

Almer v Summit Glory Prop. LLC
2021 NY Slip Op 31811(U)
May 27, 2021
Supreme Court, New York County
Docket Number: 154195/2019
Judge: Erika M. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA M. EDWARDS

PART 11

Justice

-----X
NICK ALMER,

Plaintiff,

- v -

SUMMIT GLORY PROPERTY LLC, FOSUN
MANAGEMENT (US) INC., and BENCHMARK BUILDERS,
INC.,

Defendants.

-----X
SUMMIT GLORY PROPERTY LLC, FOSUN MANAGEMENT
(US) INC., and BENCHMARK BUILDERS, INC.,

Third-Party Plaintiffs,

-against-

LINEAR TECHNOLOGIES, INC. and FOREST ELECTRIC
CORP.,

Third-Party Defendants.

-----X
SUMMIT GLORY PROPERTY LLC, FOSUN MANAGEMENT
(US) INC., and BENCHMARK BUILDERS, INC.,

Second Third-Party Plaintiffs,

-against-

TRI RAM LLC D/B/A MOMENTUM DATA,

Second Third-Party Defendant.

-----X
LINEAR TECHNOLOGIES, INC.,

Third Third-Party Plaintiff,

-against-

TRI RAM LLC D/B/A MOMENTUM DATA,

Third Third-Party Defendant.

-----X

INDEX NO. 154195/2019

MOTION DATE 8/13/20,
9/4/2020

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595753/2019

Second Third-Party
Index No. 595378/2020

Third Third-Party
Index No. 595584/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 97, 100, 111 and (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 101, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for

DISMISS/DISCOVERY

Upon the foregoing documents and oral argument conducted on May 13, 2021, the court grants in part Third-Party Defendant Forest Electric Corp.'s ("Forest") motion to dismiss Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc.'s ("Linear") cross-claims against Forest under motion sequence number 001 to the extent that the court dismisses Linear's cross-claims against Forest, but denies costs, reasonable attorney's fees and sanctions.

Additionally, the court grants in part Linear's motion to preclude Plaintiff Nick Almer ("Plaintiff"), Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Summit Glory Property, LLC ("Summit"), Fosun Management (US) Inc. ("Fosun") and Benchmark Builders, Inc. ("Benchmark") (collectively, "Third-Party Plaintiffs") and Forest from offering evidence at trial or to compel discovery and extend the time to file a Note of Issue under motion sequence number 002 to the extent that the court compels the parties to provide the discovery set forth herein and the court extends the time to file a Note of Issue. The court denies the remainder of the relief requested.

This matter involves Plaintiff's alleged injuries he suffered when he tripped and fell on a drag-line while working for Forest at a construction site on November 16, 2018.

Forest's Motion to Dismiss

Under motion sequence 001, Forest moves to dismiss Linear's cross-claims against Forest, pursuant to CPLR 3211(a)(1), (a)(7) and (c), plus costs and reasonable attorneys' fees for this motion and sanctions against Linear and its counsel. Forest argues in substance that Linear's claims against Forest are barred by Section 11 of the Workers Compensation Law because Forest was Plaintiff's employer at the time of the alleged accident and Plaintiff did not suffer a grave

injury. Additionally, Forest moves to dismiss based on documentary evidence and relies upon the contract between Forest and Benchmark which did not require Forest to insure or indemnify Linear and argues that there was no agreement between Forest and Linear requiring indemnification or procurement of insurance on Linear's behalf. Additionally, Forest argues in substance that even if there was a contract requiring indemnification or contribution, then Linear cannot be indemnified for its own negligence. Alternatively, Forest argues in substance that the court should treat its motion as a summary judgment motion and grant Forest summary judgment in its favor as a matter of law.

Forest further argues that Linear's cross-claims are frivolous and in bad faith so sanctions are warranted. All other parties discontinued their claims and cross-claims against Forest, but Linear failed to do so despite Forest's multiple attempts to convince Linear to discontinue its cross-claims. Forest further argues that Linear is maintaining these cross-claims solely to attempt to get additional discovery from Forest to assist Linear with its other claims and defenses.

Linear opposes the motion and argues in substance that Forest failed to make a prima facie showing of its entitlement to judgment as a matter of law and it failed to provide admissible evidence as the contract was provided without an affidavit of someone with personal knowledge, there was only an Attorney Affirmation and the contract was not signed by Benchmark. Linear further argues that there is outstanding discovery that forms a reasonable basis for Linear's cross-claims and it attempts to refute Forest's other arguments.

When considering Defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but rather whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

Dismissal is warranted only where the documentary evidence utterly refutes the factual allegations in the pleadings, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of the claims (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

Here, the court dismisses Linear's cross-claims against Forest based on CPLR 3211(a)(7) and (a) (1). The court agrees with Forest and determines that Linear's cross-claims against Forest have no merit. As Plaintiff's employer, Linear's cross-claims for contribution and common-law indemnification are barred by Section 11 of the Workers Compensation Law as Plaintiff failed to allege a grave injury. Additionally, Linear failed to demonstrate that Forest is required to insure or indemnify Linear, as there is no contract requiring such obligations.

As such, the court dismisses Linear's cross-claims against Forest and there are no remaining claims or cross-claims against Forest.

Linear's Motion to Preclude

Under Motion Sequence Number 002, Linear moves to preclude Plaintiff, the Third-Party Plaintiffs and Forest from offering evidence at trial based on their failure to respond to Linear's outstanding discovery demands, or in the alternative, compelling them to respond to Linear's outstanding discovery demands and extending the time to file a Note of Issue.

Since the court dismissed Linear's cross-claims against Forest, the court denies Linear's motion to preclude as against Forest. However, to the extent not already provided, the court directs Plaintiff and the Third-Party Plaintiffs to provide Linear with the discovery set forth below within thirty (30) days of the date of this order.

The court has considered all remaining arguments and additional requests for relief and denies them unless expressly granted herein.

As such it is hereby

ORDERED that as to motion sequence 001, the court grants in part Third-Party Defendant Forest Electric Corp.'s motion to dismiss Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc.'s cross-claims against it under motion sequence number 001 to the extent that the court dismisses Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc.'s cross-claims against Third-Party Defendant Forest Electric Corp. and denies the remaining requests for relief, including, but not necessarily limited to, costs, reasonable attorney's fees and sanctions; and it is hereby

ORDERED that as to motion sequence 002, the court grants in part Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc.'s motion to preclude or to compel discovery and extend the time to file a Note of Issue to the extent that the court compels Plaintiff Nick Almer, Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Summit

Glory Property, LLC, Fosun Management (US) Inc. and Benchmark Builders, Inc. to provide the following discovery set forth herein within thirty (30) days of the date of this order, but denies the motion as to Third-Party Defendant Forest Electric Corp. and denies all other requests for discovery not specifically set forth herein:

- 1) To the extent not already provided, the court directs Plaintiff Nick Almer to provide Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc. with the following discovery:
 - a) HIPAA-compliant authorizations to obtain copies of Plaintiff's medical records, billing records and insurance records from all treating and examining healthcare providers, including, but not necessarily limited to, diagnostic tests, x-rays, MRIs, EMGs and CT scans, for injuries specified in Plaintiff's bill of particulars, for two (2) years prior to the date of the alleged accident for treatment of any body part allegedly injured in this accident and injuries related to Plaintiff's loss of enjoyment of life claim;
 - b) Authorizations for all of Plaintiff's employers, collateral source, disability and compensation records for two (2) years prior to the date of the alleged accident;
 - c) Photographs of the subject drag-line and alleged scene of the accident taken one (1) month prior to or on the date of the alleged accident;
 - d) Notices of any related liens, including the amount of said lien;
 - e) Authorizations to obtain Plaintiff's file with the Workers' Compensation Board and Social Security Disability; and
- 2) To the extent not already provided, the court directs Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Summit Glory Property, LLC, Fosun

Management (US) Inc. and Benchmark Builders, Inc. to provide Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc. with the following discovery:


- a) The last known address of John DeCorsi;
- b) Copies of all daily reports, weekly reports, safety minutes, progress photos of the alleged scene of the accident and tool box reports for one (1) month prior to and including the date of the alleged accident;
- c) Copies of their insurance policies in effect on the date of the alleged accident related to work done at the subject construction site;
- d) Response to Linear's Demand for Witnesses;
- e) Photographs of the subject drag-line and alleged scene of the accident taken one (1) month prior to or on the date of the alleged accident; and it is further

ORDERED that the court grants the portion of Third-Party Defendant/Third Third-Party Plaintiff Linear Technologies, Inc.'s motion requesting an extension of time to file a Note of Issue, to the extent that the court extends the deadline for the parties to file a Note of Issue until September 30, 2021; and it is further

ORDERED that all dispositive motions must be filed within sixty (60) days from the filing of the Note of Issue; and it is further

ORDERED that counsel are directed to appear for a virtual status conference via Microsoft Teams on August 24, 2021, at 10:00 a.m. (separate link will be provided).

5/27/2021
DATE


ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: