

Villa v 83rd St. Tenants, Inc.
2025 NY Slip Op 35321(U)
January 31, 2025
Supreme Court, Queens County
Docket Number: Index No. 703381/2020
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE **KARINA E. ALOMAR**
JUSTICE

IAS PART 23

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WILSON SAQUICELA VILLA,

Plaintiff,

Index No.: 703381/2020
Motion Date: 12/19/24
Motion Seq. No.: 4, 5

-against-

83RD STREET TENANTS, INC., WILLIAM K.
CONSTRUCTION GROUP, INC., and BROWN
HARRIS STEVENS RESIDENTIAL
MANAGEMENT, LLC,

Defendants.

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83RD STREET TENANTS, INC., and BROWN
HARRIS STEVENS RESIDENTIAL
MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

SRCC CORP.,

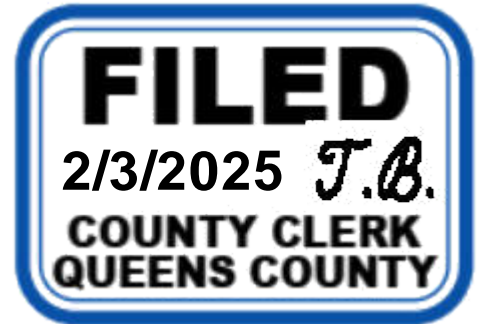
Third-Party Defendant.

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The following numbered papers 197 to 237 and 213 to 227 read on these motions by: (1) defendants/third party plaintiffs 83rd Street Tenants Inc (“83rd Inc”) and Brown Harris Residential Management LLC (“Brown LLC”) for an order pursuant to CPLR §2221(d) for leave to reargue the portion of this Court’s Order dated September 18, 2024, that granted plaintiff’s Labor Law §§ 240(1) and 241(6) claims; and (2)(a) defendants/third party plaintiffs 83rd Inc and Brown LLC’s motion pursuant to CPLR §3124 compelling third party plaintiff to respond to the Court’s May 15, 2024, Order, and (b) granting summary judgment as against SRCC for contractual indemnification, breach of contract, and reimbursement of past defense costs and fees

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibits.....	EF No: 197 – 212
Notice of Motion, Affidavit, Exhibits.....	EF No: 213 – 227
Affirmations in Opposition, Exhibits.....	EF No: 230 – 236
Affirmations in Reply.....	EF No: 237

Upon the foregoing cited papers, it is hereby ordered that 83rd Inc and Brown LLC’s motion for leave to reargue and motion for summary judgment as against SRCC Corp is decided as follows:



Plaintiff commenced the instant Labor Law action on February 26, 2020, to recover for personal injuries allegedly sustained as the result of a work-related accident which occurred on January 31, 2020, at 8 East 83rd Street, New York, (the “premises”). Defendant 83rd Inc is the owner of the subject premises, and defendant Brown LLC was the managing agent of the building. Whereas defendant William K Construction Group Inc (“William Inc”) was the general contractor for the construction, renovation and alteration of the premises, and third-party defendant SRCC Corp (“SRCC”) was plaintiff’s employer at the time of the accident.

On September 18, 2024, this Court issued an Order, inter alia, granting plaintiff’s motion for summary judgment on its Labor Law §§ 240(1) and 241(6) claims.

Plaintiff’s Deposition Transcript

On February 2, 2022, plaintiff averred that he had been working at the premises for approximately 2 or 3 months prior to the date of the accident, January 31, 2020. At the time of the accident plaintiff was working by himself at the front side of the building, on the outside. Plaintiff had been tasked by the SRCC foreman called Freddy to paint the front left side of the building. When plaintiff arrived at the job site the painting materials had already been set and placed for him to use. Plaintiff averred that he did not “punch in” to work on January 31, 2020.

Plaintiff averred that at the time of the accident he had been on the second level of a scaffold by the sidewalk, standing on top of two wooden OSHA planks. Plaintiff was on a ten feet tall metal scaffold with a wooden plank platform, but without any railings or bars, above a wooden bridge built above the sidewalk. While plaintiff was painting, the wooden plank upon which plaintiff was standing moved causing plaintiff to lose his balance and fall on his back. Plaintiff fell onto the bridge, plaintiff’s back, neck, legs, knees, and right arm made contact with the scaffold steps and the right side of the bridge protector (wooden railing). Plaintiff does not recall seeing anyone on the bridge except for his co-worker Miguel Bonilla.

Affidavit of Miguel Angel Bonilla Cando

Pursuant to Mr. Cando’s February 16, 2023, affidavit. Mr. Cando averred that on January 31, 2020, he did not see the accident as it occurred, but he heard something move and then heard a loud crash of someone falling. Mr. Cando saw plaintiff on the sidewalk bridge. Plaintiff had no safety equipment or harness on. However, there was nowhere to tie a harness on to. Mr. Cando further averred that: there was no safety netting in the area; the scaffold did not have guardrails; and the planks on the scaffold were not secured to the frames.

Affidavit of Roman Rosa Martinez

Pursuant to the affidavit of Mr. Martinez dated April 13, 2023, Mr. Martinez averred that he was on the bridge on January 31, 2020. On said date. Mr. Martinez never saw the plaintiff working and did not see any person getting injured or heard of anyone getting injured.

Worker’s Compensation Hearing: Roman Rosa Martinez

On September 21, 2020, the Worker’s Compensation hearing was conducting before the Honorable Lucky Enobakhare.

Mr. Martinez testified during the hearing and averred that in January of 2020, he was overseeing the project at the premises. In January of 2020, the foreman for SRCC at the premises was Freddie Ayala, who no longer works for SRCC.

Mr. Martinez averred that he maintains a record of what workers are working at specific sites and on what days. The time sheets are completed every Wednesday upon receipt of all the sing-in sheets for the week. According to his records plaintiff's last day at the job site was on January 30, 2020 (the day before the accident).

Mr. Martinez averred that he had never been notified of the accident prior to the commencement of the lawsuit. Mr. Martinez averred that on January 31, 2020, he did not receive any phone call from plaintiff notifying him that he would be late to work. Mr. Martinez also did not give plaintiff a phone call to inquire as to why plaintiff was not at the job site.

Upon the conclusion of the hearing, the Honorable Lucky Enobakhare held that plaintiff had established that he worked on the day of the accident and Mr. Martinez lacked personal knowledge of the accident. The Hon. Enobakhare's decision read in part as follows:

"Mr. Martinez...testified today, he did not work with the claimant, and he was not there when the accident happened. He did not say that he saw the accident. If anything, with regard to his testimony, it would relate to notice and notice is not an issue in this case. And even if it were, Mr. Wilson Saquicela-Villa testified credibly that he told his foreman and the foreman does not work there anymore."

Jeffrey Alan Smith's Deposition on behalf of SRCC

On July 20, 2022, the deposition of Jeffrey Alan Smith, project manager of SRCC, was conducted. Mr. Smith averred that, in relation to work hours, it is the foreman's discretion to determine whether an employee did not work on a certain day, and not include them in the time sheet for payroll purposes, in situations when an employee goes to the job site to just pick up tools or when an employee is deemed to not have completed any "work."

Agreement Between Owner and Contractor

In support of their summary judgment motion movants reference, inter alia, the "Agreement" between defendants/third-party defendants and third-party defendant SRCC Corp dated June 7, 2019. (see NYSCEF Doc 27).

The Agreement reads in part as follows:

§9.15- Indemnification

§9.15.1

To the fullest extent permitted by law, [SRCC Corp] shall indemnify and hold harmless the Owner (defendants/third-party plaintiffs)...and agents and employees...from and against claims, damages, losses and expenses, including but not limited to reasonable attorney's fees, arising out of or resulting from performance of the Work provided that such claim, damage, loss, or expenses is attributable to bodily injury...but only to the extent caused by the negligent acts or

omissions of the Contractor, a Subcontracts, or anyone directly or indirectly employed by them, or anyone for whose acts they may be liable...

§9.15.2

In claims against any person or entity indemnified under this section... by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts that may be liable, the indemnification obligation under Section 9.15.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or Subcontractor under Worker's Compensation Acts...

Motion for leave to Reargue

A motion for leave to reargue is addressed to the sound discretion of the trial court and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]; *Haque v Daddazio*, 84 AD3d 940, 942 [2d Dept 2011]). It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously determined, or to present arguments different from those originally presented to the court (*Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010] [internal quotations omitted]).

"Determination by the [Workers' Compensation] [B]oard shall not be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, *other than the determination of the existence of an employer employee relationship.*" (Workers' Compensation Law § 11; Workers' Compensation Law § 118-a)

Here, defendants/third-party plaintiffs contend that the Court erred in granting plaintiff's summary judgment motion in as much as there is allegedly issues of fact as to whether plaintiff was present on the subject premises on the day of the accident. Defendants/third-party plaintiffs ground their contentions on the affidavit of Roman Rosa Martinez and Jeff Smith, as well as missing time sheets for plaintiff on January 31, 2020.

Defendants/third-party plaintiffs' contentions are however unavailing. Plaintiff provided the affidavit of Miguel Angel Bonilla Cando dated February 16, 2023, providing that on January 31, 2020, Mr. Cando did not see the accident but heard the fall and thereafter saw plaintiff on the sidewalk bridge. Plaintiff also provided that deposition transcript of Jeffrey Alan Smith, project manager of SRCC, dated July 20, 2022, wherein Mr. Smith averred that it is the foreman's discretion to determine whether an employee did not work on a certain day and not include them in the time sheet for payroll purposes, such as situations when an employee goes to the job site to just pick up tools or when an employee is deemed to not have completed any "work." Here plaintiff had averred that he did not punch in to work on January 31, 2020, but was given his assignment by his foreman Freddie that very same day and that he had been working by himself when the accident happened.

Moreover, although defendants/third-party plaintiffs allege that plaintiff was not at the subject premises on the day of the accident, defendants/third-party plaintiffs do not refute that the

SRCC foreman, Freddie, was working on January 31, 2020, and/or provide an affidavit of Mr. Freddie providing that plaintiff was not present on the day of the accident.

Furthermore, Mr. Smith's affidavit, which defendants/third party plaintiffs rely on, is not based on his personal knowledge but on "conversations" with Mr. Martinez and with unidentified workers. Additionally, Mr. Martinez testified on September 21, 2020, that the time sheets do not provide that plaintiff did not work on January 31, 2020, and thus plaintiff must not have worked on January 31, 2020. The Worker's Compensation Judge Lucky Enobakhare found plaintiff's testimony to be credible and found that Mr. Martinez's allegations that plaintiff did not work on January 31, 2020, were based on sign in time sheets which he does not fill out, thus Judge Lucky Enobakhare found that there was a worker-employee relationship on January 31, 2020. As such, plaintiff's branch of motion for leave to reargue is denied.

Summary Judgment

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 (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact." (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]).

Here, defendants/third-party plaintiffs submit the Agreement dated June 7, 2019, signed by Jeff Smith on behalf of SRCC Corp, which provides an Indemnification Clause. Moreover, SRCC Corp does not oppose defendant/third-party plaintiff's motion for summary judgment as against SRCC Corp.

Accordingly, it is hereby

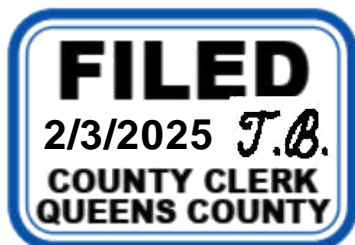
ORDERED, that defendants/third-party plaintiffs' motion pursuant to CPLR §2221(d) is denied in its entirety, and it is further

ORDERED, that defendants/third-party plaintiffs' unopposed motion pursuant to CPLR §3212 for summary judgment as against third party defendant SRCC Corp is granted, and it is further

ORDERED, that defendants/third-party plaintiffs shall serve a copy of this order, with notice of entry, upon all parties within thirty days from the date of entry.

This constitutes the decision and order of the Court.

Dated: January 31, 2025



A handwritten signature in black ink, appearing to read "Karina E. Alomar".

HON. KARINA E. ALOMAR, J.S.C.

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