SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

MANUEL FERNANDO PADILLA,
Plaintiff,

-against-

39 FIFTH AVENUE OWNERS CORP., ROCKLEDGE SCAFFOLD CORP., BERNINI CONSTRUCTION CORP., GRYPHON CONSTRUCTION, LTD and RAND ENGINEERING, P.C.,
Defendants.

INDEX NO. 115975/08

MOTION SEQ. NO. 006

The following papers, numbered 1 - 6 were considered on this motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1 - 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	6

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion by defendant Gryphon Construction, Ltd. is granted to the extent set forth below.

This personal injury action was commenced by plaintiff to recover for injuries he allegedly sustained on April 22, 2008, at the premises located at 39 Fifth Avenue, New York, New York. At the time of the accident, plaintiff was employed as a laborer, by non-party Ignacio Costa and was doing work at such premises. Defendant Gryphon Construction, Ltd. ("Gryphon") now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and any cross-claims asserted against it.

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." CPLR 3212 (f); *see Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Zuckerman*, 49 NY2d at 562.

Defendant Gryphon contends that summary judgment should be granted in its favor, as it had no relation to the work being done that caused plaintiff's injury, even though it did perform some work at the building in question. First, Gryphon contends that plaintiff has acknowledged that the incident occurred on the roof of the building, when a falling object struck and injured him. Gryphon argues that, as it was hired solely to perform interior renovation work on two fifth floor apartments, it could not be liable for plaintiff's injuries, which occurred on the roof of the building. Second, defendant Gryphon contends that, regardless, it was not present at the subject building on the date of the incident.

In opposition to defendant Gryphon's motion, plaintiff's counsel indicates that the summary judgment motion is premature, as depositions have been ordered, but have not yet occurred. Defendant 39 Fifth Avenue Owners Corp. ("39 Fifth") also opposes Gryphon's motion on the same basis.

Here, defendant Gryphon has made a *prima facie* showing of entitlement to judgment as a matter of law dismissing all claims against it, as the parties have supplied no evidence sufficient to defeat the granting of this motion. Plaintiff stated, in his Supplemental Verified Bill of Particulars, that "the accident took place on the exterior of the building on the Fifth Avenue exposure at the top of the building." Joel M. Maxwell Affirmation, Exh B, at 14. Defendant Gryphon has submitted an affidavit by its President, Jerome Leiken, stating that it was hired to perform interior renovation work, and that it did not commence the actual renovation work until *after* the date of the accident. *See* Jerome Leiken Aff ¶¶ 2, 5-6 (attached at Exh G of Joel M. Maxwell Affirmation). Moreover, defendant Gryphon submitted its construction contract with defendants Anthony C.M. Kiser and Lisa Atkin, demonstrating that it was hired to perform renovation work on apartments 5C and 5D. *See* Maxwell Affirmation, Exh D. By acknowledging that he was injured on the roof of the building, plaintiff has failed to sufficiently rebut that defendant Gryphon cannot be held liable for plaintiff's injuries, since it is undisputed that Gryphon was doing renovation work on the fifth floor and the incident occurred on the roof of a building with 16 stories.

Further, the opposition papers do not contain an affidavit by plaintiff putting forth any triable issues of fact. Instead, only an attorney's affirmation by John M. Shaw, plaintiff's attorney, has been

supplied. New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion. *GTF Mktg. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985); *Zuckerman*, 49 NY2d at 560; *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 585 (1st Dep't 1982). Thus, plaintiff's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Mktg.*, 66 NY2d at 968. As the injured party, plaintiff has personal knowledge as to the facts and circumstances of this case, in particular, as to where and how the incident occurred. Yet, plaintiff has not submitted any affidavit, let alone one that could link together the work Gryphon was performing on the fifth floor with the incident that occurred on the roof.

Moreover, although plaintiff and defendant 39 Fifth argue that depositions have not yet occurred, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Plaintiff and defendant 39 Fifth have failed "to show facts essential to justify opposition to the motion may emerge upon further discovery. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 (1st Dep't 2000) (internal citations omitted). Therefore, defendant Gryphon's motion for summary judgment is granted and the complaint is dismissed against it.

As to all cross claims against defendant Gryphon, they are also dismissed. Co-defendants 39 Fifth, Bernini Construction Corp., Anthony C.M. Kiser and Lisa Atkin have asserted cross claims against Gryphon for indemnification and/or contribution. "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, 684–85 (2d Dep't 2005), quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 (1st Dep't 1999). "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." *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61–62 (2d Dep't 2003) (internal quotation marks and citations omitted). As defendant Gryphon cannot be held liable or culpable for plaintiff's injuries, the cross-claims for common-law indemnification and/or contribution are dismissed. Further, as to any contractual indemnification cross-claims, none of the co-defendants has opposed Gryphon's motion to dismiss the cross-claims by attaching a contractual agreement with an indemnification clause or attested that any such agreement exists. Thus, any cross-claims alleged against defendant Gryphon are also dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Gryphon Construction, Ltd., with costs and disbursements as taxed by the Clerk, and all cross-claims are severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

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

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

Dated: 7/2/10

DORIS LING-COHAN, J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

Check if Appropriate: [ ] **DO NOT POST** [ ] **REFERENCE**
[ ] **SUBMIT ORDER/JUDG.** [ ] **SETTLE ORDER/JUDG.**

J:\Summary Judgment\Padilla, seq 6, sj - granted, only affirm in opp, did not show evidence of discovery needed.wpd