

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21541
W/kmg

_____AD3d_____

Argued - November 25, 2008

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
EDWARD D. CARNI
CHERYL E. CHAMBERS, JJ.

2007-09005

DECISION & ORDER

Staten Island New York CVS, Inc., appellant-respondent, v Gordon Retail Development, LLC, et al., defendants third-party plaintiffs-respondents-appellants, Virga Commercial Contractors, Inc., defendants second third-party plaintiffs-respondents-appellants, Nave, Newell & Stampfl, Ltd., et al., defendants-respondents-appellants; Future Tech Consultants of New York, Inc., third-party defendant-respondent, et al., second third-party defendants. (Action No. 1)

Staten Island New York CVS, Inc., et al., appellants, v MXW Holding Corp., respondent. (Action No. 2)

(Index Nos. 10972/03, 12197/04)

Allyn & Fortuna, LLP, New York, N.Y. (Nicholas Fortuna of counsel), for appellant-respondent in Action No. 1 and appellants in Action No. 2.

O'Connell and Aronowitz, Albany, N.Y. (Jeffrey J. Sherrin and William F. Berglund of counsel), for defendants third-party plaintiffs-respondents-appellants in Action No. 1 and respondent in Action No. 2.

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STATEN ISLAND NEW YORK CVS, INC. v GORDON RETAIL DEVELOPMENT, LLC
STATEN ISLAND NEW YORK CVS, INC. v MXW HOLDING CORP.

Newman Fitch Altheim Myers, P.C., New York, N.Y. (Charles W. Kreines and Martin I. Nagel of counsel), for defendant second third-party plaintiff-respondent-appellant in Action No. 1.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Richard E. Lerner and Glenn J. Fuerth of counsel), for defendants-respondents-appellants in Action No. 1.

Porzio, Bromberg & Newman, P.C., New York, N.Y. (Allan I. Young of counsel), for third-party defendant-respondent in Action No. 1.

In related actions to recover damages for breach of contract, breach of warranty, and negligence, Staten Island New York CVS, Inc., the plaintiff in Action No. 1 and a plaintiff in Action No. 2, and CVS Pharmacy, Inc., a plaintiff in Action No. 2, appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated September 7, 2007, as granted those branches of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLP, the cross motion of the defendant Virga Contractors, Inc., and the separate cross motion of the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., which were for summary judgment dismissing the causes of action to recover damages for breach of contract and breach of warranty insofar as asserted against each of them in Action No. 1 and granted the motion of the defendant MXW Holding Corp. for summary judgment dismissing the complaint in Action No. 2, the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, cross-appeal, as limited by their notice of appeal and brief, from so much of the same order as denied that branch of their motion which was for summary judgment dismissing the cause of action to recover damages for negligence insofar as asserted against them in Action No. 1, the defendant Virga Commercial Contractors, Inc., separately cross-appeals, as limited by its brief, from so much of the same order as denied that branch of its cross motion which was for summary judgment dismissing the cause of action to recover damages for negligence insofar as asserted against it in Action No. 1, and the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., separately cross-appeal, as limited by their notice of cross appeal and brief, from so much of the same order as denied those branches of their separate cross motion which were for summary judgment dismissing the cause of action to recover damages for negligence insofar as asserted against them in Action No. 1 and granted that branch of the separate cross motion of the third-party defendant Future Tech Consultants of New York, Inc., which was for summary judgment dismissing the cross claim for contribution insofar as asserted against it by the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., in Action No. 1.

ORDERED that the appeal by CVS Pharmacy, Inc., a plaintiff in Action No. 2, from so much of the order as granted those branches of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLP, the cross motion of the defendant Virga Contractors, Inc., and the separate cross motion of the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., which were for summary judgment dismissing the causes of action to recover damages for breach of contract and breach of warranty insofar as asserted against each of them in Action No. 1 is dismissed, as it is not aggrieved by those portions of the order (*see*

