

<b>Ame v Ocean Breeze Track &amp; Athletic Assn.</b>
2019 NY Slip Op 33302(U)
November 4, 2019
Supreme Court, New York County
Docket Number: 154834/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

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INDEX NO. 154834/2017

BUJAR AME,

Plaintiff,

MOTION SEQ. NO. 005

- v -

OCEAN BREEZE TRACK & ATHLETIC ASSOCIATION,  
INC., SAGE AND COOMBE ARCHITECTS, LLP, NASDI,  
LLC, C & L CONTRACTING CORP.,

Defendants.

**DECISION + ORDER ON  
MOTION**

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NASDI, LLC

Plaintiff,

Third-Party  
Index No. 595140/2018

-against-

NICHOLAS INDUSTRIES AND CORPORATION SERVICES,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 174, 176, 177, 178, 179

were read on this motion to/for

SUMMARY JUDGMENT

In this action to recover for personal injuries arising from alleged violations of the Labor Law, defendant C & L Contracting Corp. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it. Alternatively, it moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. After a review of the motion papers, and after consideration of the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff Bujar Ame commenced this personal injury action against Ocean Breeze Track & Athletic Association, Inc. (“Ocean Breeze”), Sage and Coombe Architects, LLP (“Sage and Coombe”), NASDI, LLC (“NASDI”), Fitzpatrick & Associates, Inc. (“Fitzpatrick”), and C & L Contracting Corp. (“C & L”) by filing a summons and verified complaint on May 25, 2017. Doc. 1.<sup>1</sup> In his complaint, plaintiff alleged that he was injured on November 30, 2016 directly across the street from Ocean Breeze Park and the Ocean Breeze Athletic Complex (“the Complex”), which was located at 625 Father Capodanno Blvd., Staten Island, New York. Doc. 1 at par. 55. Plaintiff claimed that C & L was hired by the complex to “maintain, inspect, service and/or repair” the premises under construction across the street from the Complex. He claimed that he was injured on a wet and slippery elevated surface while in close proximity to a co-worker using a defective hand-operated saw and that, as a result, he is entitled to damages arising from common-law negligence committed by defendants, as well as violations of Labor Law sections 200, 240(1), and 241(6). Doc. 1, at pars. 108, 121.

The facts of this matter are set forth in detail in the decision and order of this Court entered January 11, 2018, pursuant to which this Court granted the motion (motion sequence 001) by defendant Fitzpatrick for summary judgment dismissing all claims and cross claims against it and amending the caption accordingly. Docs. 46-47, 63. Any additional relevant facts are set forth below.

On or about February 16, 2018, defendant NASDI commenced a third-party action against Nicholas Industries and Construction Services Inc. s/h/a Nicholas Industries and Construction Services (“Nicholas”) asserting claims of contribution, common-law and

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

contractual indemnification, and breach of contract to procure insurance. Doc. 51. Nicholas joined issue by its answer filed June 25, 2018. Doc. 91. In its answer, Nicholas cross-claimed against C & L seeking contribution and indemnification. Doc. 91.

By stipulation filed May 7, 2018, all claims and cross claims against defendant Sage and Coombe Architects, LLP were discontinued without prejudice. Doc. 89.

C & L now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Docs. 153-167. In an affirmation in support of the motion, counsel for C & L argues, inter alia, that the said defendant “had no involvement or legal responsibility for the work being performed in the parking lot where the plaintiff claims he sustained personal injury during the course of his employment.” Doc. 154 at par. 2.

In support of the motion, C & L also submits the affidavit of Jose F. Rodriguez-Santamaria, its project superintendent at the site. Doc. 155. According to Rodriguez-Santamaria, the accident report reflects that plaintiff was employed by Nicholas, which “was hired by NASDI to perform concrete work in connection with the construction of the parking lot across the street from the [Complex].” Doc. 155 at par. 3. He further states that there were three prime contractors for the project and three separate phases of work. Doc. 155 at par. 4. Rodriguez-Santamaria maintains that C & L, which was awarded contract number 3, was hired for the “fit-out of the building only”, and that it was retained for the construction of the final phase (Phase III) of the project, as well as “the overall completion of an indoor track and field building” at the Complex, and that it did not perform any work in the parking lot where the alleged accident occurred. Doc. 155 at par. 4.

