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

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ANGELO ARDIZZONE and MARYBETH ARDIZZONE,

Plaintiffs,

- against-

SUMMIT GLORY LLC, FOSUN INTERNATIONAL LIMITED d/b/a FOSUN PROPERTY HOLDINGS, HUNTER ROBERTS CONSTRUCTION GROUP, LLC, AMERICON CONSTRUCTION INC., MILROSE CONSULTANTS, INC., GENSLER ARCHITECTURE DESIGN & PLANNING P.C., INTERIOR ARCHITECTS INC., INTERIOR ARCHITECTS P.C., SHMERYKOWSKY CONSULTING ENGINEERS, SYSKA HENNESSY GROUP, INC., DNA CONTROLLED INSPECTION LTD.,

Defendants.

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DECISION AND ORDER

Index No.: 157243-2017

Mot. Seqs. 002 & 004

HON. KATHRYN E. FREED, J.S.C.:

Motion sequence numbers 002 and 004 are consolidated for disposition. The following e-filed documents, listed by NYSCEF document number, have been reviewed by the court: 48, 49, 50, 51, 52, 53, 73, 74, 75, 90, 101, 129, 130, 131, 132, 133, 134, 135, 136 (Motion sequence 002); 81, 82, 83, 84, 85, 86, 87, 88, 100, 102, 103, 104, 112, 113, 114, 115, 116, 117, 118, 119, 137, 138 (Motion sequence 004) .

In this action, plaintiff Angelo Ardizzone alleges that he suffered personal injuries while working at a construction site.[1] In motion sequence 002, defendant Shmerykowsky Consulting Engineers (Shmerykowsky), moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' complaint and all cross claims as against it. Shmerykowsky also moves, pursuant to 22 NYCRR 130-1.1 (a), for costs.

[1]Plaintiff's wife, plaintiff Marybeth Ardizzone, asserts a derivative claim for loss of consortium.

In motion sequence 004, defendant Syska Hennessy Group, Inc. (Syska), moves, pursuant to CPLR 3212, for an order granting summary judgment, dismissing plaintiffs' complaint and all cross claims.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that he suffered personal injuries on June 9, 2016, when he fell from a ladder during the course of his employment at a construction site on the 30th floor of a building located at 28 Liberty Street, New York, New York. At the time of his accident, plaintiff was an employee of Allran Electric of New York, LLC., which is a non-party to this action.

Plaintiff filed a complaint on August 11, 2017, alleging common law negligence and violations of New York's Labor Law §§ 200, 240 (1), and 241 (6) as against defendants Hunter Roberts; Summit Glory, LLC ("Summit"); Fosun International Limited d/b/a Fosun Property Holdings; Americon Construction Inc. ("Americon"); Milrose Consultants, Inc.; Gensler Architecture Design & Planning P.C.; Interior Architects Inc.; Interior Architects, P.C.; Shmerykowsky; Syska; and DNA Controlled Inspection Ltd.

ARGUMENTS

Motion Sequence 002

In motion sequence 002, Shmerykowsky seeks an order, pursuant to CPLR 3212, granting summary dismissing the complaint and all cross-claims as against it. Shmerykowsky contends that its responsibilities at the site were limited to designing structural support for a "Skyfold" folding partition for an office build-out to be supported from the 31st

floor. Shmerykowsky argues that it was performing no work at the site when plaintiff fell, did not own or lease the premises, did not contract or subcontract with any entity to perform construction work at the premises, and did not control, operate, manage or maintain the premises. Shmerykowsky contends that it is not a proper defendant under New York's Labor Law because it did not exercise any supervisory control or direction over plaintiff or his employer. Shmerykowsky also argues that, since it was not working at the construction site on the day of the accident, it did not have any notice of the conditions which allegedly caused or created plaintiff's injury.

In an affidavit dated November 6, 2017, Shmerykowsky's principal, Marco J. Shmerykowsky, states that Jones Lan LaSalle entered into an agreement with Shmerykowsky for engineering services for the premises located at 28 Liberty Street. According to the affidavit, Shmerykowsky had finished its work pursuant to the agreement two months before plaintiff's accident; it did not own or lease the premises or contract or subcontract with any entity to perform construction work at the premises; and it did not perform any physical labor at the premises. The affidavit also states that Shmerykowsky did not control, operate, manage, or maintain the premises; did not have control over the construction project or the direction of the work; and that it did not employ or supervise plaintiff, have control over his work, or have contracts with his employer or any co-defendant on the date of the accident.

Shmerykowsky argues that the cross claims for contractual indemnification, contribution, and common law indemnification must also be dismissed as there is no evidence that Shmerykowsky was negligent. Shmerykowsky also contends that it should be awarded costs pursuant to 22 NYCCRR 130-1.1. Counsel for Shmerykowsky indicates that, on two occasions,

he requested that the action be discontinued as against Shmerykowsky.

In opposition, plaintiffs contend that the motion is premature because discovery is incomplete. Plaintiffs maintain that bills of particulars have yet to be served, depositions have not taken place, and no formal discovery has been exchanged. They contend that CPLR 3212 (f) permits a party that is opposing a motion for summary judgment to obtain discovery when it appears that facts surrounding the position of the opponent exist, but cannot be stated. Plaintiffs argue that they would need documentary evidence before discontinuing their action against any party. Plaintiffs also contend that, because the co-defendants are not stipulating to discontinue against Shmerykowsky, plaintiffs must presume that Shmerykowsky is not free from liability.

Americon also opposes Shmerykowsky's motion and argues that the motion for summary judgment is premature because discovery is outstanding. Americon argues that the only documentary evidence in support of Shmerykowsky's motion is the self-serving affidavit of Marco J. Shmerykowsky, which merely reiterates the contentions set forth in the affirmation of counsel for Shmerykowsky.

Americon argues that, while plaintiff alleges that he was caused to fall from a ladder due to debris or construction materials, evidence involving any construction or engineering work at the site prior to plaintiff's accident is relevant and should be disclosed through the discovery process. Americon contends that plaintiffs have not served a bill of particulars, depositions have not been conducted, and documentary discovery has just begun.

Summit also opposes Shmerykowsky's motion and contends that the motion is premature. Summit contends that the project at which plaintiff alleges to have been injured did not involve work performed on behalf of Summit. Summit argues that, due to the lack of discovery, it should

not be expected to have sufficient documents or information which would enable it to provide a meaningful response to the motion. Summit maintains that the discovery process must be completed before a summary judgment motion is entertained.

Motion Sequence 004

In motion sequence 004, Syska moves, pursuant to CPLR 3212, to dismiss the complaint and all cross claims as against it. Syska argues that plaintiffs' claim that it violated New York's Labor Law must be dismissed because Syska was not responsible for performing or supervising any of the work at the site. Syska contends that it neither owns nor controls the property where the alleged accident took place, that it was not a general contractor for the project, nor did it exercise supervisory control over plaintiff's work. Syska also contends that it was not working on the 30th floor when plaintiff fell, it had no notice of the conditions, and that it did not create or cause the injury producing activity.

In support of its motion, Syska submits an affidavit from Richard Drouin (Drouin), Project Manager from Syska. Drouin states that Jones Lang LaSalle Americas, Inc., and Syska entered into an agreement for engineering services involving the premises at 28 Liberty Street on the 30th floor. Drouin maintains that the scope of work included taking a survey of existing mechanical, electrical, plumbing, and fire protection systems, and for the design of new systems. He states that Syska was not present on the date of plaintiff's accident; that it did not own or lease the premises; did not contract with any entity to perform construction work; did not perform any physical labor on-site; did not control, operate, maintain, or manage the premises; and did not employ or supervise the plaintiff's work. Syska also contends that any and all cross

claims for contractual indemnification, common law indemnification, or contribution should be dismissed because there is no evidence that Syska was negligent.

Americon opposes the motion and contends that it is not clear whether Syska was on the site prior to the date of the alleged incident, or whether Syska performed work other than the survey of existing systems. Americon argues that Drouin's affidavit states in a conclusory manner that Syska did not perform any construction work on the subject site. Americon contends that non-party discovery proceedings involving Syska's contractual and common law obligations have not commenced and issues involving Syska's involvement with the subject site prior to the date of plaintiff's incident, have not yet been determined. Americon argues that evidence of any prior involvement and/or work performed in connection with the subject location is relevant and is properly elicited through the discovery process which has not commenced.

