

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

D25904
O/kmg

_____AD3d_____

Argued - December 21, 2009

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-05331

DECISION & ORDER

Nicole Corrado, respondent, v East End Pool & Hot
Tub, Inc., et al., appellants.

(Index No. 22430/05)

Faust Goetz Schenker & Blee, LLP, New York, N.Y. (Lisa L. Gokhulsingh of
counsel), for appellants.

Paris & Chaikin, New York, N.Y. (Jason L. Paris and Sourean A. Israelyan of
counsel), for respondent.

In an action, inter alia, to recover damages for negligence and breach of contract, the
defendants appeal from an order of the Supreme Court, Queens County (Rosengarten, J.), dated May
13, 2009, which, among other things, denied that branch of their cross motion which was for
summary judgment dismissing the complaint.

ORDERED that the order is modified, on the law, by deleting the provision thereof
denying that branch of the defendants' cross motion which was for summary judgment dismissing the
complaint and substituting therefor a provision granting that branch of the cross motion which was
for summary judgment dismissing the cause of action to recover damages for negligence and
otherwise denying the branch of the cross motion which was for summary judgment dismissing the
complaint with leave to renew after the completion of discovery; as so modified, the order is affirmed,
with costs to the plaintiff.

The gravamen of the negligence cause of action in this case is that the work performed
under the contract was performed in a less than skillful and workmanlike manner. Such a cause of
action sounds in breach of contract, not negligence (*see Staten Is. N.Y. CVS, Inc. v Gordon Retail
Dev., LLC*, 57 AD3d 760, 763; *Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 805). The

January 26, 2010

Page 1.

CORRADO v EAST END POOL & HOT TUB, INC.

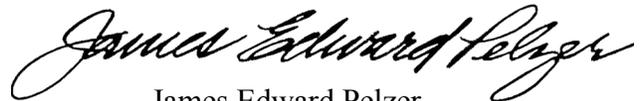
plaintiff's allegations of negligence are "merely a restatement, albeit in slightly different language, of the . . . contractual obligations asserted in the cause[s] of action [alleging] breach of contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390). Accordingly, the Supreme Court should have granted that branch of the defendants' cross motion which was for summary judgment dismissing the negligence cause of action.

The defendants failed to meet their prima facie burden of demonstrating entitlement to judgment as a matter of law on the remaining causes of action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). As the defendants failed to meet their prima facie burden, we need not consider the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). In any event, the defendants' cross motion was made before discovery was complete, and many of the essential issues of fact are within the knowledge of individuals who have not yet been deposed (*see Long Is. Power Auth. v Anderson*, 67 AD3d 652; *Town of Riverhead v County of Suffolk*, 66 AD3d 1004; *Yerushalmi & Assoc., LLP v Westland Overseas Corp.*, 21 AD3d 1098, 1099).

The defendants' remaining contention is without merit (*see* CPLR 325[d]; New York City Civil Court Act §§ 201, 202).

SKELOS, J.P., BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court