Rodriguez-Santamaria further represents that C & L “had no role in the design, construction, management or supervision of the parking lot across the street from the [Complex]”

and that it did not supervise or direct, or have the ability to supervise or direct, any of the workers under the prime contract issued to NASDI, such as plaintiff. Doc. 155 at pars. 5-6. NASDI, explains Rodriguez-Santamaria, was a prime contractor hired by the City of New York, the owner of the project, and that NASDI hired plaintiff's employer, Nicholas, as a subcontractor. Doc. 155 at par. 5. In summary, maintains C & L, the construction of the parking lot across the street from the Complex was not within the scope of its contract. Doc. 155 at par. 6.

In an affirmation in opposition, counsel for Nicholas argues that, since C & L failed to establish its prima facie entitlement to summary judgment by submitting documentary proof in admissible form, the motion must be denied. Specifically, counsel argues that, although Rodriguez-Santamaria refers to prime contract number 3, he does not annex it to his affidavit, and thus C & L has failed to comply with the best evidence rule. Additionally, urges counsel, since C & L has not explained why the original contract is absent, it has not established that an exception to the best evidence rule exists under the circumstances.

At oral argument of the instant motion on September 10, 2019, counsel for C & L asserted that, since Rodriguez-Santamaria had submitted an affidavit explaining C & L's involvement on the Project, it was not necessary to annex the contract to the motion. In response, counsel for Nicholas represented that it would not pursue its argument regarding the best evidence rule if C & L were to produce its contract. Nicholas' attorney further stated that, if the actual contract could not be produced, then it wanted to depose a witness on behalf of C & L. By interim order dated September 10, 2019, the motion was deemed fully submitted after oral argument but C & L was directed to submit prime contract number 3 to this Court and to all

parties within 14 days and this Court ruled that, if produced, the contract would be considered in deciding the motion. Doc. 174.

On September 30, 2019, C & L's attorney filed an affirmation in further support of the motion in which he asserts, inter alia, that the pages of the contract annexed to his affirmation "set forth the scope of work under the contract." Doc. 176 at par. 3; Doc. 177. Although the pages of the contract annexed set forth a "project description", which does not reference a sidewalk across the street from the Complex, the project description, in and of itself, does not entitle C & L to summary judgment given that the pages annexed to counsel's affirmation do not name the contracting parties. However, counsel for C & L also annexes what he describes as "[t]he entire voluminous contract between C & L and [the City]." Docs. 178-179.

On October 16, 2019, this Court granted C & L permission to submit a further affidavit by one with personal knowledge addressing how the contract establishes that C & L did not do any work in the parking lot where plaintiff was allegedly injured. Doc. 180. In a further affidavit in support of the motion, Rodriguez-Santamaria states that "the construction of the parking lot was neither within the scope of work of the contract nor was it contained within the architectural drawings." Doc. 181. Nicholas has not submitted any further opposition to the motion since C & L submitted the entire contract and the additional affidavit of Rodriguez-Santamaria.

#### LEGAL CONCLUSIONS:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). Upon proffer of evidence

establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted).

Here, C & L has established its prima facie entitlement to summary judgment dismissing the complaint and all cross claims against it by submitting the contract between it and the City, as well as the affidavits of Rodriguez-Santamaria in which he attests to the fact that C & L did no work in the parking lot where plaintiff was allegedly injured. In opposition, Nicholas fails to raise a triable issue of fact. Indeed, Nicholas even stated in its opposing papers that it would withdraw its opposition to the motion based on the best evidence rule if C & L were to produce the contract, which C & L has done. Thus, the motion is granted.

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

ORDERED that the motion for summary judgment by defendant C & L Contracting Corp. is granted, and the complaint and all cross claims against said defendant are severed and dismissed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant C & L Contracting Corp. dismissing all claims and cross claims made against it in this action, and the caption is to be amended accordingly; and it is further

ORDERED that, within 20 days from entry of this order, counsel for defendant C & L Contracting Corp. shall serve a copy of this order, with notice of entry, upon counsel for all parties and upon the Clerk of the General Clerk's Office and upon the County Clerk's Office; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties are directed to appear for a previously scheduled status conference on December 10, 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.

11/4/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE