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

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_____AD3d_____ Argued - October 9, 2012

PETER B. SKELOS, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2011-05702 DECISION & ORDER

Nikolai Katz, et al., plaintiffs-appellants, v Eastern Construction Developing and Custom Homes, Inc., respondent, Franks Plumbing and Heating, defendant-appellant.

(Index No. 20634/07)

Sheps Law Group, P.C., Melville, N.Y. (Robert C. Sheps and Aimee Alix of counsel), for plaintiffs-appellants.

Feldman, Rudy, Kirby & Farquharson, P.C., Jericho, N.Y. (Gerald F. Kirby of counsel), for defendant-appellant.

Farber, Brocks & Zane LLP, Mineola, N.Y. (Braden H. Farber and Tracy L. Frankel of counsel), for respondent.

In an action to recover damages for negligence and breach of contract, the plaintiffs appeal from so much of an order of the Supreme Court, Suffolk County (Gazzillo, J.), entered May 26, 2011, as granted that branch of the motion of the defendant Eastern Construction Developing and Custom Homes, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, and the defendant Franks Plumbing and Heating separately appeals from so much of the order as granted that branch of the motion of the defendant Eastern Construction Developing and Custom Homes, Inc., which was for summary judgment dismissing the cross claim against it.

ORDERED that the order is affirmed, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

The defendant Eastern Construction Developing and Custom Homes, Inc. (hereinafter

Eastern), established its prima facie entitlement to judgment as a matter of law dismissing the plaintiffs' negligence cause of action insofar as asserted against it by submitting evidence that the cause of the subject fire at the plaintiffs' premises was unrelated to its work, and that it committed no act from which a jury could rationally infer that it negligently caused the fire (*see Tower Ins. Co. v Allstate Ins. Co.,* 31 AD3d 630). In addition, Eastern established its prima facie entitlement to dismissal of the plaintiffs' cause of action alleging breach of contract insofar as asserted against it by submitting, among other things, proposals for the work, which did not include fire protection services. In opposition, the plaintiffs failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324). The plaintiffs' remaining contentions are without merit.

Similarly, Eastern established its prima facie entitlement to judgment as a matter of law dismissing the cross claim of the defendant Franks Plumbing and Heating (hereinafter Franks). In opposition, Franks failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted Eastern's motion for summary judgment dismissing the complaint insofar as asserted against it and the cross claim against it.

SKELOS, J.P., FLORIO, LEVENTHAL and HALL, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court