Summit contends that Syska's motion is premature insofar as it was filed prior to the exchange of any meaningful discovery. It maintains that the project at which plaintiff alleges he was injured did not involve work performed on behalf of Summit. Further, Summit argues that, due to the lack discovery, it is not in possession of sufficient documents or other information which would enable it to oppose the motion.

DISCUSSION

"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 eliminate any material issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the party opposing the motion to "present evidentiary facts in

admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

The Court of Appeals has held that, when there is insufficient evidence regarding how an accident took place and discovery could aid in establishing what occurred, a granting of summary judgment would be premature. *See Somereve v Plaza Constr. Corp.*, 31 NY3d 936, 937 (2018); *see also Groves v Land's End Hous. Co.*, 607 NE2d 790, 790-791 (1992) ("[g]iven that defendants in their affidavits asserted that they needed more discovery time to depose witnesses as to the use and existence of safety devices, and given that the discovery timetables set forth in a preliminary conference order had not yet expired, we cannot conclude that the Appellate Division erred in its disposition").

The Appellate Division, First Department, has held that an order granting summary judgment may be premature when discovery is incomplete. *See Wilson v Yemen Realty Corp.*, 74 AD3d 544, 545) (1st Dept 2010) ("in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature"); *see also Churaman v C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485, 486 (2d Dept 2016) (holding the "motion for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) . . . was premature since there has been almost no discovery in the case and the plaintiff has not been deposed"); *see also Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 755 (2d Dept 2008) ("[f]urthermore, the court should have denied as premature those branches of the defendant's motion which were for summary judgment dismissing the plaintiff's Labor Law § 200 and common-law negligence causes of action. A party should be afforded a reasonable opportunity to conduct discovery prior to the

determination of a motion for summary judgment"); *Fazio v Brandywine Realty Trust*, 29 AD3d 939, 939 (2d Dept 2006) (holding "[t]he prediscovery motion of the defendant Harvest Real Estate Services, Inc. . . . for summary judgment dismissing the complaint was premature, as the plaintiff was entitled to an opportunity to more fully develop Harvest's alleged relation to, and control over, the subject premises at the time of the accident").

Here, the formal discovery process has yet to commence. A preliminary conference has not been conducted and one is scheduled for January 22, 2019. Defendants Americon and Summit agree that the lack of discovery has impeded their ability to defend against the motions for summary judgment. A bill of particulars has not been provided and plaintiff has not been deposed about the circumstances at the site which allegedly caused his accident. Plaintiff has also not had the opportunity to testify as to which defendants, if any, were supervising or instructing his work.

Furthermore, defendants have also not been deposed to establish what work, if any, was being conducted at the site prior to, and at the time of, plaintiff's accident. While both moving defendants submit affidavits from representatives of their respective companies, the parties have not been able to question the witnesses about the statements.

Since there has been almost no discovery in this case, and because plaintiffs and defendants should have a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment, the court holds that the motions of Shmerykowsky and Syska

are premature. Accordingly, the court denies Shmerykowsky and Syska's motion for summary judgment without prejudice to renew upon the completion of discovery.[2]

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Shmerykowsky Consulting Engineers seeking summary judgment pursuant to CPLR 3212 (mot. seq. 002) is denied, with leave to renew upon the completion of discovery; and it is further

ORDERED that the motion by defendant Syska Hennessy Group, Inc. seeking summary judgment pursuant to CPLR 3212 (mot. seq. 004) is denied, with leave to renew upon the completion of discovery; and it is further

ORDERED that the parties are to appear for a preliminary conference on January 22, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: December 18, 2018

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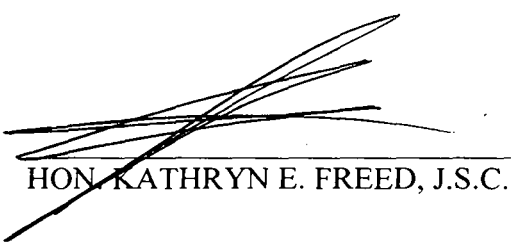

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[2]In support of its motion, Syska submits the only potentially relevant document uploaded to NYSCEF thus far: a proposal for structural engineering services from Shmerykowsky to Jones Lang LaSalle, dated October 28, 2015 and accepted November 11, 2015 (Doc. 86). However, none of the parties has had the opportunity to question Shmerykowsky about the document.