

**Allstate Insurance Company v Eastern Express
Home Improvements, Inc.**

2004 NY Slip Op 30054(U)

August 16, 2004

Supreme Court, Queens County

Docket Number: 0014343/4343

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

ALLSTATE INSURANCE COMPANY a/s/o x
DANIEL FINKELSTEIN,

Plaintiff,

Index
Number 14343 2003

Motion
Date June 16, 2004

-against-

EASTERN EXPRESS HOME IMPROVEMENTS,
INC. d/b/a EASTERN EXPRESS ROOFERS,
ANTHONY PRAINITO and ROSARIO
PRAINITO,

Defendants.

Motion
Cal. Number 3

x

The following papers numbered 1 to 8 were read on this motion by the defendants Anthony Prainito and Rosario Prainito, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims interposed against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-6
Reply Affidavits	7-8

Upon the foregoing papers it is ordered that the motion is determined as follows:

On February 8, 2002, a fire on the roof of a premises owned by Anthony and Rosario Prainito (the Prainitos) occurred as a result of the negligence of the defendant Eastern Express Home Improvements, Inc., d/b/a Eastern Express Roofers (Eastern). At the time, Karen and Pedro Munoz (the Munoz) were tenants at the premises. Although the record is not entirely clear on the issue, it appears that Daniel Finkelstein (Finkelstein) was also a tenant at the premises.

The Munoz commenced an action against Eastern and the Prainitos (see Munoz et al. v Eastern Express Home Improvements, Inc. et al., Index No. 12403/02) (the Munoz action). In the Munoz action, by order dated March 24, 2004 and entered on April 2, 2004, this court (Schulman, J.), inter alia, granted a cross motion by the Prainitos for summary judgment dismissing the Munoz' complaint and all cross claims interposed against them.

In reaching that determination this court found that: (1) there was no dispute that the defendant Eastern was an independent contractor hired by the Prainitos; (2) there was no evidence that the Prainitos knew of any special dangers inherent in the roof repair work, or that they should have anticipated any special dangers; and (3) the record was devoid of any evidence that the Prainitos knew or should have known of Eastern's propensity for the conduct which caused the accident. A judgment in favor of the Prainitos was entered in the Munoz action on April 21, 2004.

Allstate Insurance Company as subrogee of Finkelstein (Allstate) commenced this action by filing the summons and complaint on June 11, 2003. Allstate seeks to recover from Eastern and the Prainitos all sums it paid to Finkelstein as a result of the fire, based upon the Prainitos' negligent hiring and supervision of Eastern. A preliminary conference order was issued on December 22, 2003; however, a copy of that order is not part of the record.

By short form order dated April 28, 2004 and entered May 6, 2004 this court (Satterfield, J.), granted Allstate's motion for, inter alia, a default judgment against Eastern in the amount of \$164,744.52, together with interest calculated at the statutory rate, plus costs and disbursements.

To date, no note of issue has been filed in this action.

The Prainitos now move for summary judgment dismissing Allstate's complaint and all cross claims interposed against them. In support they annex the examinations before trial (EBTs) taken in the Munoz action, and contend that they are not liable for the negligence of their independent contractor, Eastern.

Allstate contends that the Prainitos' motion is premature as EBTs have not been conducted, and the EBTs in the Munoz action were not sufficiently vigorous on the issue of the Prainitos' negligent hiring and supervision of Eastern. The Prainitos reply that Allstate has not submitted any affidavit by Finkelstein which would raise an issue of fact, and has failed to proceed with discovery.

In opposition to the Prainitos' evidence, Allstate submitted only the affidavit of its attorney, and it failed to submit any evidence demonstrating that the facts are different from those previously testified to by the Munoz, the Prainitos or Eastern's representative. In addition, Allstate neither annexed the preliminary conference order, nor indicated its previous attempts to obtain discovery in this action.

Under these circumstances, Allstate's contention that summary judgment is premature is without merit, as Allstate's opposition consists of nothing more than a mere hope that somehow it will uncover evidence that will prove its case (see Federal Deposit Ins. Corp. v Schwartz, 55 NY2d 702 [1981]; Aminov v East 50th St. Restaurant Corp., 232 AD2d 592 [1996], lv denied 89 NY2d 815 [1997]; Sun Yan Ko v Lincoln Sav. Bank, 99 AD2d 943 [1984], affd 62 NY2d 938 [1984]).

Accordingly, the Prainitos' motion for summary judgment dismissing the complaint and all cross claims interposed against them is granted, and the complaint and all cross claims interposed against the Prainitos are dismissed.

Dated: August 16, 2004



J.S.C.