

**Araujo v Tiano's Construction Corp.**

2004 NY Slip Op 30231(U)

September 20, 2004

Supreme Court, New York County

Docket Number: 0603101/2001

Judge: Richard F. Braun

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richard F. Braun  
Justice

PART 23

0603101/2001

ARAUO, TEOFILO et al  
VS  
TIANO'S CONSTRUCTION et al

SEQ 003

INDEX NO. \_\_\_\_\_

MOTION DATE May 6, 2004

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

*cross motion to strike answer*

motion to/for summary judgment

**FILED**  
SEP 23 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED
<u>1, 2</u>
<u>3, 4, 5</u>
<u>6</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
*Notice of cross motion*  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is denied because discovery was stayed by the motion, pursuant to CPLR 3114(b).*

*It is further ORDERED that the motion by defendant Tiano's Construction Company is denied due to its non-appearance and oral argument.*

*It is further ORDERED that plaintiffs' first and second causes of action are discontinued.*

*It is further ORDERED that the motion is denied, and it is further*

*ORDERED that the above order regarding the cross motion is recalled and vacated, and the cross motion is granted to the extent of setting aside the answers of the defendants Tiano's Construction, Mitroni Casala General Partnership, and Tiano's Construction*

*and it is further ORDERED that defendant Lumbermens Mutual Casualty Company shall pay a total of \$100 motion costs, and it is further*

*ORDERED that the Clerk shall enter judgment accordingly, and it is further ORDERED that the remaining causes of action be severed and shall continue.*

*This constitutes the decision of the Court. See separate Opinion.*

Dated: New York, New York, September 18, 2004

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

-----X

TEOFILO ARAUJO, FRANCISCO CONCEPCION,  
LORENZO FIGUEROA, ANDRES GONZALES, JOSE  
MARRERO, CARLOS MONTALVO, FELIX MATOS  
also known as WILFREDO ESCRIBANO, JOSE DELIO  
MUÑOZ, RAMON PAULINO, DOROTEO  
POLANCO, DANILO VILLA, STEVEN HALL and  
RALPH HALL,

Plaintiffs,

-against-

TIANO'S CONSTRUCTION, CORP., MITRANI  
PLASTERERS CO., INC., TIANO CONSTRUCTION  
MITRANI CESARE GENERAL PARTNERSHIP,  
PYTHAGORAS GENERAL CONTRACTING CORP.,  
GBE ALASIA CONTRACTING CORP.,  
LUMBERMENS MUTUAL CASUALTY COMPANY,  
SAFECO INSURANCE COMPANY OF NORTH  
AMERICA, ST. PAUL MERCURY INSURANCE  
COMPANY and JOHN DOE BONDING COMPANY,  
whose identity is presently unknown,

Defendants.

-and-

LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendant/Third Party Plaintiff,

-against-

EFRAIN J. RAMOS, MARIBEL RAMOS, ANTHONY  
MITRANI, CESARE MITRANI, PHYLIS MITRANI,  
JAMES CARRION, NANCY MITRANI,

Third-Party Defendants.

-----X

**RICHARD F. BRAUN, J.:**

Defendants Lumbermens Mutual Casualty Company (Lumbermens) and Tiano's

Index No. 603101/01

**OPINION**

Construction, Corp. (Tiano's) jointly move for summary judgment against plaintiffs dismissing their action. The motion by defendant Tiano's was denied due to its non-appearance at oral argument. Plaintiffs state that their "cause" of action grounded in NY Constitution, article I, § 17 is voluntarily withdrawn. Thus, by this court's separate decision and order of August 27, 2004, plaintiffs' first and second causes of action were discontinued.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendant Lumbermens asserts that, derivatively under the Davis-Bacon Act and the doctrine of Federal preemption, summary judgment should be awarded dismissing the cause of action against said defendant. Under CPLR 3018 (b), those defenses should have been pled in the answers, but were not, and thus were waived (*see Munson v New York Seed Improvement Coop.*, 64 NY2d 985, 986 [1985]). The sending of a letter by defendant Lumbermens' counsel alluding to the defenses does not make up for the failure to assert them in the answer of defendant Lumbermens.

The cross motion has only been opposed by defendants Pythagoras General Contracting Corp., Safeco Insurance Co. of North America, St. Paul Mercury Insurance Company, and Lumbermens. The cross motion is not addressed to the latter defendant. As to the first three defendants, the cross motion cannot be granted. First, 22 NYCRR 202.7 (a) (2) required submission of an affirmation of good faith (*Sixty-Six Crosby Assocs. v Berger & Kramer*, 256 AD2d 26 [1<sup>st</sup> Dept 1998]), and the allegations pertaining thereto do not show that the attorneys "conferred" (*see Eaton*

v. *Chahal*, 146 Misc 2d 977, 983 [Sup Ct, Rensselaer County 1990]). Second, although plaintiffs have shown that some defendants did not reply to plaintiffs' discovery demands, discovery became stayed, pursuant to CPLR 3214 (b).

Thus, the motion was denied, pursuant to this court's separate September 18, 2004 decision and order. The cross motion was granted to the extent of striking the answer of defendants Tiano's, Mitrani Plasterers Co., and Tiano Construction Mitrani Cesare General Partnership. Pursuant to CPLR 8106 and 8202, a total of \$100 costs was awarded to plaintiffs against defendant Lumbermens on the motion, to abide the event.

Dated: New York, New York  
September 20, 2004

  
\_\_\_\_\_  
RICHARD F. BRAUN, J.S.C.

SEP 23 2004  
NEW YORK  
COUNTY CLERK'S OFFICE