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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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MANUEL FERNANDO PADILLA,

Plaintiff,

-against-

39 FIFTH AVENUE OWNERS CORP., ROCKLEDGE SCAFFOLD CORP., BERNINI CONSTRUCTION CORP., GRYPHON CONSTRUCTION, LTD., RAND ENGINEERING, P.C., ANTHONY C.M. KISER and LISA ATKIN,

Defendants.

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BERNINI CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

CELTA RESTORATION CORP.,

Third-Party Defendant.

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Index No.: 115975/08

Motion Seq. No.: 002 & 003

Third-Party Index No.: 590679/09

Ling-Cohan, J.:

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages sustained by a worker when a grinder machine fell on him while he was working at a construction site located at 39 Fifth Avenue, New York, New York (the premises) on April 22, 2008.

In motion sequence number 002, defendant Rand Engineering, P.C. (Rand) moves, pursuant to CPLR 3212, for summary judgment dismissing all remaining cross claims against it. In motion sequence number 003, defendant Gryphon Construction, Ltd. (Gryphon) moves,

002
& 003

pursuant to CPLR 3126, for dismissal of plaintiff Manuel Fernando Padilla's complaint on the ground that plaintiff was willful and contumacious in his failure to provide discovery pursuant to a Preliminary Conference Order, dated September 25, 2009 (the preliminary conference order). Defendant Bernini Construction Corporation (Bernini) cross-moves, pursuant to CPLR 3126, for dismissal of plaintiff's complaint on the ground that plaintiff was willful and contumacious in his failure to provide discovery pursuant to a Preliminary Conference Order, or, in the alternative, for an order compelling plaintiff to provide a response to the preliminary conference order. Defendant Rockledge Scaffold Corporation (Rockledge) also cross-moves, pursuant to CPLR 3124, for an order compelling plaintiff to provide all outstanding discovery.

Plaintiff's counsel has executed a stipulation of discontinuance, with prejudice, in favor of defendant Rand. In addition, defendant Bernini has executed a stipulation of discontinuance, with prejudice, as to its cross claims asserted against Rand.

BACKGROUND

Plaintiff was injured when a grinding machine fell on him while he was performing work at the premises, a large residential apartment building containing multiple dwelling units and facing multiple exposures. At the time of the accident, renovation work was being performed at the premises relative to the implementation of a Local Law 10/90 and 11/98 repair program (the project). Plaintiff alleges that his accident was caused due to defendants' negligence in not providing a safe work environment, as well as certain violations of the New York Labor Law.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Defendant Rand's Motion to Dismiss All Remaining Cross Claims for Indemnification and Contribution Against It

Defendant 39 Fifth Avenue Owners Corporation (39 Fifth) and defendant Rand entered into an agreement, dated November 6, 2006, whereby Rand would perform engineering services relative to the project. To this effect, in his affidavit, Stephen Varone (Varone), president of Rand, explained that:

> 4) Rand prepared the appropriate bid documents, engineering drawings and construction documents with respect to the above-referenced renovations at the Premises. Notably, Rand's construction phase services at the premises were expressly limited to observing the construction to evaluate whether the work was being completed in conformance with the project's drawings and specifications.
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> 5) At no time was Rand retained to perform, nor did it perform, any services at the Premises involving the direction or control of the means, methods, sequencing or techniques of construction performed by any of the contractors or subcontractors at the site. Further, Rand was not obligated, contractually or otherwise, to perform any site safety services at the Premises during the renovation project

(Defendant Rand's Notice of Motion, Affirmation of Jeffrey R. Beitler, Verone Affidavit, dated

November 6, 2006). In fact, the contractual provisions expressly excluded Rand's responsibilities for "[c]ontrol over or charge of and responsibility for construction means, methods, techniques ... or for safety precautions and programs connected with the work, since these are solely the contractor's responsibility under the contract for construction" (Defendant Rand's Notice of Motion, Exhibit A, Rand/39 Fifth Agreement, dated November 6, 2006, at 4).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1st Dept 2004]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]" (*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61-62 [2d Dept 2003]).

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]; *Marasco v C.D.R. Electronics Security & Surveillance Systems Company*, 1 AD3d 578, 579 [2d Dept 2003]; *Zavaro v Westbury Property Investment Company*, 244 AD2d 547, 547-548 [2d Dept 1997]).

Defendant Rand argues that, because a finding of negligence must be based upon a breach

of duty, a threshold and dispositive question in this case is whether defendant Rand owed a duty of care to plaintiff, a non-contracting party to the contractual arrangement between Rand and 39 Fifth (*Church v Callanan Industries, Inc.*, 99 NY2d 104, 110 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Construction Corporation*, 9 AD3d 62, 65 [1st Dept 2004]).

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 138). In the case of *Espinal v Melville Snow Contractors, Inc.* (*supra*), the Court identified three sets of circumstances as exceptions to this general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof (*id.* at 140; *see Church v Callanan Industries, Inc.*, 99 NY2d at 111; *Timmins v Tishman Construction Corporation*, 9 AD3d at 66).

