

Caraballo v Denville Line Painting, Inc.

2005 NY Slip Op 30525(U)

August 4, 2005

Sup Ct, Bronx County

Docket Number: 6097/2004

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

[* 1]

PART ⁶ 03

Case Disposed
 Settle Order
 Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

CARABALLO, JOSE

Index No. 0006097/2004

against-

Hon. PAUL VICTOR

DENVILLE FIRE PAINTING

LUCY BILLINGS
 J.S.C.

Justice.

The following papers numbered 1 to _____ Read on this motion, **STRIKE COMPLAINT**
 Noticed on **March 04 2005** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-6	
Answering Affidavit and Exhibits	7-8	
Replying Affidavit and Exhibits	9	
_____ Affidavits and Exhibits	FILED	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *grants third party defendant Step-Mar Construction Corp.'s motion to dismiss the third party complaint and any cross-claims against Step-Mar Construction.*

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 8 / 4 / 05

Hon. Lucy Billings
PAUL VICTOR, J.S.C.

LUCY BILLINGS
 J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 6
-----x

JOSE CARABALLO,

Plaintiff

- against -

Index No. 6097/2004

DENVILLE LINE PAINTING, INC.; DEMICO
BROTHER, INC.; CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.; and CITY
OF NEW YORK,

Defendants

-----x
-----x

FILED
SEP 13 2005
BRONX COUNTY CLERK'S OFFICE

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third Party Plaintiff

- against -

DECISION AND ORDER

STEP-MAR CONSTRUCTION CORP. f/k/a
CO-STAR CONSTRUCTION CORP. and TRI-
MESSINE CONSTRUCTION CORP.,

Third Party Defendants

-----x

LUCY BILLINGS, J.S.C.:

Plaintiff seeks damages for injuries he sustained from
falling off his motorcycle upon encountering a defective
condition on St. Ann's Avenue, Bronx County, June 28, 2003.

Third party defendant Step-Mar Construction Corp. moves to
dismiss the third party complaint and any cross-claims against
this third party defendant. C.P.L.R. § 3211(a)(7).

In determining a motion to dismiss pursuant to C.P.L.R. §
3211(a)(7), the court may not consider third party defendant's

extrinsic evidence unless it is undisputed and conclusively disproves an element necessary to a claim. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Skillgames, LLC v. Brody, 1 A.D.3d 247, 251 (1st Dep't 2003); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001). Looking solely at the third party complaint, its only claim against Step-Mar Construction is based on a contract entitled Con Edison Purchase Order No. 412482, in which the "Contractor" agreed to perform work or provide services in the area of 150th Street and St. Ann's Avenue, according to the Standard Terms and Conditions of Construction Contracts dated October 7, 1988. Both the Purchase Order and the Standard Terms and Conditions are annexed to the third party complaint. Neither document, however, lists Step-Mar Construction Corp. as the Contractor or even mentions Step-Mar Construction anywhere. Only a nonparty entity, Co-Star Construction Corp., is mentioned.

Third party plaintiff Consolidated Edison Company of New York presents an agreement dated May 14, 2004, in which Step-Mar Construction Corp. assumed "obligations of Co-Star Construction, Inc." regarding damages claims arising from "purchase orders issued to Co-Star Construction, Inc." Aff. in Opp'n of Gail Richardson, Ex. A at 1, 15. Although the court may consider third party plaintiff's affidavits and other admissible evidence to preserve inartfully pleaded but potentially meritorious claims in the complaint, Held v. Kaufman, 91 N.Y.2d 425, 430 (1998);

Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635 (1976), this agreement is not authenticated by any witness with personal knowledge. Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003).

Moreover, this agreement simply does not form any part of the complaint's allegations. The complaint is based on two other contracts. It nowhere refers or alludes to the May 2004 agreement.

On this basis, the court grants third party defendant Step-Mar Construction Corp.'s motion and dismisses the third party complaint and any cross-claims against this third party defendant. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order and judgment of dismissal.

Dated: August 4, 2005



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.