KELLY O'NEILL LEVY
JSC

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

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JAMES BURGUND,

Plaintiff,

- v -

VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., TRISTATE FILTER & HVAC SUPPLIES INC., NKD CONSTRUCTION INC., A&S CONSTRUCTION GROUP INC., A&S CONSTRUCTION CORP., JOHN DOE, the Name being fictitious, true name being unknown, and JOHN SMITH, the Name being fictitious, true name being unknown,

Defendants.

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VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., and STRUCTURE TONE CONTRACTING CORP.,

Third-Party Plaintiffs,

- v -

CUSHMAN AND WAKEFIELD, INC.,

Third-Party Defendants.

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INDEX NO. 155887/2014

MOTION DATE 06/13/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 96, 98, 99, 100, 101, 102, 103, 104, 106, 111, 112, 117

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

This is a Labor Law action arising from a trip and fall accident. Defendant A&S Construction Group Inc. ("A&S Group") moves, pursuant to CPLR § 3212, for summary judgment in its favor dismissing the complaint, and, pursuant to CPLR § 8303(a), for reasonable attorney's fees. Plaintiff James Burgund opposes.

BACKGROUND

In this Labor Law action, plaintiff alleges that on April 18, 2013 he tripped and fell on the condenser pump of a spot cooler during his work on the second floor of a seven-story central station building located at 360 Bridge Street in Brooklyn (hereinafter, "the building") and owned by Verizon New York Inc. (hereinafter, "Verizon"). The building was occupied by Verizon and contained Verizon computer and telephone communications equipment. Third-party defendant Cushman and Wakefield, Inc. (hereinafter, "Cushman") serves as the building's managing agent.

At the time of the accident, plaintiff was employed as a Central Office Equipment Installer for Verizon. Plaintiff testified that he was stepping off of a ladder while completing his work when he tripped over a condenser pump, a box-like object attached to a spot cooler, which is a portable air conditioning unit. Plaintiff also testified that he had seen the spot cooler before climbing the ladder but did not notice the condenser pump.

Plaintiff learned of A&S Group's potential involvement in the alleged accident while deposing Mario Frangella, Cushman's project manager [Frangella tr. (ex. F to Rice aff. for motion # 003) at 47-48]. Frangella characterized an entity he referred to as "A&S" as "the contractor who supports the network engineer," which means that "A&S" installed telecommunications equipment on behalf of Verizon (*id.* at 48). Frangella stated that "A&S" had no involvement with the cooling systems and did not state "A&S"'s full legal name (*id.*).

Thereafter, plaintiff named A&S Group and A&S Construction Corp (hereinafter, "A&S Corp"), among others, as defendants in a separate case that was consolidated with the present action. Upon service and investigation of the complaint on April 26, 2016, Arif Gecaj, A&S Group's principal, immediately contacted the individual whose business card was included in the serving papers (Gecaj aff. at para. 9). Mr. Gecaj explained to that person that A&S Group never

performed work in the building, never worked for Verizon or any of the other named defendants as a sub-contractor or in any other capacity, had no involvement with A&S Corp or its principals despite the similar corporate names, and was not even in existence at the time of the alleged accident (*id.*). Nobody ever called Mr. Gecaj back (*id.* at para. 12). Just over a year later, Mr. Gecaj learned that plaintiff had applied for entry of default against A&S Group. Mr. Gecaj attempted to contact plaintiff's counsel and explain A&S Group's lack of involvement for the aforementioned reasons, however, plaintiff's counsel refused to discuss the matter with Mr. Gecaj until he was represented by counsel. At the default motion hearing, the court similarly did not allow Mr. Gecaj to represent himself *pro se*, as A&S Group is a corporation, so the court adjourned the motion and A&S Group subsequently retained counsel at its own expense.

