

Estate of Hamzavi v Dewberry-Goodkind, Inc.

2005 NY Slip Op 30196(U)

January 6, 2005

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

0127083/2002

HAMZAVI, SIAMAK
vs
DEWBERRY GOODKIND, INC.

INDEX NO. _____

MOTION DATE 9/20/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to 16 were read on this motion to/for _____

PAPERS NUMBERED

1-2

3-13

14-16

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided by
accompanying decision + order*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 18 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/6/05

[Signature]
JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
THE ESTATE OF SIAMAK HAMZAVI by its
administrator TIMOTHY P. FARRELL,

Plaintiff,

INDEX NO. 127083/02

-against-

DECISION AND ORDER

DEWBERRY-GOODKIND, INC. f/k/a
GOODKIND & O'DEA, INC.,

Defendant.

-----X

JANE S. SOLOMON, J.

In this wrongful death action arising out of an automobile accident that took the life of Dr. Siamak Hamzavi ("Hamzavi"), his estate, by its administrator Timothy P. Farrell, ("the Estate") seeks to impose tort liability upon defendant Dewberry-Goodkind, Inc. f/k/a Goodkind & O'Dea, Inc. ("Goodkind").

Goodkind now moves for summary judgment pursuant to CPLR § 3212 (i). The Estate opposes the motion and cross-moves for summary judgment dismissing Goodkind's first and seventh affirmative defenses.

For the reasons set forth below, defendant's motion is granted, and the complaint is dismissed.

BACKGROUND

Goodkind is an engineering firm. Pursuant to a contract dated June 3, 1969, it was hired by the New York State Department of Transportation ("NYSDOT") to "survey and design" the interchange between Interstate 81 ("I-81") and Interstate 481 ("I-481") near Syracuse, New York, in particular, the structure where I-481 passes over I-81, placement of the pillars supporting it, and placement of the guide rails on the shoulder of I-81 to protect those pillars. NYSDOT accepted Goodkind's work by letter dated January 21, 1976. The contract did not cover the construction of the interchange or any components--overpass, pillars or guard/guide rails--all of which was performed by NYSDOT or its contractors.

On the morning of December 14, 2000, Hamzavi was traveling northbound on I-81 towards the overpass. The parties agree that there had been snow on the previous three days and Hamzavi was driving on a wet road. At approximately 9:30 A.M., he lost control of the car as the road curved to his left. Still northbound, the vehicle crossed the shoulder westward until it ramped up on a guide rail; the car slid along the guide rail until it spun around and crashed into the nearest pillar beneath the overpass.

Hamzavi was seriously injured and remained hospitalized in Syracuse until his death two weeks later. There were no

witnesses to the accident, and much of the evidence concerning it comes through photographs, police reports and reconstruction experts.

On August 22, 2002, the Estate served Goodkind with a CPLR § 214-d notice of claim. Its complaint in this action was filed on December 18, 2002. There is a separate action against the State of New York in the Court of Claims.

The Estate contends that Goodkind engaged in engineering malpractice and is liable for Hamzavi's death. It makes three claims about the guide rail. Asserting that it is a standard relevant to Goodkind's contractual responsibilities, the Estate first alleges that Goodkind failed to follow the New York State Highway Design Manual section 10.01.04, Guide Rail Installation ("Section 10.01.04"). That section states in relevant part:

Where guide rail terminates near a normal longitudinal drainage ditch in cut, extend the rail into the cut slope and anchor if required for the type of rail. A sloped terminal section would not be required for this condition.¹

The Estate also contends that Goodkind is responsible for having designed a guide rail that caught Hamzavi's car and directed it towards the pillar, and for not having designed a feature which

¹ A cut section of highway is one from which naturally occurring material is removed, resulting in a "cut" in the natural terrain. This is opposed to a "fill," a section of highway that requires material to be filled in.

* 5]
would have redirected the vehicle back onto the roadway. The Estate asserts other departures in Goodkind's failure to abide by the "clear zone" and "forgiving road" design concepts by locating the I-481 pillar too close to the roadway, and failure to abide by other NYSDOT design specifications.

DISCUSSION

Goodkind moves for summary judgment on the ground that it complied with the prevailing engineering standards at the time it performed its work. The Estate opposes the motion and cross-moves for summary judgment on Goodkind's contributory negligence and statute of repose affirmative defenses.

Generally, the party seeking summary judgment under CPLR § 3212 has the burden of demonstrating the absence of genuine issues of material fact on every relevant issue raised by the pleadings. See Sokolow, Dunaud, Mercadier, & Carreras LLP v. Lacher, 299 A.D.2d 64 (1st Dept. 2002). There is, however, a special rule in an engineering malpractice case where, as here, the complained of services were rendered many years in the past and the action is based on CPLR § 214-d. That rule appears in CPLR § 3212 subdivision (i), which provides that the motion "shall be granted unless the party responding to the motion demonstrates that a substantial basis in fact and in law exists to believe that the performance, conduct or omission complained of [of] such...engineer...was negligent and...a proximate cause

* 6]
of personal injury...."

In other words, when the claim is against a design professional protected under CPLR § 214-d, the initial burden is on the non-moving party, the Estate here. As explained by Professor Alexander in his practice commentary, "the main emphasis of the New York statute...seems to be on the threshold evidentiary basis for the action. The action may proceed only if it is shown to have actual merit." CPLR § 214-d, V. Alexander, Practice Commentaries at 214-15 (McKinneys Supp. 1998).

To defeat the motion, the Estate must show that Goodkind departed from accepted standards of engineering practice in effect at the time its work was performed for NYSDOT, and that said departure was a proximate cause of Hamzavi's injury. D.D. Hamilton Textiles, Inc. v. Estate of Theodore Mate, 269 A.D.2d 214, 215 (1st Dept. 2000).

At its simplest, section 10.01.04 applies to the end treatment of a guide rail near which a drainage ditch runs longitudinally. The parties argue the merits of their respective experts' conclusions about Goodkind's alleged departures from that provision. The Estate's position is that Goodkind was responsible for the end treatment of the guide rail on which the car got caught. It contends that the end of the guide rail should have been turned into the nearby slope rather than directly into the ground, as section 10.01.04 arguably requires,

[*7]

because the original plan indicates that there was a ditch next to the guide rail and there currently is a ditch just south of the guide rail's terminus. Goodkind counters that section 10.01.04 is inapplicable, because any ditch that did exist in the area was filled before the guide rail was installed, although a drainage ditch still exists south of the guide rail and pillar. It adds that its design was nevertheless consistent with all relevant applicable standards at the time. What the parties fail to address with equal zeal is whether section 10.01.04 is applicable.

Goodkind has set forth sufficient evidence to show that it was responsible only for design of the location of the guide rail in relation to the overpass pillar and adjacent highway but not for the physical design of the guide rail itself. See Dep. of Donald Goldberg, at 28-30, Exh. 12 to Goodkind's Motion. In other words, Goodkind contends that it did not determine the end treatment and it was not required to do so under its contract. It points to the drawings it prepared, which NYSDOT accepted. Those drawings are consistent with its contention. They show where the rail would go without further detail about construction, end treatment or otherwise. The Estate has presented no contrary evidence.

The unambiguous language of section 10.01.04 indicates that it governs the design and installation of a guide rail

* 8]

itself, not its location. Moreover, the existence of a ditch near where a guide rail is to be installed is a prerequisite to the section's applicability. Even if there was a ditch in 1976, Goodkind cannot be held liable for a departure from this standard, because the State or others in its employ designed, constructed and installed the guide rail.

The Estate's expert also identifies a second departure, which is easily disposed of. He cites a document called Recommended Procedures for Vehicle Crash Testing of Highway Appurtenances (Transportation Research Board, 1974), which states that the "placement of an appurtenance close to the pavement [say, 30 ft (9.1 m)] should, in general, be avoided." Aff. of John Serth, Jr., P.E., submitted in opposition to the motion, paragraph 8. The expert contends that the bridge pillar is an appurtenance that was placed closer than thirty feet from the pavement, and that this was a departure. However, the NYSDOT Design Manual in effect at the time Goodkind performed its work addresses the appropriate treatment of the situation where a bridge pillar is within the "traversable area", i.e., close to the pavement. The NYSDOT standard requires the use of a guide rail, which was provided. The Estate does not contest that Goodkind complied with NYSDOT standards in this regard.

Under CPLR § 3212 (i), the Estate's increased burden to show actual merit has not been met. It has not offered evidence

sufficient to prove the applicability of the standards upon which it relies.

The Estate's remaining theories of recovery are also without merit, as it has failed to show any departure from accepted engineering standard applicable at the time Goodkind performed under its NYSDOT contract.

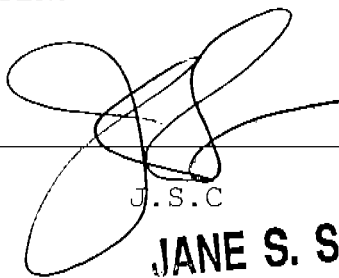
Accordingly, it hereby is

ORDERED that defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied as moot; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly with costs and disbursements to defendant as taxed.

Dated: January 6, 2005

ENTER:



J.S.C
JANE S. SOLOMON

FILED
JAN 18 2005
NEW YORK
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