

Martinez v City of New York

2013 NY Slip Op 32421(U)

October 4, 2013

Supreme Court, New York County

Docket Number: 402880/2010

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

Martinez
-v-
Mocal Enterprises, et. al.

INDEX NO. 402880/10
MOTION DATE 8/13/13
MOTION SEQ. NO. 008

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

**MOTION IS DECIDED
WITH ACCOMPANYING MEMORANDUM DECISION**

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

OCT 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/4/13

Lou, J.S.C.
LOUIS B. YORK

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

JULIO MARTINEZ, X

Plaintiff,

-against-

Index No. 402880/2010

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., MOCAL ENTERPRISES
INC., VERIZON NEW YORK INC.,
PETROCELLI ELECTRIC CO. INC., TULLY
CONSTRUCTION CO INC., RUCKEL'S INC.,
TC CONTRACTING INC., PIPELINE
CONSTRUCTION LLC, AND VALANA
CONSTRUCTION CORP., CH. MONACO
CORP., and CHIN HANG YUN,

Defendants.

MOCAL ENTERPRISES, INC., X

Third-Party Plaintiff,

- against -

JSK MONA CORP.,

Third-Party Defendant.

LOUIS B. YORK, J.: X

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NEW YORK

Third-Party Index No.:
509771/2011

First, the Court notes that previous orders by Justice Wright and by this Court have trimmed down the number of active parties substantially. Prior to this motion, plaintiff received default judgment against TC Contracting, Inc., and Valana Construction Corp. In addition, the action and all cross-claims have been dismissed or discontinued as against several defendants – in particular, The City of New York, The City of New York Department of Transportation, Consolidated Edison Company of New York, Inc., Verizon New York, Inc., Petrocelli Electric

Co., Inc., and Pipeline Construction, LLC. Thus, it appears that the remaining parties in the main action as of the date of this motion were plaintiff and defendants Mocal Enterprises, Tully Construction Co., Inc., Ruckel's, Inc., TC Contracting, Inc., Valana Construction Corp., JSK Mona Corp., CH. Monaco Corp., and Chin Hang Yun. Unfortunately, at no point has the caption been amended. The Court will include the corrected caption in this order.

Now, the Court turns to the motion at hand, motion sequence number 8. In it, defendants JSK Mona Corp., CH. Monaco Corp., and Chin Hang Yun (collectively, "movants") move for summary judgment dismissing all claims and cross claims against them. Prior to the final submission date, plaintiff stipulated with movants to discontinue against them. Therefore, movants discontinued their motion against plaintiff alone. The third-party action, against JSK Mona Corp., appears to remain in its entirety. This third-party action relates to the issue of indemnification. There is no opposition to the current motion by any party.

The underlying complaint asserts that plaintiff alleges that on March 12, 2009, he sustained injuries when he tripped over a metal plate cover. The cover was on a part of the sidewalk that abutted the building at 1205-1211 Broadway in Manhattan. JSK Mona Corporation leased the premises from Mocal Enterprises during the period in question. Subsequently, CH. Monaco Corporation became the lessee. Chin Hang Yun is the principal of both of these lessees.

Movants argue that all claims and cross claims against them should be dismissed because it had nothing to do with the metal plate cover in question. In particular, they state that the metal plate was installed on the sidewalk by someone else, and that they had no knowledge of the plate, of problems with the plate, or with subsequent repairs. They cite the sworn deposition testimony of Chin Hang Yun to substantiate their argument. As stated, no party has opposed this

motion with evidence to the contrary, and plaintiff himself discontinued against movants after the submission of this motion. Therefore, the Court grants the motion to this extent.

As for movants' request to dismiss the third-party complaint against JSK Mona Corp., the Court must deny it at this time. Although movants' have annexed evidence that it held the requisite insurance policy on the date of the accident, the notice of motion does not contain a request for dismissal of the third-party complaint, and therefore the third-party plaintiff was not on proper notice that movants would raise the issue in this motion, and thus did not have the proper opportunity to defend it. *See* CPLR 2214(a). The notice does seek "other and further relief," but as the request for dismissal of the third-party action is extreme and also is sufficiently related to the explicit requests in the motion the Court concludes in its discretion that it is inappropriate to consider it at this time.

Therefore, it is

ORDERED that the motion is granted and all claims and cross-claims against JSK Mona Corporation, CH. Monaco Corporation, and Chin Hang Yun are severed and dismissed; and it is further

ORDERED that, based on this order and on prior orders dismissing or discontinuing against other defendants, the caption is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

JULIO MARTINEZ,

Plaintiff,

Index No. 402880/2010

-against-

MOCAL ENTERPRISES INC., TULLY
CONSTRUCTION CO INC., RUCKEL'S INC.,
TC CONTRACTING INC., and VALANA
CONSTRUCTION CORP.,

Defendants.

MOCAL ENTERPRISES, INC.,

Third-Party Plaintiff,

- against -

Third-Party Index No.:
509771/2011

JSK MONA CORP.,

Third-Party Defendant.

_____X

The Trial Support Clerk, Motion Support Clerk and County Clerk are directed to mark their records accordingly, and the parties shall use the amended caption in all future proceedings; and it is further

ORDERED that movant shall file a copy of this decision on the aforesaid clerks.

Dated: Dec. 4, 2013

Enter:

Key

FILED

OCT 10 2013

COUNTY CLERK'S OFFICE
NEW YORK