

Pinto v 200 W. 108 Hous. Corp.

2013 NY Slip Op 32348(U)

September 12, 2013

Sup Ct, NY County

Docket Number: 104286/10

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Shlomo Hagler
J.S.C.
Justice

PART 17

Index Number : 104286/2010
PINTO, RENEE
vs.
200 WEST 108 HOUSING
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
OCT 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/12/13

Shlomo Hagler
J.S.C., J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION # + CROSS-MOTIONS ARE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

RENEE PINTO,

Index No. 104286/10

Plaintiff,

-against-

200 WEST 108 HOUSING CORP.,

Defendant.

-----X

200 WEST 108 HOUSING CORP.,

Third-Party

Third-Party Plaintiff,

Index No.: 590060/11

-against-

ESTATE OF PETER LEKUTANAJ, JOHN
LEKUTANAJ, TRUSTEE, TACORIA RESTAURANT
and NICK'S CONSTRUCTION GROUP CORP.

DECISION and ORDER

Motion Sequence
Numbers: 001 & 002

Third-Party Defendants.

FILED

OCT 03 2013

-----X

Hon. Shlomo S. Hagler, J.S.C.:

**NEW YORK
COUNTY CLERK'S OFFICE**

This action arises out of an alleged accident that resulted in physical injuries. In motion sequence number 001, plaintiff Rene¹ Pinto ("Pinto" or "plaintiff") moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of defendant's liability under Labor Law § 240(1). In their cross-motion, third-party defendants Estate of Peter Lekutanaj ("The Estate") and John Lekutanaj, Trustee ("the Trustee") cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint.

In motion sequence number 002, third-party defendant Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexican (incorrectly sued herein as Tacoria Restaurant) ("Sacrop"), moves

1. The proper spelling of plaintiff's name is "Rene."

for summary judgment dismissing the third-party complaint and the Estate's and the Trustee's cross-claims for common-law and contractual indemnification and contribution. In their cross-motion, the Estate and the Trustee seek summary judgment in their favor against Sacrop on the Estate's cross-claims for contribution and common-law and contractual indemnification.

Motions sequence numbers 001 and 002, and their cross-motions, are hereby consolidated for disposition.

BACKGROUND

The basic issue in this matter is whether the alleged accident actually happened or whether, as defendant/third-party plaintiff 200 West 108 Housing Corp. ("200 West") asserts, it was a "phantom accident" (Affirmation of 200 West's Counsel Martin J. Moskowitz, Esq., dated June 11, 2012, in Opposition to Plaintiff's Motion and to Third-Party Defendants' Cross-Motion["Moskowitz Aff. in Opposition"], ¶ 21).

The alleged accident occurred on March 4, 2010, at the back of the building located at 200 West 108th Street, New York, New York ("the subject building"). The subject building had been converted by the Estate and the Trustee into a residential cooperative, with several commercial units. The Estate and the Trustee retained ownership of several apartments and the commercial units in the subject building. Non-party Nikola Djonovic ("Nick") has been the superintendent of the building since 1981 (Examination Before Trial of Nikola Djonovic, dated August 4, 2011, attached as Exhibit "B" to Plaintiff's Motion ["Nick's EBT"], at 19). Nick also is the principal of non-party Nick's Construction Company ("NCC") (*Id.*, at 9) and is the uncle of the Trustee of the Estate, John Lekutanaj (*id.*, at 16, 83). Sacrop owned the Mexican restaurant and Pinto alleged that the accident

occurred while he was working on the exterior wall of the restaurant which was at the back of the subject building.

Plaintiff's Assertions

Plaintiff alleges that on the day of his accident he was employed by Nick's company NCC and was given his assignment by Nick. (Examination Before Trial of Plaintiff Rene Pinto, dated April 15, 2010, attached as Exhibit "A" to Plaintiff's Motion [motion sequence number 001] and Exhibit "A" to Third-Party Defendant's Motion [motion sequence number 002] ["Plaintiff's 1st EBT"], at 27, 30, 68.) Plaintiff testified that on the day of the accident, the project on which he was working was to replace the individual bricks in a sealed-off window in the building's exterior wall to better align them. (*Id.*, at 104-105.) Specifically, plaintiff stated he was "removing some window protection to even it out and, you know, erase the wall so that I would be able to cover it." (*Id.* at 28.) Plaintiff also testified that Nick provided the tools for plaintiff, including a six-foot metal A-frame ladder, a grinder, a chisel and hammer. (*Id.* at 70-72.) Plaintiff also claims that on the day of the accident, Nick from NCC came to observe the plaintiff a couple of times before the accident. (*Id.* at 112-113.) Plaintiff testified that on the day of his accident he was working alone and there were no other witnesses to the accident. (*Id.* at 116.)