After conducting a brief search of the online 'Entity Database' maintained by the New York State, Division of Corporations, State Records & UCC website, A&S Group's counsel was able to demonstrate that A&S Group did not file to become a corporation in New York until May 21, 2015, a date more than two years after the alleged accident [NYS DOS Entity Information (ex. C to the Janiec aff.)]. A&S Group composed a letter to plaintiff on June 14, 2017 requesting a voluntary discontinuance of the action against it and attaching the state corporate database report [Letters (ex. D to the Janiec aff.)]. Plaintiff's counsel replied on June 28, 2017, stating that they hoped to verify A&S Group's claims and pledging to take action once they received outstanding discovery materials (*id.*). A&S Group sent another letter to plaintiff's counsel dated August 1, 2017 asking what plaintiff planned to do about the voluntary discontinuance (*id.*). Plaintiff's counsel replied on August 8, 2017 and informed A&S Group that they did not receive the necessary contracts and other materials which would allow for voluntary discontinuance (*id.*).

A&S Group renewed its request for a voluntary discontinuance on November 1, 2017, to which plaintiff's counsel never replied (*id.*). A&S Group accordingly filed this instant motion.

ARGUMENTS

A&S Group seeks summary judgment in its favor, denying any liability and asserting that plaintiff wrongfully included it in this action without any factual basis. In opposition, plaintiff asserts that the motion is premature because of insufficient discovery about A&S Group's alleged involvement. Plaintiff also suggests that the court should not dismiss A&S Group from this action because A&S Group failed to affirmatively disprove that they were not conducting business in New York prior to the company's date of incorporation.

A&S Group requests attorney's fees based on plaintiff's continued failure to voluntarily discontinue the action against it despite affirmative evidence showing A&S Group had no involvement in the subject accident. A&S Group contends that Mr. Gecaj was unable to defend his corporation in this action *pro se* and that plaintiff's repeated failure to discontinue the case without a valid factual basis for continuing necessitated the accrual of the attorney's fees requested in relief. Plaintiff contends that an earlier discontinuance against another party in a separate action demonstrates its good faith intention not to harm innocent parties and therefore costs should not be awarded. Plaintiff notes that it never received a contract from either A&S Group or A&S Corp and argues that continuance against A&S Group is justified because of the failure of A&S Corp to answer to the complaint.

DISCUSSION

Summary Judgment

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen*

v. N.Y. City Health & Hosps. Corp., 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (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). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

The court finds that A&S Group had no involvement in the alleged accident. From the moment that its principal, Mr. Gecaj, was served in this action, A&S Group has presented affirmative evidence that it never performed work at the building, had no professional relationships with Verizon, Cushman, A&S Corp, or any of the other named parties to this action, and was not even a registered corporation in New York at the time of the alleged accident (Gecaj aff. at para. 9). Accordingly, A&S Group has demonstrated a *prima facie* entitlement to judgment as a matter of law.

In response, plaintiff has not met its burden of establishing the existence of further triable factual issues against A&S Group. Plaintiff justifies maintaining this action against A&S Group based entirely on Mr. Frangella's ambiguous testimony, where Mr. Frangella not only failed to state exactly which "A&S" entity he was referring to, but also mentioned that whomever "A&S" was, that entity had no involvement with the cooling systems that allegedly caused the accident (Frangella tr. at 47-48). Moreover, the court declines plaintiff's suggestion to speculate about possible work A&S Group performed before incorporation as plaintiff has failed to bolster its allegation with any affirmative evidence. Given that a search of licensed corporations on the

state's online database revealed that there were 291 registered entities whose name begins with "A&S" and that 156 of those corporations were still active, it is highly unlikely that the A&S to which Mr. Frangella referred was A&S Group, which did not exist at the time of the accident, rather than numerous other possibilities identified on the database [NYS Dep't of State Database (ex. H to the Janiec aff. in reply)].

Accordingly, plaintiff has failed to create a genuine issue of material fact and therefore the branch of A&S Group's motion for summary judgment in its favor is granted.

Attorney's Fees

A&S Group has requested reasonable attorney's fees, pursuant to CLPR § 8303(a), for the continued failure of plaintiff's counsel to discontinue this action against it. CPLR § 8303(a) "imposes a duty on a party and [its] attorney to act in good faith to investigate a claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis." *Smullens v. MacVean*, 183 A.D.2d 1105, 1106-07 (3d Dep't 1992). If the court determines that the behavior of a party, its attorney, or both is frivolous, CLPR § 8303(a) obligates the court to impose sanctions. *Nyitray v. New York Athletic Club in City of New York*, 274 A.D.2d 326, 327 (1st Dep't 2000). Defined by the statute, frivolity is met whenever "an action [is] commenced or continued without any reasonable basis in law or fact, and without any good-faith argument for an extension, modification, or reversal of existing law." *Grasso v. Matthew*, 164 A.D.2d 476, 480 (3d Dep't 1991).