CPLR 5511); and it is further,

ORDERED that the order is modified, on the law and the facts, (1) by deleting the provisions thereof granting those branches of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, the cross motion of the defendants Virga Commercial Contractors, Inc., and the separate cross motion of the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., which were for summary judgment dismissing the causes of action to recover damages for breach of contract insofar as asserted against each of them in Action No. 1 and substituting therefor provisions denying those branches of the motion, cross motion, and separate cross motion, (2) by deleting the provisions thereof granting those branches of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, and the cross motion of the defendant Virga Commercial Contractors, Inc., which were for summary judgment dismissing the cause of action to recover damages for breach of warranty insofar as asserted against each of them in Action No. 1 and substituting therefor provisions denying those branches of the motion and the cross motion, (3) by deleting the provisions thereof denying those branches of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, and the cross motion of the defendant Virga Commercial Contractors, Inc., which were for summary judgment dismissing the cause of action to recover damages for negligence insofar as asserted against each of them and substituting therefor provisions granting those branches of the motion and the cross motion, and (4) by deleting the provision thereof granting that branch of the cross motion of the third-party defendant Future Tech Consultants of New York, Inc., which was for summary judgment dismissing the cross claim for contribution insofar as asserted against it by the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., in Action No. 1 and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as reviewed on the appeal by CVS Pharmacy, Inc., insofar as appealed from by the plaintiff Staten Island New York CVS, Inc., and insofar as cross-appealed from by the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, and separately cross-appealed from by the defendant Virga Commercial Contractors, Inc., and the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., without costs or disbursements.

The Supreme Court should have denied that branch of the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC (hereinafter the Gordon defendants), which was for summary judgment dismissing the causes of action to recover damages for breach of contract insofar as asserted against them in Action No. 1. The Gordon defendants failed to establish their entitlement to judgment as a matter of law in connection with that cause of action since their submissions revealed the existence of triable issues of fact with respect to the existence of a valid contract (*see Mega Contr., Inc. v Insurance Corp. of N.Y.*, 37 AD3d 669, 670).

Upon the showing by the defendant Virga Commercial Contractors, Inc. (hereinafter Virga), that no contract existed between it and the plaintiff Staten Island New York CVS, Inc. (hereinafter SINY CVS), SINY CVS raised a triable issue of fact as to whether it was an intended third-party beneficiary of the contract between Virga and the defendants MPG Construction Corp.,

and MPG Construction, LLC (*see Dormitory Auth. of State of N.Y. v Baker, Jr., of N.Y.*, 218 AD2d 515; *Facilities Dev. Corp. v Miletta*, 180 AD2d 97, 100-101; *Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 455).

The gravamen of the negligence causes of action asserted by SINY CVS against the Gordon defendants and Virga in Action No. 1 is that the work that was performed under the contracts was performed in a less than skillful and workmanlike manner. Such causes of action sound in breach of contract, not negligence (*see Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 805; *Kopec v Hempstead Gardens*, 264 AD2d 714, 715-716; *Zulinski v Merkley Bros.*, 247 AD2d 613, 614). SINY CVS's allegations of negligence against those defendants are "merely a restatement, albeit in slightly different language, of the . . . contractual obligations asserted in the cause[s] of action for breach of contract" against those defendants (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390).

The Supreme Court erred in granting that branch of the cross motion of the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., which was for summary judgment dismissing the cause of action to recover damages for breach of contract insofar as asserted against them in Action No. 1 on the ground that no contract existed between them and SINY CVS. To the contrary, those defendants conceded in their motion papers that such a contract existed.

The Supreme Court, however, properly denied that branch of the cross motion of the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., which was for summary judgment dismissing the cause of action to recover damages for negligence insofar as asserted against them in Action No. 1. In opposition to the prima facie showing of Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., of their entitlement to judgment as a matter of law in connection with that cause of action, SINY CVS raised a triable issue of fact as to whether there was a departure from accepted standards of care and whether that departure was a proximate cause of the injury (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 323; *Zuckerman v City of New York*, 49 NY2d 557).

The Supreme Court erred in granting that branch of the cross motion of the third-party defendant Future Tech Consultants of New York, Inc., which was for summary judgment dismissing the cross claim for contribution insofar as asserted against it by the defendants Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., in Action No. 1. Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same . . . injury to property . . . may claim contribution among them" (CPLR 1401; *see Plemmenou v Arvanitakis*, 39 AD3d 612, 614). The injury allegedly caused by the alleged negligence of Nave, Newell & Stampfl, Ltd., and Nave Newell, Inc., is the same injury as the one allegedly caused by the alleged negligence of the third-party defendant Future Tech Consultants of New York, Inc. (*see Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603).

The plaintiffs' remaining contentions regarding Action No. 2, commenced against MXW Holding Corp., are without merit.

The defendants' remaining arguments regarding damages for lost profits are without merit (*see Cifone v City of Poughkeepsie*, 234 AD2d 331, 332).

FISHER, J.P., FLORIO, CARNI and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court