SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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ALEJANDRO ABREGO,

Plaintiff,

-against-

451 LEXINGTON REALTY LLC, MCCARTY CONSTRUCTION INC. and FLINTLOCK CONSTRUCTION SERVICES, LLC, ARCHITECTURAL MOLDED COMPOSITES, INC.,

Defendants.

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451 LEXINGTON REALTY LLC and FLINTLOCK CONSTRUCTION SERVICES, LLC,

Third-Party Plaintiffs,

-against-

ARCHITECTURAL MOLDED COMPOSITES, INC.,

Third-Party Defendant.

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ARCHITECTURAL MOLDED COMPOSITES, INC.,

Fourth-Party Plaintiff,

-against-

ROCKLEDGE SCAFFOLD CORP.,

Fourth-Party Defendant.

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Index No. 156180/2013
Motion Sequence # 002

DECISION & ORDER

Hon. Kelly O'Neill Levy, J.:

Fourth-Party Defendant Rockledge Scaffold Corp. ("Rockledge") moves pursuant to CPLR 3212 for an order granting summary judgment on the common law indemnity and contribution claims brought against it by Defendant/Third-Party Defendant/Fourth-Party

Defendant Architectural Molded Composites, Inc. ("AMC"). Rockledge brings this motion after considerable paper discovery but before any depositions have been held. The motion is granted for the reasons set forth below.

Background

Plaintiff Alejandro Abrego brought the primary action against AMC and other parties for negligence and violation of Labor Law § 200, § 240(1) and § 241(6) for personal injuries he allegedly incurred after falling from scaffolding on June 6, 2013 during the course of his work for subcontractor Cavalier Construction Services, LLC ("Cavalier") at a worksite at 447-451 Lexington Avenue in Manhattan. AMC subsequently commenced a fourth-party action against Rockledge and later AMC stipulated to withdraw the contractual indemnification and breach of contract claims against Rockledge without prejudice.[1] The claims that remain against Rockledge are for common law indemnification and contribution. Plaintiff Abrego made no claims against Rockledge and Rockledge has not been brought into a third party action.

The following facts pertinent to the fourth-party complaint are undisputed. As evidenced by a contract between general contractor Flintlock and Rockledge dated October 17, 2012 ("Contract"), contractor Flintlock hired Rockledge to erect scaffolding at a construction site at 447-451 Lexington Avenue in Manhattan. The equipment had already been placed in service before the contract was signed (General Terms and Conditions of the Agreement appended to Contract at ¶ 5) and the scaffolding remained the property of Rockledge during the period at issue. AMC was hired as a subcontractor by Flintlock and AMC retained Cavalier.

[1] The stipulation attached to the moving papers is dated February 9, 2014 but the fourth-party defendant was not brought into the case until June 2014. In memo of law, Rockledge's counsel states that the stipulation was from February 2015.

Rockledge offers through a number of affidavits, emails, photographs, and other supporting documentation the following. After Rockledge installed the scaffolding at the site, the scaffolding remained in the care, custody, and control of Flintlock until it was dismantled and Rockledge personnel returned to the site only if specifically called by Flintlock, and only to perform the specific work requested of it by Flintlock (Aff. of Rockledge controller John Harrington at ¶¶ 4-5). On April 18, 2013, approximately two months prior to the accident at issue, Flintlock communicated to Rockledge that issues had arisen at the south elevation with the mid rails, toe boards, and secured planks that required immediate attention. Rockledge dispatched two estimators to assess the issues with the scaffolding.

Rockledge estimator Jose Flores states in his affidavit that he "had been present at the Project after the installation was completed" and that when he went to the site on April 20, 2013, he observed that the scaffolding had been modified by some unknown party after Rockledge installed it on the property. (Aff. of Jose Flores at at ¶ 4). Mr. Flores noted that "planks had been removed from the outriggers at multiple levels and installed on the frames without toe board, mid rails and end rails." (Jose Aff. at ¶ 3).

It is undisputed that Rockledge communicated with Flintlock about its findings and subsequently prepared and transmitted a change order for Flintlock's signature that would allow Rockledge to make the necessary modifications to the scaffolding. Rockledge asserts that Flintlock never signed and returned the change order. (Aff. of Rockledge estimator Neil McEntee at ¶ 10, Harrington Aff. at ¶ 7). Flintlock did not otherwise authorize or request Rockledge to perform the work described in the change order. (McEntee Aff. at ¶ 10).

Following the accident, an OSHA inspector examined the scaffolding and noted that "[t]he scaffold platforms were modified and rearranged during the course of construction work to

where there were sections of platform missing." (OSHA Violation Worksheet with print date of September 24, 2013).

Discussion

A party moving for summary judgment pursuant to CPLR § 3212 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." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997).

