor's summary motion seeking to dismiss defendants LSL's and Polanco's crossclaims against O'Connor is **GRANTED**.

Accordingly, defendant O'Connor's motion for summary judgment, pursuant to 3212, is **GRANTED in the entirety**. Further, it is hereby

ORDERED that plaintiff John Cedeno's Verified Complaint is dismissed as against defendant Brian O'Connor only; further it is hereby

ORDERED that defendants L.S.L Services, Inc.'s and Miguel Polanco's crossclaims against defendant Brian O'Connor are dismissed.

Movant is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and file proof of service with the Court.

**Dated: March 26, 2024
Bronx, New York**



Hon. Kim Adair Wilson, J.S.C.