Courts have adopted a 'reasonable investigation' standard to determine frivolity in the CPLR § 8303(a) context. *Jacobson v. Chase Manhattan Bank, N.A.*, 174 A.D.2d 709, 710 (2d Dep't 1991). If a reasonable investigation by the plaintiff or his attorney would have revealed that the action against A&S Group was meritless, then failure to discontinue the action

constitutes frivolous behavior (*id.*). In the *Smullens* case, the Third Department determined frivolity based on "whether [the party and their] attorney knew or should have known that [continuing the] action was meritless." *Smullens*, 183 A.D.2d at 1107. Because a reasonable investigation of public records would have established the frivolous nature of the action and because the action was not voluntarily discontinued after multiple requests by the defendant, the *Smullens* court upheld sanctions against the party and its attorney. *Id.* at 1108. The First Department has also held that CPLR § 8303(a) sanctions may be inappropriate where the action was brought in good faith. *Hinckley v. Resciniti*, 159 A.D.2d 276, 277 (1st Dep't 1990); *Rittenhouse v. St. Regis Hotel Joint Venture*, 180 A.D.2d 523, 525 (1st Dep't 1992).

Based on the evidence presented, a reasonable investigation of the online state corporate database by plaintiff's attorney would have revealed that A&S Group did not exist at the time of the alleged accident and that dozens of other entities in New York had the name 'A&S'. A&S Group's attorney also sent three separate letters informing plaintiff and his counsel that there was no reasonable factual basis for continuing the action against A&S Group. Given these facts, the only other basis for keeping A&S Group in the lawsuit was the pure speculation that A&S Group performed illegal, unlicensed work. *See Bostich v. U.S. Trust Corp.*, 233 A.D.2d 193, 194 (1st Dep't 1996) (upholding imposition of $500 in CPLR § 8303(a) sanctions where plaintiff failed to establish any link between alleged misbehavior and the party who was sued).

Given that plaintiff's counsel included A&S Group based on Mr. Frangella's unclear testimony, plaintiff's commencement of the action here may well have been in good faith. However, CPLR § 8303(a) pertains not only to frivolous commencements of actions, but also to frivolous continuations of actions. Regardless of whether it originally brought this action in good faith, plaintiff's repeated failure to voluntarily discontinue the action, despite three specific

requests by A&S Group's counsel, constituted a bad-faith, frivolous continuation that warrants sanctions under CPLR § 8303(a). *See Mantis v. United Cerebral Palsy Ass'n of Nassau Cnty, Inc.*, 662 N.Y.S.2d 698, 701 (Sup. Ct., Nassau Cty. 1997) (imposing CPLR § 8303(a) sanctions against plaintiff and her attorneys for frivolous behavior in failing to discontinue otherwise meritless action despite four separate requests by defendants); *see also Fritze v. Versailles*, 158 A.D.2d 669, 669-70 (2d Dep't 1990) (affirming imposition of CPLR § 8303(a) sanctions for frivolous action which, even if commenced in good faith, was continued long after the plaintiff's counsel knew it to be meritless).

Thus, the court grants the branch of A&S Group's motion pursuant to CPLR § 8303(a), for reasonable attorney's fees.

The court has considered the remaining arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of defendant A&S Construction Group Inc.'s motion, pursuant to CPLR § 3212, for summary judgment in its favor and dismissal of the complaint with respect to A&S Construction Group Inc. is granted; and it is further

ORDERED that the branch of defendant A&S Construction Group Inc.'s motion, pursuant to CPLR § 8303(a) for reasonable attorney's fees is granted; and it is further

ORDERED that defendant A&S Construction Group Inc. is directed to provide documentation establishing such fees, costs and expenses by submission of an affirmation, within thirty (30) days of the date of this order; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8-10-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE