Guaraca v Blatt Plumbing, Inc.
2018 NY Slip Op 30759(U)
March 28, 2018
Supreme Court, Bronx County
Docket Number: 303014/2015
Judge: Howard H. Sherman

C

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

----------x

Segundo Juan Guaraca,

Plaintiff

-against-

Blatt Plumbing , Inc., MHA LLC.,
Senid Plumbing & Heating Corp.,[1] and
Cow Bay Contracting Inc.,

Defendants

Index No. 303014/2015

----------x

Cow Bay Contracting Inc.,

Third-Party Plaintiff

against-

D'Amico Construction , Inc., and
James River Insurance Company,

Third-Party Defendants

Third-Party Index No. 83709/2016

----------x

The following papers numbered 1- 17 read on this motion of DEFENDANT/THIRD-PARTY PLAINTIFF COW BAY CONTRACTING INC for an award of summary judgment in favor of co-defendant Blatt Plumbing , Inc., dismissing the complaint as asserted against it, and upon same, a change of venue, and the cross-motion of PLAINTIFF for a default judgment against Blatt Plumbing , and summary judgment against the remaining defendants on the Labor Law § 240[1] claim, and the cross-motion of DEFENDANT MHA , LLC for partial summary judgment against Cow Bay and third-party defendant D'Amico Construction , Inc.

Notice of Motion , Affirmation , Exhibits A-E /Cow Bay	1
Affirmation in Opposition/Support Cross-Motion, Exhibit	2
Reply and Opposition to Pltf's Cross-Motion	3
Notice of cross-motion of plaintiff for default judgment/summary judgment Affirmation and accompanying exhibits 1-20	4
Affirmation in Opposition /MHA	5
Affirmation in Opposition , Exhibits A,B, Supplemental Aff./Cow Bay	6,7
Affirmation in Opposition , Exhibit A /James River	8
Affirmation in Opposition, Exhibit A /D'Amico	9
Affirmation in Reply, Memo of Law /Exhibits 1-6 /Pltf	10
Notice of Cross-Motion, Affirmation, Exhibits A-C /MHA	11
Affirmation in Opposition to MHA cross-motion /Cow Bay	12

[1]The action as against Senid Plumbing has been discontinued by stipulation of 04/04/16.

Affirmation in Opposition to MHA cross-motion/James River	13
Affirmation in Opposition to MHA cross-motion, Exhibit A/D'Amico	14
Affirmations in Reply /MHA	15-17

Facts and Procedural History

In this action alleging common law negligence and causative violations of Labor Law §§ 200, 240[1], and 241[6], plaintiff seeks damages for injuries allegedly sustained on June 2, 2015 while he was in the course of his employment with third-party defendant D'Amico Construction , Inc., (D'Amico). At the time , plaintiff was erecting a cinder-block wall at a Bronx County worksite, and he alleges that the scaffold on which he was standing shifted suddenly due to an improperly placed planking, causing him to lose balance, and his hand to be injured when it was pinned between the cinder block he was holding, and the wall.

Defendant MHA LLC (MHA) is the owner of the land and building then under construction , and Cow Bay Contracting, Inc. (Cow Bay) was the general contractor at the worksite.

Issue was joined in September 2015 with the service of the owner's answer that included a cross-claim as against the co-defendants .

Cow Bay commenced a third-party action against subcontractor D 'Amico, and James River Insurance Company (James River) seeking indemnification and contribution.

Defendant Blatt Plumbing Inc. (Blatt) has neither answered nor appeared in the action, and as noted, the claim against the other plumbing sub-contractor has been

discontinued.

To date, no Note of Issue has been filed.

Motion and Cross-Motions

Cow Bay now moves for summary judgment dismissal of the claim against co-defendant Blatt Plumbing , and on such determination , a change of venue pursuant to CPLR 511 and 510 on the grounds that the venue in Bronx County was predicated solely on the "residence" of that defendant. Cow Bay alternatively seeks a discretionary change of venue on the grounds that material witnesses, including the doctors and health care providers who rendered treatment to plaintiff, a resident of Queens County, maintain their offices in that county, or in Nassau or Suffolk county. The motion is supported by copies of the pleadings and by the transcript of the deposition testimony of Third-Party defendant D'Amico's principal[2] [Exhibit C], and printouts of the New York State Department of State printouts for the defendant entities confirming the county of the principal place of business for defendants MHA, LLC , and Senid Plumbing [Queens], and Cow Bay[Nassau].

Plaintiff opposes the motion for dispositive relief made on behalf of Blatt Plumbing contending that the moving defendant has no authority or standing to make the motion , as counsel was not retained by that entity to represent it, and on the further grounds that

[2]While unsigned , the copy of the transcript is admissible as it is certified by the court reporter, and its accuracy is unchallenged (see, Franco v. Rolling Frito–Lay Sales, Ltd., 103 A.D.3d 543, 962 N.Y.S.2d 54 [1st Dept.2013]), and accompanied by a transmitted letter indicating compliance with CPLR 3116.

the motion is premature. Plaintiff also contends that there are issues of fact precluding dispositive relief, including Blatt Plumbing's presence at the site "during the time of the incident" confirmed by a photograph authenticated as having been taken on 07/06/15 showing the plumbing concern's work permit in connection with the new construction with a start date of 05/07/15 and a completion date of 06/05/15. It is plaintiff's assertion that the moving papers fail to demonstrate as a matter of law, inter alia., that Blatt was not responsible for worksite safety nor a statutory agent of the owner, nor have a leasehold interest in the property.

Plaintiff seeks a default judgment against Blatt Plumbing and partial summary judgment against the remaining defendants on his Labor Law § 240[1] claim , submitting in support , his affidavit of merit , as well as his employer's deposition testimony [Exhibit 15].

Defendants and third-party defendants oppose the dispositive motion as premature, and on the further grounds that to the extent plaintiff's accident, which involves neither a "falling worker" nor "falling object" scenario , would be afforded the protection of the scaffold law, the testimony of his employer creates material issues of fact , including a viable sole proximate cause defense. In addition , it is maintained that plaintiff's affidavit may not be considered because it is unaccompanied by an affidavit of a translator pursuant to CPLR 2101[b] and his employer testified that he only spoke to plaintiff in

Spanish because "[h]e didn't understand too much English according to him , but he understood more than me." [183]

Defendant **MHA LLC.** moves for partial summary judgment on its claims for contractual indemnification and defense asserted as against Cow Bay and D'Amico respectively as a cross-claim in the main action, and as a "counterclaim"[3] in connection with Cow Bay's third-party action. In support , defendant owner submits a copy of the construction contract between MHA and Cow Bay [Exhibit B], and the subcontract between Cow Bay and D'Amico [Exhibit C], and maintains that the clear language of both agreements there are no material issues of fact that would preclude summary judgment..

Cow Bay, James River , and D'Amico all oppose the motion as premature, and Cow Bay and D'Amico also argue that there are material issues of fact as to the causative negligence of both the general contractor, and its subcontractor. It is maintained that the indemnification clause of the contractor's agreement with the owner provides for same "but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor , anyone directly or indirectly employed by them or anyone for whose acts they may be liable." As there are unresolved issues of fact as to the happening of the accident, it is asserted that an award on the indemnification claims is precluded.

---

[3]It is unclear how such a claim may be asserted by means of a counterclaim rather than a third-party action, however the third-party defendant raises no procedural objection, and opposes the motion for summary judgment on its merits, the court will treat the counterclaim as a third-party claim.

Discussion and Conclusions

Cow Bay Motion

The motion for summary judgment made on behalf of a non-answering party is denied . CPLR 3212(a) allows a party to move for summary judgment "after issue has been joined", and here, issue has not joined with respect to plaintiff's claim against Blatt Plumbing. While the movant asserts that it can move for summary judgment on behalf of another party, here an "unrepresented" party in default, it provides no authority for this contention. Cow Bay argues that it "merely presented facts for the court concerning BLATT's non-liability in this action for the purpose of seeking the rightful dismissal of all claims asserted against it . . . " However, the facts are presented for purposes of dispositive relief on behalf of another party that is in default.

With respect to the motion seeking a change of venue, it is noted that absent an order dismissing the claims against Blatt Plumbing as abandoned, i.e., finding no sufficient cause for the delay (see LaValle v Astoria Constr. & Paving Corp., 266 AD2d 28 [1999]; Graham v Chester, 60 AD2d 523 [1977]), Blatt Plumbing remains a party to the action on whose residence plaintiff can rely in selecting venue (CPLR 503 [a], [d]; see, (Haywood v. Grand Concourse Radiology, 2 A.D.3d 111, 112, 767 N.Y.S.2d 610 [1st Dept. 2003]).

The court also finds that the remainder of the motion seeking a discretionary change of venue should be denied .

In order to obtain relief pursuant to CPLR 510(3), defendant is required to assert all of the following information: the names and addresses of the witnesses, the substance and materiality of their testimony relative to the issues in the case, that the witnesses have been contacted and are willing to testify on behalf of the movant, and the manner in which they will be inconvenienced by a trial in the county where the action was commenced (Montero v. Elrac, Inc., 300 A.D.2d 9, 751 N.Y.S.2d 432 [2002]; Cardona v. Aggressive Heating, 180 A.D.2d 572, 580 N.Y.S.2d 285 [1992]). Gissen v. Boy *1190 Scouts of Am., 26 A.D.3d 289, 291, 811 N.Y.S.2d 20 [1st Dept.2006] No such showing is made here , and as a consequence, defendant's failure to carry its burden warrants denial of the motion.

Plaintiff's Cross-Motion

To the extent that the non-English speaking plaintiff [4]was required to submit his affidavit in Spanish, with a translation in English and an affidavit from a translator (see Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d 47, 54, 919 N.Y.S.2d 44; Martinez v. 123–16 Liberty Ave. Realty Corp., 47 A.D.3d 901, 850 N.Y.S.2d 201), those documents were submitted in reply to the arguments raised in the defendant's opposition, and will be considered here (see, Taveras v. Cayot Realty, Inc., 125 AD3d 754, 755 [2d Dep't 2015]).

However, upon review of the affidavit, it is clear that it fails to state any facts sufficient to constitute plaintiff's claim against Blatt Plumbing , the defaulting party. As

[4]It is noted that plaintiff verified the pleadings here, and there is no indication that he did so with the assistance of a translator.

a consequence, the motion for a default judgment is denied.

With respect to the remainder of the cross-motion seeking summary judgment on the Labor Law § 240[1] claim, the court finds that the proof on the motion , consisting of a paragraph of the same affidavit, and the deposition testimony of plaintiff's employer, as afforded all favorable inferences in favor of the non-moving parties, fails to establish that there are no triable issues of fact as to whether plaintiff's own conduct in refusing to follow his supervisor's direct instruction to replace an aluminum plank with an available wooden one in finishing the construction of the scaffold, rather than any violation of scaffold law, was the sole proximate cause of the shifting of the scaffold and the consequent injuries alleged precluding summary judgment in favor of plaintiff on his scaffold law claim (see, Valente v. Lend Lease (US) Construction LMB, Inc., 29 N.Y.3d 1104, 82 N.E.3d 448 [2017]).

D'Amico and his workers had been engaged in the assembling the scaffold with plaintiff, and the supervisor testified that he stood on the scaffold and noticed that the plank was moving.

> A. Just standing on it . I said, move it. I specifically asked him to change it without even working, not even pick up a block or mortar, nothing . I said, change it, Now, I went to the office , to the trailer, to double- check the measurements on the

drawing , but he never changed it, which I already told hin to change it. I already give an order to change it, either you or somebody else.