If the moving party meets this burden, the burden shifts to the non-moving party to either demonstrate with admissible evidence the existence of a factual issue requiring a trial, or offer an adequate excuse for its failure to do so. *See Marden v. Maurice Villency, Inc.*, 29 A.D.3d 402, 402-03 (1st Dep't 2006); *Vermette v. Kenworth Truck Co., Div. of Paccar, Inc.*, 68 N.Y.2d 714, 717 (1986). Conclusions, allegations, and speculative statements are insufficient to defeat a summary judgment motion. *See Marden*, 29 A.D.3d at 403; *Plantamura v. Penske Truck Leasing, Inc.*, 246 A.D.2d 347, 348 (1st Dep't 1998).

Rockledge argues that the claim for common law indemnification should be dismissed because Rockledge was not actively at fault in bringing about the injury and assumed no duty of inspection or maintenance of the scaffolding after assembly. Rockledge further argues that the contribution claim must be dismissed as it was not negligent as a matter of law. In opposition,

AMC asserts that no depositions have been taken and that a motion for summary judgment is thus premature.

In this case, Rockledge, through various affidavits, the Contract, OSHA records, Rockledge's daily schedules; and daily reports and maintenance logs maintained by Flintlock has met its prima facie burden for summary judgment and AMC has failed to raise a triable issue in opposition. *See Fox v. H & M Hennes & Mauritz, L.P.*, 83 A.D.3d 889, 891 (2d Dep't 2011)(dismissing third-party complaint for contribution and indemnification where third-party defendant demonstrated that it was not a contractor, not negligent, and did not have the authority to supervise or control the work giving rise to the plaintiff's injuries), *see generally Smith v. Cassadaga Cal. Cent. School Dist.*, 178 A.D.2d 955, 956-57 (4th Dep't 1991).

A court may deny a motion for summary judgment as premature if a party brings the motion before the end of discovery. *See Jimenez v. New York Cent. Mut. Fire Ins. Co.*, 71 A.D.3d 637, 640 (2d Dep't 2010). However, a party making that argument must provide an evidentiary basis that supports the need for further discovery, *see Green v. Metro. Transp. Auth. Bus Co.*, 127 A.D.3d 421, 422-23 (1st Dep't 2015), one not, as it is here, rooted in speculation or "mere hope" that further discovery will reveal evidence that is sufficient to defeat a motion for summary judgment. *See Gasis v. City of New York*, 35 A.D.3d 533, 534-35 (2d Dep't 2006). Here, AMC bases its assertion that further discovery is necessary on the possibility that "depositions will shed light on how and where the plaintiff's accident allegedly occurred, as well as who was responsible for the subject scaffold, and who, if anyone, altered the subject scaffold or created an unsafe condition" (*see* AMC's attorney affirmation at ¶16) without further support. The court disagrees.

The court first examines the common law indemnity claim. "To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 10 (1st Dep't 2012). *See also Correia v. Prof'l Data Mgmt.*, 259 A.D.2d 60, 65 (1st Dep't 1999). Indeed "a party sued for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification." *Mathis v. Central Park Conservancy*, 674 N.Y.S.2d 336, 337 (1st Dep't 1998). Here, AMC has failed to raise a triable issue of fact as to whether Rockledge was negligent in its installation or maintenance of the scaffolding or the degree of fault, if any, that was attributable to Rockledge. *See generally Aragundi v. Tishman Realty & Const. Co., Inc.*, 68 A.D.3d 1027, 1029-1030 (2d Dep't 2009). Accordingly, the claim for common law indemnification is dismissed.

Finally, to maintain a cause of action for contribution, AMC must show that Rockledge contributed to Abrego's alleged injuries by breaching a duty either to Abrego or to AMC. *See Jehle v. Adams Hotel Assocs.*, 264 A.D.2d 354, 355 (1st Dep't 1999). As there is no indication of either here, the claim for contribution is dismissed. *See Calandro v. Avalon Bay Communities, Inc.*, 3 N.Y.S.3d 284, 44 Misc.3d 1230(A) at 14 (Supreme Court, Nassau County 2014), *Hall v. Smithtown Cent. School Dist.*, 82 A.D.3d 703, 704 (2d Dep't 2011), *Karanikolas v. Elias Taverna, LLC*, 120 A.D.3d 552, 556 (2d Dep't 2014).

Accordingly, it is ORDERED that the Rockledge's motion for summary judgment is granted and the fourth-party complaint is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of ROCKLEDGE SCAFFOLD CORP. is granted.

The Clerk is directed to enter judgment in favor of fourth-party defendant ROCKLEDGE SCAFFOLD CORP. dismissing the fourth-party complaint against it.

The remaining parties are to appear in Part 19 for status conference on March 9, 2016 at 9:30 a.m. as previously scheduled.

This constitutes the decision and order of the court.

ENTER:

Dated: December 10, 2015
New York, New York

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY