

Perez v Sunbay Enters., Inc.

2025 NY Slip Op 30300(U)

January 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 4427/2009

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of January 2025.

PRESENT:

HON. WAYNE SAITTA, Justice.

-----X

ANTONIO PEREZ,

Plaintiff,

Index No. 4427/2009

-against-

MS #9, MS # 10 & MS #11

Decision and Order

SUNBAY ENTERPRISES, INC. LEHR
CONSTRUCTION CORP., and DFL INTERIORS, INC.,
f/k/a DL CARPENTRY, INC.,

Defendants,

-----X

SUNBAY ENTERPRISES, INC. LEHR
CONSTRUCTION CORP., and DFL INTERIORS, INC.,
f/k/a DL CARPENTRY, INC.,

Third-Party Plaintiff,

-against-

CIROCCO & OZZIMO, INC.,

Third- Party Defendants,

-----X

CIROCCO & OZZIMO, INC.,

Fourth-Party Plaintiff,

-against-

A.R. RENAISSANCE CORP., ARCHITECTURAL
PRODUCTS and SESSA PLASTURING CORP.,

Fourth-Party Defendants,

-----X

The following papers read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits

Cross-motions Affidavits (Affirmations)
and Exhibits

Answering Affidavit (Affirmation)

Reply Affidavit (Affirmation)

Supplemental Affidavit (Affirmation)

NYSCEF Doc Nos

68-100, 102-125

149-158, 169

130-132, 133-134, 174,

176-178, 179-181, 182-186

139, 187, 189-192, 193

In this case Plaintiff alleges he was injured when a sidewalk construction fence fell on top of him while he was walking on the public sidewalk. Plaintiff alleges that the bracing securing the fence was inadequate or had been removed to allow contractors to refinish the exterior of the building.

Defendant LEHR CONSTRUCTION CORP., (LEHR) the general contractor of the construction project, and SUNBAY ENTERPRISES NC., (SUNBAY) the owner of the property move for summary judgment seeking to dismiss the complaint on the grounds that they owed no duty to the Plaintiff and they did not cause or have notice of any defective condition.

Defendant LEHR also move for summary judgment in its claims for contractual indemnification and failure to procure insurance against third party defendant CIROCCO & OZZIMO, INC., (C &O).

Defendant SUNBAY also moves for leave to amend their answer to assert cross claims against co Defendants LEHR and DFL INTERIORS, INC (DFL) for indemnification and contribution and also moves for summary judgment on those cross claims.

Plaintiff moves for summary judgment as to liability, to dismiss the affirmative defense of comparative negligence and for leave to amend his bill of particulars to assert violations of the New York City Building Code. Plaintiff also withdraws any claim pursuant to the New York State Labor Law.

It is hereby ORDERED that Plaintiff is granted leave to amend his bill of particulars to cite New York City Building Code § 3301.2; § 27-569; §27- 1009, and §27-1021 of the Administrative Code of the City of New York, reference standard RS 9-5, and ASCE7-98 "Minimum Design Loads", Table RS 9-5.1 a.

It is further ORDERED that that part of Plaintiff's motion for summary judgment is denied is there remain questions of fact as to whether the bracing was removed, and if it was removed who removed it, and which Defendants had actual or constructive notice of the condition.

It is further ORDERED that that part of Plaintiff's motion to dismiss the claims of comparable negligence against him is granted. The fence fell onto him as he was walking on a public sidewalk and no evidence has been offered that he contributed to the accident.

It is further ORDERED that that part of the motions of Defendants SUNBAY and LEHR to dismiss Plaintiff's complaint are denied as the building code of the City of New York imposed a duty on the owners of property and the contractors engaged in the construction to safeguard members of the public using the adjacent public sidewalk. Further, Defendants have not ruled out all questions of fact as to whether either had constructive notice of the removal or inadequacy of the bracing of the fence. No evidence was presented as to how long the condition existed or when the last time the movants inspected the fence prior its collapse.

It is further ORDERED that that part of Defendant SUNBAY's motion to amend its answer to add cross claims against Defendant's LEHR and DFL for contribution and common law indemnification is granted.

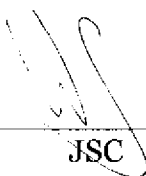
It is further ORDERED that that part of Defendant SUNBAY's motion for summary judgment on its claims for contribution and common law indemnification is denied as the amended answer has not been served and issue has not yet been joined on those claims.

It is further ORDERED that the part of Defendant/Third Party Plaintiff LEHR's motion for summary judgment on its claims against Third Party Defendant C & O for contractual indemnification and failure to procure insurance is denied. There remains a question of fact whether the bracing of the fence was removed to allow C & O to perform its work or whether the bracing, which C & O did not install, failed because it was inadequate. Further, C & O adduced evidence of an insurance policy covering LEHR.

It is further ORDERED that the note of issue is vacated so discovery may be had as to the amended claims and amended bill of particulars.

It is further ORDERED that Plaintiff shall file a new note of issue by May 27, 2025.

ENTER:



JSC

HON. WAYNE SAITTA
J.S.C.