Based upon the circumstances of this case, plaintiff fails to qualify under any of the exceptions. The first set of circumstances arises where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 139). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*Church v Callanan Industries, Inc.*, 99 NY2d at 111, quoting *H.R. Moch Company v Rensselaer Water Company*, 247 NY 160, 168 [1928]). Here, there is no evidence in the record that Rand, whose services were limited to observation of the construction to evaluate whether the work was being completed in conformance with the project's drawings, increased the risk for plaintiff's accident beyond the risk which existed before this defendant entered into any contractual undertaking (*see*

Church v Callanan Industries, Inc., 99 NY2d at 112 [no evidence that defendant's incomplete performance of its contractual duty to install guide-railing created or increased the risk of plaintiff's divergence from roadway beyond the risk which existed before the contractual duty arose]).

The second set of circumstances giving rise to a promisor's tort liability arises where the plaintiff has suffered injury as a result of a reasonable reliance upon the defendant's continuing performance of a contractual obligation (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; *see also Eaves Brooks Costume Company v Y.B.H. Realty Corporation*, 76 NY2d 220, 226 [1990]). Here, it cannot be said that plaintiff detrimentally relied on defendant Rand's continued performance of its engineering services as set forth in the Rand/39 Fifth Agreement.

The third set of circumstances wherein tort liability will be imposed upon a promisor is "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*Church v Callanan Industries, Inc.*, 99 NY2d at 112, quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]). Here, defendant Rand's responsibilities at the site were not of the type of "comprehensive and exclusive" property maintenance obligation that would entirely displace the contractor's duty to maintain the premises safely (*Timmins v Tishman Construction Corporation*, 9 AD3d at 66, quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 141).

Moreover, defendant Rand has sufficiently established that it was not responsible for any negligence that proximately caused plaintiff's injury. To this effect, Verone maintained that Rand's services at the premises were limited to observation, and that Rand was never involved in

the direction and control of the means or methods of the construction. In addition, Rand was not present on-site on the day of the accident, nor did Rand provide any equipment, including the subject grinder, to any workers at the premises.

Therefore, as there were also no provisions in the Rand/39 agreement providing for contractual indemnification, defendant Rand is entitled to summary judgment dismissing all remaining cross claims asserted as against it, with prejudice.

Defendant Gryphon's Motion and Defendant Bernini and Rockledge's Cross Motions
(motion sequence number 003 and Bernini and Rockledge cross motions)

Pursuant to the September 25, 2009 Preliminary Conference Order, plaintiff was to provide all defendants with a Supplemental Bill of Particulars stating the exact location of plaintiff's accident, including which floor and exposure the accident occurred on. Specifically, this court ordered that "as to location of accident, plaintiff will make its best attempt to provide location within 15 days. Otherwise, location must be provided within 30 days" (Bernini's Cross Motion, Exhibit A, Preliminary Conference Order, dated September 25, 2009). In addition, plaintiff was ordered to provide all defendants with authorizations to obtain plaintiff's employment records for a period of two years prior to and including the date of loss by October 26, 2009.

On October 28, 2009, defendant Gryphon sent plaintiff a letter requesting plaintiff's response to the preliminary conference order, as well as the supplemental bill of particulars outlining the exact location of plaintiff's accident. Gryphon maintains that, as yet, plaintiff has completely failed to provide said bill of particulars, as well as the requested authorizations for plaintiff's employment records. As a result, as it only conducted interior work in two apartments

and no exterior work, Gryphon is extremely prejudiced by plaintiff's failure to provide the discovery at issue. Defendants Bernini and Rockledge, who also performed work at the premises, also assert that they will be extremely prejudiced if forced to defend this action without the aforementioned outstanding discovery.

"[T]o invoke the drastic remedy of striking a pleading, the court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent" (*Conch Associates, Inc. v PMCC Mortgage Corporation*, 303 AD2d 538, 538 [2d Dept 2003]; *Frost Line Refrigeration, Inc. v Frunzi*, 18 AD3d 701, 701-702 [2d Dept 2005]).

Defendant Gryphon's motion and defendant Bernini's cross motion for an order dismissing plaintiff's complaint on the ground that plaintiff was willful and contumacious in his failure to provide certain discovery, pursuant to the preliminary conference order, are denied, as moot, as plaintiff has established that he has complied with the preliminary conference order. To this effect, plaintiff annexed copies of the aforementioned documents at issue to his opposition papers. For the same reason, defendant Rockledge's cross motion seeking to compel plaintiff to provide all outstanding discovery is also denied, as moot.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Rand Engineering, P.C.'s motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing all remaining cross claims against it is granted; and these cross claims are severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and

disbursements as taxed by the Clerk; and it is further

ORDERED that defendant Gryphon Construction, Ltd.'s motion (motion sequence number 003), pursuant to CPLR 3126, is denied, as moot; and it is further

ORDERED that defendant Bernini Construction Corporation's cross motion, pursuant to CPLR 3126, is denied, as moot; and it is further

ORDERED that defendant Rockledge Scaffold Corporation's cross motion, pursuant to CPLR 3124, is denied, as moot; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that all parties shall appear for a previously scheduled discovery compliance conference on **Friday, April 16, 2010 at 10:15 a.m., Room 428, 60 Centre Street, New York, NY;**

ORDERED that within 30 days of entry of this order, defendant Rand Engineering, P.C. shall serve a copy upon all parties with notice of entry.

DATED: 4/8/10

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Padilla v 39 Fifth Avenue Owners.wpd