

**Smith v Bovis Lend Lease LMB, Inc.**

2014 NY Slip Op 31516(U)

June 16, 2014

Sup Ct, New York County

Docket Number: 113098/10

Judge: Doris Ling-Cohan

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 113098/2010  
SMITH, CHARLES F.  
vs.  
BOVIS LEND LEASE LMB  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_


The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3  
Replying Affidavits \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is for summary judgment  
by defendant Bovis Lend Lease LMB, Inc  
is decided in accordance with the attached  
memorandum decision.

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

**FILED**  
JUN 17 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/16/14

  
\_\_\_\_\_, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 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

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

-----x  
CHARLES F. SMITH and SONIA ORTIZ,  
Plaintiffs,

Index No. 113098/10

- against -

Motion Seq. No.: 005

BOVIS LEND LEASE LMB, INC. and  
ERNEST FLEMING,

Defendants.  
-----x

BOVIS LEND LEASE LMB, INC.,

Third-party Plaintiff,

- against -

PARKVIEW PLUMBING & HEATING, INC.,

Third-party Defendant.  
-----x

**FILED**

JUN 17 2014

NEW YORK  
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN, J.:

Defendant/third-party plaintiff Lend Lease (US) Construction LMB Inc., formerly known as Bovis Lend Lease LMB, Inc. ("Lend Lease"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and all cross claims against it.

**BACKGROUND**

Plaintiffs Charles F. Smith ("Smith") and Sonia Ortiz ("Ortiz"), husband and wife, reportedly commenced this action seeking to recover damages from defendants for personal injuries that resulted from an incident between Smith and defendant Ernest Fleming ("Fleming"). The incident allegedly occurred on May 20, 2010, during work on a construction project at the Rego Park Mall, 61-11 Junction Boulevard, Queens, New York. Smith, a plumber, was employed by third-party defendant Parkview Plumbing

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& Heating, Inc. ("Parkview Plumbing"), located at 3928 East Tremont Avenue, Bronx, New York. Fleming was a foreman with Lend Lease, the general contractor for the Rego Park Mall construction project. Parkview Plumbing was a plumbing subcontractor for the project. Smith claims that he was assaulted by Fleming while working on the construction project. Plaintiffs seek to recover damages for personal injuries based on Fleming's negligence, and to impose liability on Lend Lease under the doctrine of respondeat superior.

The following facts are gleaned from the pleadings and the transcript of Smith's testimony at an examination before trial ("EBT") (Tr of Smith EBT, Not of Mot, Exh G). Smith began working at the Rego Park Mall construction project in February 2008 (*id.* at 20). He was the plumbing foreman for the construction project, and had never been suspended for any reason (*id.* at 25, 30-31). On May 20, 2010, two Lend Lease workers informed Smith that Fleming had hidden his snap cutter tool the previous night, presumably because Fleming wanted to maintain a clean work area, and Smith often left his tools on the floor (*id.* at 48-49). In response, Smith took Fleming's keys from an ATV-type vehicle, assuming that Fleming would return Smith's snap cutter tool in exchange for the keys (*id.* at 55, 58, 61). Fleming denied taking Smith's cutter, and forcefully attempted to recover his keys (*id.* at 64-65). The two men got into a scuffle, and Fleming tackled Smith onto a pile of sheet rock (*id.* at 67-68). The incident

ended only when another Lend Lease worker separated Smith and Fleming (*id.* at 69). Smith allegedly sustained injuries and this action ensued.

In the first cause of action in the Complaint, Smith alleges that the occurrence was caused solely by the negligence of defendants. He claims that he was assaulted by Fleming while lawfully performing his duties on the construction project. He also claims that Lend Lease was negligent, under the doctrine of respondeat superior, for permitting Fleming to assault him; allowing Fleming to be employed on the construction project despite his tendencies for bad actions; and hiring Fleming, who faced criminal charges for aggressive and violent behavior in another jurisdiction. In the second cause of action, Ortiz reportedly alleges a claim against defendants for loss of consortium. The Bills of Particulars contain similar allegations and adds that Smith suffered injury to his right shoulder and lumbar spine (Bill of Particulars, Lend Lease Affirm, Exh F, ¶14).

Defendants filed separate answers, generally denying the allegations in the Complaint, asserting numerous affirmative defenses, and alleging cross claims against co-defendant for contribution or indemnification. In addition, Lend Lease commenced a third-party action against Parkview Plumbing alleging claims for contractual indemnification (first count), breach of contract (second count), negligent hiring and retention (third

count), and negligent supervision (fourth count). The submissions do not include an appearance by Parkview Plumbing.

Plaintiff Ortiz failed to appear for conferences scheduled before this Court (Ling-Cohan, J.) for June 8, 2012 and August 24, 2012, and the Court dismissed the action as to Ortiz (see Order on Non-appearance dated August 24, 2012, Lend Lease Affirm, Exh J). In addition, Ortiz testified at an EBT, held on March 23, 2013, that she never consented to be a party in this action (Tr of Ortiz EBT, Reply Affirm, Exh A, at 29-30).

Lend Lease now seeks summary judgment dismissing the remaining negligence claim by Smith and all cross claims asserted against it.

#### DISCUSSION

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 (see *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 for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or

unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Complaint alleges, in essence, that the occurrence was caused solely by the negligence of defendants, including the negligence of Lend Lease in employing and supervising Fleming. Negligence is the breach of a duty resulting in injury (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

An employer is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]). The term "scope of employment" is defined to include "an act ... done while the servant is doing [the] master's work, no matter how irregularly, or with what disregard of instruction" (*id.* [internal citations omitted]).

The determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations (*id.* at 303). Thus, the question is ordinarily one for the jury (*id.*). Among the factors to be weighed are the connection between the time, place, and occasion of the act; the history of the relationship between the employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act

was one that the employer could reasonably have anticipated (*id.* [internal citations omitted]).

An employer may also be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm (see *Kirkman v Astoria Gen. Hosp.*, 204 AD2d 401, 403 [2d Dept 1994]).

In seeking summary judgment, Lend Lease essentially argues that the alleged wrongful acts of Fleming were not done within the scope of his employment. Lend Lease also contends that Smith cannot establish that Lend Lease was negligent in employing or supervising Smith. To support its position, Lend Lease relies primarily on the transcripts of the EBT testimony of the parties.

Fleming testified at an EBT and denied assaulting Smith (see Tr of Fleming EBT, Not of Mot, Exh I, at 103). He also testified that he had never been convicted of a crime, and that there were no charges pending against him (*id.* at 8-9). He further testified that he received orientation from Lend Lease on the code of ethics and treatment of other workers at a job site (*id.* at 10, 11). In addition, he stated that Lend Lease probably identified violence or using expletives to talk to other workers as unbecoming conduct (*id.* at 11). Fleming also testified that he was notified of Lend Lease's policy against physical fights on the job site, and was aware that a violation of the policy would



lead to termination (*id.* at 14). He further testified that he was never reprimanded by Lend Lease for his conduct at the job site (*id.* at 16), but had seen the termination policy implemented one time (*id.* at 17). Fleming stated that Lend Lease's policy required supervisors to notify foremen of tripping hazards and dangerous conditions at the work site (*id.* at 36-37, 40). He also testified that prior to the alleged incident, he repeatedly complained to the plumbing foreman about materials being left at work sites by plumbing workers (*id.* at 35).

As to the alleged incident, Fleming admitted that on May 19, 2010, at approximately 5:30 p.m., he picked up Smith's snap cutter tool, which had been left on the floor at the construction site (*id.* at 53-57). He also testified that the next morning, Smith inquired about his tool; that Smith taunted him with the keys, dangling them in front of him; that he reached for Smith's hand to recover the keys; and that he did not touch Smith's body while trying to recover the keys (*id.* at 102-103). He stated that he grappled with Smith for two minutes, trying to recover the keys, until a Lend Lease worker separated them and Smith threw the keys onto the floor (*id.*). Fleming's claims that he then picked up the keys and returned to work (*id.*). He denied that he and Smith wrestled, or that he threw Smith down on sheet rock (*id.* at 113). He stated that Lend Lease investigated the incident and terminated him six days later, based on the company's policy barring physical fights on the job (*id.* at 127).

He also stated that he was never involved in any other incident, and that there were no complaints made regarding any fights or altercations or allegations of a violent temper during his roughly 25 years of employment with Lend Lease (*id.* at 149).

Christopher DelPozzo ("DelPozzo"), General Superintendent of Lend Lease, testified at his deposition that he was the supervisor for the construction project (see Tr of DelPozzo EBT, Not of Mot, Exh H, at 24). He also stated that the duties of a Lend Lease foreman included cleaning the project and removing debris (*id.* at 14).

DelPozzo also testified that he terminated Fleming on May 24, 2010, at the direction of the Lend Lease legal department and in order to comply with company policy, based on the May 20, 2010 incident at the Rego Park Mall construction project (*id.* at 16-17). DelPozzo testified that he was informed of the alleged incident by another laborer, who reported that Smith and Fleming had gotten into an argument; that Smith had dangled Fleming's keys, and teasing him; that the two got into a small pushing or wrestling match; that it was broken up immediately; and that it was not a big deal (*id.* at 40). DelPozzo further testified that he had not received any prior complaints about Fleming's work or behavior (*id.* at 20-21, 50).

On review of the submissions, the Court cannot determine as a matter of law that Fleming was not acting within the scope of his employment at the time of the alleged incident. The parties

sharply dispute the circumstances surrounding the alleged incident. The evidentiary proof submitted raises triable issues of fact as to whether Fleming confiscated Smith's snap cutter tool in furtherance of his responsibility as foreman to maintain a clean job site, and whether the alleged assault and injuries occurred when Smith tried to retrieve the tool.

The assertion that Fleming was not acting within the scope of his employment, since Lend Lease does not instruct its foremen to confiscate tools left behind by subcontractors, is unavailing. As stated, Lend Lease's supervisor on the construction project acknowledged that the duties of a foreman include maintaining a clean worksite. An employer need not have foreseen the precise act of the exact manner of the injury for an employee to be regarded as acting within the scope of employment, as long as the general type of conduct may have been reasonably expected (see *Riviello v Waldron, supra*, at 304).

However, there is no evidentiary support for the allegation that Lend Lease negligently hired and retained Fleming despite his tendencies for bad acts. Both Fleming and DelPozzo deny any prior incidents during the roughly 25 years that Fleming worked for Lend Lease. Moreover, the submissions are devoid of any evidence that Lend Lease hired or retained Fleming with knowledge of his propensity for the sort of behavior alleged herein. Thus, so much of the negligence claim as seeks damages based the negligent hiring or supervision of Fleming must be dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent of severing and dismissing so much of the negligence claim as seeks damages based on the negligent hiring or supervision of Fleming, and the motion is otherwise denied, and it is further

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

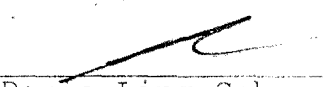
ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

**FILED**

JUN 17 2014

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dated: June 16, 2014

  
Doris Ling-Cohan, J.S.C.

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