

Diaz v Northside Realty Corp.

2026 NY Slip Op 31625(U)

March 27, 2026

Supreme Court, Kings County

Docket Number: Index No. 510958/2022

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 510958/2022
Seqs. 004

Part LL1^A

CARLOS DIAZ,

Plaintiff,

against

NORTHSIDE REALTY CORPORATION, KINGS GROUP NY
CORP., and S BROTHERS CONSTRUCTION CORP.,

Defendants.

NORTHSIDE REALTY CORPORATION,

Third-Party Plaintiff,

DECISION/ORDER

against

TOTAL NY CONSTRUCTION CORP.,

Third-Party Defendant.

TOTAL NY CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

against

S. BROTHERS CONSTRUCTION CORP.,

Second Third-Party Defendant.

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: NYSCEF 100-128, 137-148.

Upon the foregoing papers, defendant/third-party plaintiff Northside Realty Corporation (Northside)'s post-answer motion to dismiss and for summary judgment (Seq. 004) is decided as

follows:

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on February 25, 2022, while working at a construction site located at 162 West 21st Street, New York, NY (the premises). The premises were owned by Northside. Northside hired Total NY Construction Corp. (Total) as the general contractor to perform façade work at the premises. Total sub-contracted S Brothers Construction Corp. (S Brothers) to perform the work. The Workers Compensation Board determined that plaintiff was employed by Total. Therefore, pursuant to WCL §§ 118-a and 11 (2), it is *res judicata* that Total was plaintiff's employer.

Plaintiff testified as follows: On the date of the incident, plaintiff was working as a laborer at the premises (Diaz EBT at 31). Plaintiff was moving demolition debris and garbage from “upstairs” to the street in order to dispose of it in a “container” (*id.* at 33). While walking underneath a sidewalk bridge on the exterior of the building, plaintiff was struck by falling debris (*id.* at 42). Plaintiff claims that he was told subsequently that a bag of garbage ripped and the contents fell onto him; he did not see the bag or the debris prior to it falling on him (*id.* at 43).

Michelle Wharwood, an employee of defendant Kings Group NY Corp. (Kings Group), provided an affidavit claiming that the sidewalk shed at the premises was installed by Kings Group on December 26, 2019 (Wharwood aff. at ¶ 4). The shed was then removed on September 4, 2021 (*id.* at ¶ 6). Kings Group was not subsequently on the premises and did not install any additional scaffolding after September 4, 2021 (*id.* at ¶¶ 7–11).

Raghbir Singh testified as the owner of Total. Mr. Singh did not recall if his company performed work in February 2022 (Singh EBT at 50). Mr. Singh did not have record of his employees because he picked them up and paid them in cash (*id.* at 31). Defendants also provide

a “Letter of Completion” from the Department of Buildings stating that the work at the premises was completed and signed off on September 2, 2021.

Analysis

CPLR 3211

To dismiss a claim pursuant to CPLR 3211 (a) (1), the movant must produce documents that resolve “all factual issues as a matter of law, and conclusively [dispose] of the plaintiff’s claim” (*534 K, LLC v Flagstar Bank, FSB*, 187 AD3d 971 [2d Dept 2020]; see also *Braun Soller v Dahan*, 173 A.D.3d 803, 805 [2d Dept 2019]). Documentary evidence for the purpose of this statute includes “out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable” (*McDonald v O’Connor*, 189 AD3d 1208, 1210 [2d Dept 2020]).

“Under CPLR 3211 (a) (7), the applicable test is whether the pleading states a cause of action, not whether the proponent of the pleading, in fact, has a meritorious cause of action . . . The court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated” (*Board of Educ. Of City School Dist. Of City of New Rochelle v County of Westchester*, 282 AD2d 561 [2d Dept 2001]).

Here, Northside’s submissions require testimonial affidavits and deposition testimony to explain their significance; they are not the kind of “unambiguous” evidence required to support a CPLR 3211 (a) (1) motion to dismiss. Additionally, a review of the complaint reveals that plaintiff pleaded sufficient facts to make out a cause of action under the Labor Law. Therefore, Northside’s motion to dismiss is denied.

CPLR 3212

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff's Claims

Northside contends that the evidence in the record demonstrates that no work was being performed on the date of the alleged incident, and therefore that plaintiff's accident could not have occurred. However, plaintiff testified that work was being performed and that the accident happened. This evidence presents a credibility determination that must be resolved by triers of fact, and which is inappropriate for resolution on summary judgment (*see Schultheis v Arcate*, 216 AD3d 1018 [2d Dept 2023]).

Contractual Claims

A breach of contract claim requires a party to demonstrate "that a contract provision required that such insurance be procured naming it as an additional insured and that the provision was not complied with" (*Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 619 [2d Dept 2024]). Additionally, "a party seeking contractual indemnification must prove itself free from negligence" (*Anderson v United Parcel Serv., Inc.*, 194 AD3d 675, 678 [2d Dept 2021]).

Total's contract with Northside contains an indemnification obligation requiring Total to indemnify Northside for Total's negligence. Total contends that, in light of the issues concerning what parties were present at the site and what work was being performed, Northside has not demonstrated that the indemnification obligation applies here as a matter of law. Total

also correctly notes that there are outstanding issues of fact concerning whether Northside was negligent, which also preclude summary judgment on its contractual indemnification claim.

In light of the issues of fact concerning whether and what work was being performed at the premises on the date of the plaintiff's alleged incident, Northside's motion for summary judgment on its contractual indemnification claim is denied.

Conclusion

Northside's motion to dismiss and for summary judgment (Seq. 004) is denied.

This constitutes the decision of the court.

March 27, 2026

DATE



DEVIN P. COHEN
Justice of the Supreme Court