

**Gorman v Waldbaums Inc.**

2007 NY Slip Op 30180(U)

March 8, 2007

Supreme Court, Suffolk County

Docket Number: 0004149

Judge: Paul J. Baisley

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY**

**PRESENT:**  
**HON. PAUL J. BAISLEY, JR., J.S.C.**

INDEX NO.: 04149/2000

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KATHRYN GORMAN,

MOTION DATE: 11/30/2006

Plaintiff,

MOT. NO.: 002 MOT D

-against-

WALDBAUMS INC., NATHAN L. SEROTA,  
individually, and N.L. SEROTA CONSTRUCTION,  
INC., DISCOVER GENERAL CONTRACTING  
CORPORATION,

**DEFENDANTS' ATTORNEYS:**  
KRAL, CLERKIN, REDMOND, RYAN,  
PERRY & GIRVAN

Defendants.

By: Robert D. Martin, Esq.  
Atty. for Deft. Waldbaums Inc.  
69 East Jericho Turnpike  
Mineola, New York 11501

-----X  
**PLAINTIFF'S ATTORNEY:**  
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CONNICK, P.L.L.C.  
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Mineola, New York 11501

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By: Vincent D. Finnegan, Esq.  
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One Whitehall Street  
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Upon the following papers numbered 1 to 43 read on this motion for summary judgment: Notice of Motion and Affirmation 1 to 16 and supporting papers; Affirmation 17 to 18 and supporting papers; Affirmation in Opposition 19 to 26 and supporting papers; Affirmation in Opposition and Affidavit 27 to 32 and supporting papers; Affirmation in Opposition 33 to 35; Reply Affirmation 36 to 39; Affirmation in Reply 40 to 43; it is

**ORDERED** that the motion (motion sequence no. 002) of defendant WALDBAUM, INC. s/h/a WALDBAUMS, INC. ("WALDBAUM") for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the cross-claim of co-defendant DISCOVER GENERAL CONTRACTING CORPORATION ("DISCOVER") against the movant; granting the movant summary judgment on its cross-claim against DISCOVER; and granting summary judgment dismissing plaintiff's complaint as against the movant, all with prejudice, is determined as follows:

This action arises out of the claim that plaintiff fell and was injured on an unfinished interior stairway at a WALDBAUM's store in Stony Brook that was undergoing renovation. Plaintiff, an employee of a non-party electrical subcontractor hired by DISCOVER, the general contractor, has asserted claims sounding in negligence and in Labor Law violations against the owner and lessee of the premises, defendants NATHAN L. SEROTA ("SEROTA") and WALDBAUM, respectively, and against DISCOVER as general contractor. It appears from the submissions and the Court's records that WALDBAUM interposed the instant motion for summary judgment before discovery in this action was conducted, and that the motion was thereafter held in abeyance as a result of a bankruptcy stay involving the insurance carrier for defendant SEROTA (Reliance Insurance Company). The bankruptcy stay having been lifted, the original motion has now been resubmitted to the Court for determination.

WALDBAUM contends that it is entitled to summary judgment dismissing plaintiff's claims and DISCOVER's cross-claim for indemnification because there is no proof that WALDBAUM either created or had actual or constructive notice of the allegedly dangerous or defective condition, and because the renovation work was performed by DISCOVER as an independent contractor. The submissions of the moving defendant contain no proof in admissible form as to the facts and circumstances surrounding plaintiff's accident, the manner in which it occurred, whether the movant had actual or constructive notice of the allegedly dangerous condition, and which party, if any, might be responsible for it. The Court thus cannot determine upon the record as submitted that the moving defendant was not negligent as a matter of law. *Jeune v. O.T. Trans Mix Corp.*, 29 A.D.3d 635, 815 N.Y.S.2d 182 (2d Dept. 2006). Accordingly, so much of the motion as seeks an order granting summary judgment dismissing plaintiff's complaint and DISCOVER's cross-claim is denied.

WALDBAUM also contends that it is entitled to summary judgment on its claims for defense and indemnification by DISCOVER predicated on DISCOVER's alleged failure to procure insurance coverage for WALDBAUM in accordance with the written agreement between DISCOVER and WALDBAUM's parent company (Great Atlantic & Pacific Tea Company, Inc. ["Great Atlantic"]). It is well established that "[a] promisee seeking summary judgment based upon a promisor's failure to name the promisee as an additional insured, as required by the contract between the two, need only show that the contract so required and that the promisor failed to comply with this provision." *Keelan v. Sivan*, 234 A.D.2d 516, 517, 65 N.Y.S.2d 178 (2d Dept. 1996). The contract and other documents annexed to WALDBAUM's submissions reflect a requirement that DISCOVER indemnify WALDBAUM for any and all claims arising out of the work provided for in the contract, and that DISCOVER name Great Atlantic as an additional insured. Moreover, the submissions establish *prima facie* that DISCOVER failed to procure the required insurance.

On July 12, 2000, WALDBAUM served DISCOVER with a notice to admit pursuant to CPLR §3123, which required that DISCOVER admit or deny: (1) that the attached copy of the parties' January 9, 1997 contract is a true and accurate copy, or if denied, that it attach a copy to the response; (2) that DISCOVER was performing work pursuant to the contract on April 27, 1997; and (3) that DISCOVER purchased liability insurance in accordance with Article V of the contract naming Great Atlantic & Pacific Tea Company, Inc. and/or Waldbaum, Inc. as additional insureds.

DISCOVER's purported response to the notice to admit, dated July 31, 2000, is defective as it is unsworn, is provided by the attorney rather than the party, and merely denies "knowledge or information sufficient to form a belief" as to all of the allegations contained in WALDBAUM's notice to admit. *Rosenfeld v. Total Neuro Care, P.C.*, 5 A.D.3d 462, 772 N.Y.S.2d 597 (2d Dept. 2004). The defect is not cured by a virtually identical response dated August 18, 2000 which purports to be affirmed by DISCOVER's attorney. Since the matters as to which WALDBAUM was seeking admissions or denials are manifestly within the knowledge of DISCOVER, its failure to specifically admit or deny the allegations is improper. CPLR §3123(a); *Rosenfeld, supra*, 5 A.D.3d at 463; *Barnes v. Shul Private Car Service, Inc.*, 59 Misc. 2d 967, 301 N.Y.S.2d 907 (Sup. Ct. Kings Cty. 1969).

Although it appears that WALDBAUM may have failed to annex a copy of the parties' contract to the notice to admit served upon DISCOVER, that omission does not affect the validity of the notice to admit. Where copies of the documents as to which admissions are sought have already been furnished, they need not be served with the request. CPLR §3123(a). Moreover, the notice to admit sufficiently identified the contract at issue, and specifically invited DISCOVER – a signatory to the contract and presumably in possession of a copy -- to furnish a copy with its response if it denied the accuracy of the copy supposed to have been proffered by WALDBAUM.

In light of its defective response, DISCOVER is deemed to have admitted that it was performing work in accordance with the parties' January 9, 1997 contract at the premises at the time of plaintiff's accident, and that it failed to procure insurance in accordance with the contract. Accordingly, it is *prima facie* liable to WALDBAUM "for the resulting damages...including the liability of the promisee to the plaintiff [citations omitted] and the costs incurred in defending against the plaintiffs' action." *Keelan, supra*, 234 A.D.2d at 517.

Moreover, it is well established that "[a]n agreement to purchase insurance coverage is clearly distinct from and treated differently from an agreement to indemnify." Accordingly, "a final determination of [DISCOVER's] liability need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries." *Id.*, at 518, quoting *Mathew v. Crow Constr. Co.*, 220 A.D.2d 490, 632 N.Y.S.2d 181 (2d Dept. 1995). DISCOVER's submissions in opposition to the motion fail to raise a question of fact.

In light of the foregoing, WALDBAUM is granted summary judgment upon its cross-claim as against DISCOVER; and the motion is denied in all other respects.

Dated: March 8, 2007

**HON. PAUL J. BAISLEY, JR.**

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J.S.C.