

Annino v Termi-Shield Exterminating Service Corporation

2003 NY Slip Op 30070(U)

May 20, 2003

Supreme Court, Suffolk County

Docket Number: 1000569/2000

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

COPY

Index No.: 05694-00
Ret. Date: 7-3-02
Mot. Seq. #001, 002 & 003

SUPREME COURT - STATE OF NEW YORK
IAS PART XXIV, SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

CALENDAR DATE: December 18, 2002
MNEMONIC: MG; XMD; XMOT D

GEORGE ANNINO, LINDA ANNINO and
TERESA WELCH,

Plaintiffs,

-against-

PLTF'S/PET'S ATTY:
WALLACE & WITTY
600 Suffolk Ave.
Brentwood, NY 11717

TERMI-SHIELD EXTERMINATING SERVICE :
CORPORATION, JOHN DOE d/b/a TERMI- :
SHIELD EXTERMINATING SERVICE, ART :
HAGGARTY, HOUSEMASTER HOME INSPECTION: :
SERVICES, INC., JOHN DOE d/b/a HOUSE- :
MASTER HOME INSPECTIONS OF SUFFOLK :
and IM KAPCO, INC., :

DEFT'S/RESP'S ATTY:
WILSON ELSER MOSKOWITZ EDELMAN
150 E. 42nd St.
New York, NY 10017
L'ABBATE BALKAN COLAVITA CONTINI
Attys for Housemaster
1050 Franklin Ave.
Garden City, NY 11530

Defendants.

Upon the following papers numbered 1 to 36 read on these motions
for summary judgment and cross motions to amend

Notice of Motion/Order to Show Cause and supporting papers 1-11 ; Notice
of Cross Motion and supporting papers 12-19; 20-24 ; Answering Affidavits and
supporting papers 25-31 ; Replying Affidavits and supporting papers
32-36 ; Other ; and after hearing counsel in support of
and opposed to the motion it is,

ORDERED that this motion by the defendants, Housemaster Home
Inspections of Suffolk and IM Kapco, Inc., for partial summary judgment
and dismissal of plaintiffs' complaint is, after careful consideration
by the Court, granted and the plaintiffs' action against these two (2)
defendants is dismissed in its entirety.

Plaintiffs purchased premises located at 31 Westcliff Drive in
Mount Sinai, Suffolk County on Long Island, New York on or about May 10,
1999. Plaintiffs sought certain services from the various defendants in
connection with the purchase of these premises. Plaintiffs entered into
an agreement in March of 1999 with Termi-Shield Exterminating Service
Corporation to inspect the premises for termite and insect infestation
and damage and on March 18, 1999 with defendant Housemaster for a home
inspection of the premises. In its contract with Housemaster, defendant
Housemaster specifically stated it did not provide services for termite
or insect damage and clients desiring such service should contact a
specialist.

Plaintiffs after purchasing the house allegedly discovered termite and wood insect infestation and thereafter instituted this lawsuit. Defendants, Housemaster and IM Kapco, Inc., now move for summary judgment pursuant to CPLR 3212 arguing that they were to conduct a visual inspection of the house and specifically disclaim any inspection for termite or wood insect infestation. Plaintiffs oppose the motion and cross move (seq.002) to amend their complaint to allege gross negligence against defendant, Housemaster, and an amended notice of motion (seq.004) seeking to amend their complaint as against defendant, Termi-Shield, to also allege gross negligence as against it.

For the following reasons, the defendants' motion for summary judgment (seq.001) pursuant to CPLR §3212 is hereby granted and the plaintiffs' action against the defendants, Housemaster and IM Kapco, Inc., is hereby dismissed, the cross motion to amend as against the defendants, Housemaster and IM Kapco, (seq. 002) is denied and the amended cross motion (seq.003) to amend as against Termi-Shield is granted and denied in all other respects.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News. Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [VanNov v. Corinth Central School, District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. DiSabato v. Soffee, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); Usefof v. Yamali, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

Here, in the case at bar, the defendants produce the agreement entered into between the parties dated March 18, 1999 and signed by George and Linda Annino but not Theresa Welch in which the defendants clearly disclose that they would perform a home inspection but that such inspection would not include wood destroying insects or organisms. While the defendants seek by this motion to limit their liability claims to the costs associated with the inspection, the Court in a complete review and analysis of the record in this case finds no basis to establish any liability by these moving defendants to the plaintiffs for negligence or contract liability for a subsequently discovered termite infestation. Plaintiffs have failed to set forth any proof to establish a factual issue requiring resolution by a trier of fact to deny summary disposition to the defendants Housemaster and IM Kapco, Inc.. The very fact that the plaintiffs hired Termi-Shield to do a termite inspection provides the proof that Housemaster and IM Kapco, Inc. specifically disclaimed any responsibility in their inspection process for termite infestation.

For those reasons, plaintiffs have failed to bare proof that raises a factual issue that these defendants bear some or partial responsibility for a subsequently discovered termite infestation. Upon those grounds, the defendants should not be parties to this lawsuit and

upon their motion for summary judgment, the Court grants the motion and dismisses the plaintiffs' action against them. The Court need not address the claims advanced by defendants Housemaster and IM Kapco Inc. limiting their liability to the cost of the inspection citing to Peluso v. Tauscher Cronacher Professional Engineer, P.C., AD2 325, 704 NYS2d 289 (2nd Dept. 2000) and its progeny in light of the Courts dismissal of plaintiffs' action against them. As to plaintiffs' argument that further discovery precludes summary disposition, that argument is clearly without merit. An analysis of the facts in this case fails to substantiate or infer liability on behalf of these defendants for termite infestation as defendant Housemaster specifically disclaimed coverage in its contract or agreement with the plaintiffs. The plaintiffs have failed to provide any indicia of evidence which would support the conclusion that further discovery would provide a basis to find liability against these two defendants.

The cross motion and amended cross motion to amend the complaint to plead gross negligence as to these defendants, Housemaster and IM Kapco, Inc., is denied. In light of the Court's decision dismissing the plaintiffs' claims, the Court need not reach the further argument for dismissal as to plaintiff Theresa Welch individually not being a party to the agreement for inspection services with the defendants.

As to the cross motion to amend to assert a claim of gross negligence as against the defendant, Termi-Shield, that aspect of the motion is granted and the plaintiffs are directed to re-serve an amended complaint with the appropriate caption and claims within thirty (30) days of service of a copy of this order. The defendant, Termi-Shield, shall have an additional twenty (20) days from service of the amended complaint to serve a new and amended answer.

As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briar-Cliff Farms, 17 N.Y.S.2d 67, 268 N.Y.S.2d

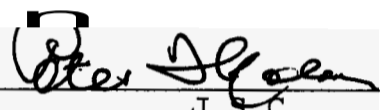
18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Accordingly, the defendants Housemaster and IM Kapco, Inc.'s motion for summary judgment pursuant to CPLR §3212 is granted and the plaintiffs' action is dismissed as against them.

SETTLE JUDGMENT

The foregoing constitutes the decision of this Court.

Date: MAY 20 2003



J.S.C.