Plaintiff testified that "I was using the grinder to remove the old cement that existed between the bricks. . . . Then I would leave the grinder and I would use a chisel and a hammer to remove the old brick" (Plaintiff's 1st EBT at 97). While he was working, plaintiff stated he was standing on the third step from the top of the six-foot, metal A-frame ladder that Nick had given him. (*Id.* at 84-85, 114-115.) Plaintiff averred the he had made sure that the ladder was steady and locked before

he climbed it (*id.* at 44, 77) but “[t]he ladder moved and as it moved, the ladder fell and I fell backwards” (*id.* at 96). Plaintiff claims that he fell from the third step from the top of the ladder to the concrete at “the bottom of those stairs,” landing on his back, and injuring his back, right arm, right side of his head and neck, and his right shoulder. (*Id.* at 117, 111, 124-125.)

Plaintiff stated that he was unconscious for a minute or two and when he regained consciousness, he realized that he was bleeding from the area above his right ear, and “[t]here was a clump of hair missing here on my head.” (Plaintiff’s 1st EBT at 119-120.) Plaintiff claims he was unable to call 911 himself because his phone was broken and so he slowly, gradually stood up on his own. (*Id.* at 117.) Plaintiff further testified as follows:

“I managed to get to the lobby area where [NCC employees] were working. Arturo and Oliver [the NCC employees] were in the lobby working and Nick the owner [of NCC] was there too. He then realized that I was bleeding. I said to call the ambulance and he answered that he wasn’t going to call the ambulance, that I didn’t need an ambulance. He grabbed me from the arms and they took me to the basement area. They, you know, they placed me under a faucet of water to clean all the blood, you know. I requested again to have an ambulance come and they insisted that no ambulance was needed. They, you know, they kept me there for 20 minutes, that I should try quiet down and relax. He said to me take a week off, then come back to work.

“At that moment someone called a taxi so that they could take me home. They carried me out of the building and they placed me inside of a cab and they sent me home but I didn’t go home, I went to the emergency room, to the hospital.”

(Plaintiff’s 1st EBT at 118-119.) Plaintiff was taken by the cab to St. Joseph’s Hospital in Yonkers.

(*Id.* at 127.)

Nick's Assertions

Nick maintains that what plaintiff has said “is not true. It is absolute a lie” (Nick’s EBT, at 78). Nick testified that plaintiff never worked for NCC but rather worked for Nick personally in Nick’s apartment and in another apartment (*id.*, at 13-14) and for which plaintiff was paid by Nick’s personal checks (Exhibit “J” to Reply Affirmation of Plaintiff’s Counsel Elizabeth Previte Morgan, Esq., to Plaintiff’s Motion, dated February 7, 2013).

It is Nick’s contention that neither he nor NCC ever worked on the commercial premises at the subject building (Nick’s EBT, at 17) and that he was not present on the day of the accident (*id.* at 41). Nick stated that he, Arturo and Oliver were not working in the lobby that day, Arturo and Oliver had put tiles in the lobby “way before” the day of the accident, and “[t]hat month nobody worked there” (*id.* at 74-75). Nick also states that as far as he knows, plaintiff did not have an accident in the back of the building where brick wall work was being done (*id.* at 78), he never saw plaintiff in the lobby of the building complaining of an injury or having an accident (*id.* at 41) and never saw plaintiff bleeding (*id.* at 75). Nick asserts that plaintiff did not ask him to call an ambulance (*id.* at 76), he did not tell plaintiff that he would not call an ambulance (*id.*) and that he, Arturo and Oliver did not take plaintiff to the basement or put him under a faucet to clean any blood away (*id.*). Nick asserts that he did not keep plaintiff for twenty minutes after plaintiff was injured (*id.* at 77), they did not call a cab to take plaintiff home (*id.* 77-78), and they did not carry plaintiff out of the building and into a cab (*id.* at 78). In response to being asked whether he had told plaintiff that no ambulance was needed, Nick replied that plaintiff had a phone and could call an ambulance himself (*id.* at 76-77). Nick also testified that he did not tell plaintiff to take a week off and then

come back to work (*id.* at 77). With respect to ladders, Nick claimed he “never give anything to anybody” (*id.* at 79).

The Pleadings

Plaintiff’s complaint is comprised of two causes of action under violations of Labor Law §§ 200, 240(1) and 241(6). The first cause of action is for negligence in failing to provide proper protection against elevation-related falls and the second cause of action is for failing to furnish a safe work place at the accident location under various sections under Rule 23 of the New York State Industrial Code.

200 West’s amended third-party complaint alleges the same claims of common-law and contractual indemnification, contribution and “in common law, statutory law, and/or contract”² against each of the Estate, the Trustee, Sacrop and NCC. The Estate’s third-party answer asserts two counterclaims for common-law and contractual indemnification and contribution against 200 West. Sacrop’s third-party answer alleges two counterclaims against West, sounding in common-law indemnification and contribution.

Third-party defendant NCC has not appeared in this action.

DISCUSSION

“Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as

2 . It is unclear what this last cause of action is supposed to be, but it appears to be duplicative of the other causes of action already alleged. As such, it will not be considered as a separate cause of action.

a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial [citations omitted].”

(*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012].) The court must determine whether that standard has been met based “on the evidence before the court and drawing all reasonable inferences in plaintiff’s favor” (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]). In addition, issues of the parties’ credibility must be resolved at trial, not on a motion for summary judgment. (See, e.g., *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept 2013].)

Plaintiff’s Motion for Partial Summary Judgment on the Issue of Defendants’ Liability Under Labor Law § 240(1) (motion sequence number 001)

It is clear that plaintiff’s and Nick’s versions of the alleged accident are diametrically opposed on every point. Thus, the determination of even the most basic issue of whether or not the accident occurred presents a question of fact and must await a trial for the trier of fact. Furthermore, the opposing testimonies of the plaintiff and Nick would require this Court to evaluate the credibility of these witnesses which is not proper for a court to assess on a motion for summary judgment. (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Santos v Tempco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

When the trier of fact considers these issues, it may also consider the April 11, 2011 decision of the Workers’ Compensation Board, which determined that plaintiff was indeed employed by NCC and “had a work related injury to the neck, back, head and right arm.” In addition, the Board decision stated:

“I have not found the testimony of the owner of the Nick’s Construction Company, Nicola Djonovic, credible. I find that he was resistant to answering questions directly. I find that he gave vague answers. He testified inconsistently at certain times, including but not limited to testimony about whether he speaks Albanian. . . . I believe that the owner of Nick’s Construction Corp. directed and controlled the work done on the premises.”

(See Exhibit “D” to Affirmation of Plaintiff’s Counsel Elizabeth Previte Morgan, Esq., in Support of Plaintiff’s Motion for Summary Judgment.) The Board also determined that plaintiff’s employer was both “Nick’s Construction Company” and “Johnny & Nikola Djonovic.” However, the Board’s reference to “Johnny and Nikola Djonovic” may be inaccurate, in part since Nick has testified that “Johnny Djonovic doesn’t exist” and that, in any event, “Johnny has nothing to do with Nick’s Construction Company” (Nick’s EBT at 36-37). Furthermore, the Workers Compensation Board decision is not dispositive in this case as not all the parties had an full and fair opportunity to be present at, participate in and/or contest the Workers Compensation Board hearing and determination. (See *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15 [1986]; cf., *Ryan v New York Telephone Co.*, 62 NY2d 494, 501 [1984].)

Plaintiff’s motion for partial summary judgment is, therefore, denied.

The Estate’s Cross-Motion for Summary Judgment Dismissing the Third-Party Complaint; Sacrop’s Motion for Summary Judgment Dismissing the Third-Party Complaint; and the Estate’s Cross-Motion for Summary Judgment Against Sacrop on the Estate’s Claims for Contribution and Indemnification

These motions and cross-motions must all be denied as premature at this time. As noted above, multiple questions of fact, such as whether plaintiff was working under the direction and control of Nick and/or NCC, the relationship between the various defendants and Nick and NCC,

and whether or not the accident occurred as plaintiff alleges, preclude summary judgment in favor of any party at this time.

CONCLUSION

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiff Rene Pinto's motion, pursuant to CPLR § 3212, for partial summary judgment under Labor Law § 240(1) (motion sequence number 001) is denied; and it is further

ORDERED that the cross-motion (under motion sequence number 001) of third-party defendants Estate of Peter Lekutanaj and John Lekutanaj, Trustee, is denied; and it is further

ORDERED that the motion of third-party defendant Sacrop Restaurant Corp. d/b/a Taqueria Restaurant Y Fonda La Mexican (motion sequence number 002) is denied; and it is further

ORDERED that the cross-motion (under motion sequence number 002) of the Estate of Peter Lekutanaj and John Lekutanaj, Trustee is denied.

The foregoing constitutes the decision and order of this Court. The Clerk is directed to enter this decision and order.

FILED
OCT 03 2013
NEW YORK COUNTY CLERK'S OFFICE
ENTER:

Dated: September 12, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.