125:6-14

It is submitted that the refusal to comply with this explicit directive, as opposed to adherence to an employer's general instruction to avoid using unsafe equipment, creates an issue of fact of a sole proximate cause defense (compare, Gordon v E. Ry. Supply, Inc., 82 NY2d 555, 563 [1993], Scorza v. CBE, Inc., 231 A.D.2d 564, 647 N.Y.S.2d 278 [2d Dept. 1996], Batista v. Manhattanville College, 28 NY3d 1093 [2016] [the non-OSHA approved board that plaintiff used in assembling scaffold was required to be tested on the ground before being sent to the job site where it broke when he was testing it on scaffold precipitating a fall from the scaffold]), raises a triable issue of fact of a sole proximate cause defense.

MHA LLC's Cross-Motion

The standard form agreement [AIA Document A107-2007] between the owner and the general contractor as amended by a contemporaneous "Supplement", provides in pertinent part, that "[t]o the fullest extent permitted by law , Contractor shall defend, indemnify, and hold harmless MHA, LLC [other named entities] , all indemnitees required by the Transit Authority ... and each of their subsidiaries , affiliates , members,

shareholders..... against all claims , losses, expenses and damages, including without limitation reasonable attorneys' fees, court costs and disbursements , arising out of , in connection with, or as a consequence of the performance of the Work , and/or any negligent or wrongful act , error or omission or breach of contract by Contractor or any subcontractor ..... provided that Contractor shall not be obligated to indemnify or hold harmless any person to the extent that such claim , loss or damage is contributed to , caused by , or results from the gross negligence of such person. " [§ 9.15.1]

The contract also provides that work done by subcontractors on the project was to be "pursuant to an appropriate written agreement between the Contractor and the Subcontractor " that contains a requirement that the subcontractor defend, indemnify and hold harmless MHA, LLC.....and each of their subsidiaries , affiliates, members, shareholders .... as provided in paragraph 9.15.1 above." [§ 11.3.9]

The subcontract between Cow Bay and D'Amico Construction incorporates a clause that requires the latter to indemnify and hold harmless the owner and contractor to the fullest extent permitted by law, *"but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor or their agents, or anyone directly or indirectly employed by them...."* [emphasis added] .

It is MHA, LLC's assertion that the above obligations demonstrate as a matter of law that there are no issues of fact precluding an award of summary judgment on its

indemnification claims against the contractor and subcontractor.

Cow Bay and its subcontractor argue that the record here does not support a finding that their respective indemnification obligations have been triggered, as there has been no dispositive showing that plaintiff's injuries were caused by their negligent acts or omissions.

However, Cow Bay's agreement appears to provide a broad indemnification requiring only that the claim arose out of the work as limited by the owner indemnitee's gross negligence. On this record, consisting of D'Amico's testimony, there is no evidence to raise an issue of fact that the owner exercised any supervisory role with respect to the "means and methods" of the work from which the accident devolved, and as a consequence, any liability on the part of the owner for the injuries sustained by plaintiff would be vicarious only. Under these circumstances, including no unresolved issue of the owner's causative gross negligence, an award of summary judgment on the indemnification cross-claim is warranted.

In contrast, and , despite the requirements for same incorporated in the owner's contract, the subcontractor's indemnity obligation arises from a more narrowly drafted provision, requiring proof of D'Amico's negligence, and there are unresolved issues of fact with respect to this issue precluding dispositive relief at this time .

Accordingly, it is

ORDERED that the motion be and hereby is denied, and it is

ORDERED that plaintiff's cross-motion for a default judgment be and hereby is denied , and the motion for summary judgment is denied without prejudice to renew after the completion of discovery, and it is

ORDERED that defendant MHA LLC's motion for partial summary judgment be and hereby is granted to the extent of awarding summary judgment in favor MHA LLC as against Cow Bay Construction Inc. on the moving defendant's cross-claim for contractual indemnification , and the remainder of the cross-motion is denied without prejudice to renew after the completion of discovery.

This shall constitute the decision and order of this court.

Dated: March 28, 2018

Howard H. Sherman