

Goncalves v North Manor Estates, Inc.

2007 NY Slip Op 30768(U)

April 11, 2007

Supreme Court, Suffolk County

Docket Number: 0004298/2004

Judge: Joseph Farneti

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.

SHORT FORM ORDER

INDEX NO. 4298/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

AUGUSTO GONCALVES and
MARIA GONCALVES,

Plaintiffs,

-against-

NORTH MANOR ESTATES, INC. and CNS
CONTRACTING & DEVELOPMENT, INC.

Defendants.

NORTH MANOR ESTATES, INC.,

Third-Party Plaintiff,

-against-

PUMP IT INC.

Third-Party Defendant.

NORTH MANOR ESTATES, INC.,

Third-Party Plaintiff,

-against-

CHRISTOPHER KEEGAN,

Second Third-Party Defendant.

ORIG. RETURN DATE: DECEMBER 7, 2006
FINAL SUBMISSION DATE: FEBRUARY 1, 2007
MTN. SEQ. #: 003
MOTION: MD

PLAINTIFFS' ATTORNEY:
BRECHER, FISHMAN, PASTERNAK,
POPISH, HELLER, RUBIN & REIFF, P.C.
222 BROADWAY
NEW YORK, NEW YORK 10038

**DEFENDANT/THIRD-PARTY
PLAINTIFF'S ATTORNEY:**
AHMUTY, DEMERS & McMANUS, ESQS.
BY: GREG CURRY, ESQ.
200 I.U. WILLETS ROAD
ALBERTSON, NEW YORK 11507
516-294-5433

DEFENDANT CNS' ATTORNEY:
ESCHEN, FRANKEL & WEISMAN, LLP
93 EAST MAIN STREET
BAY SHORE, NEW YORK 11706
631-969-7777

**THIRD-PARTY DEFENDANT
PUMP IT INC.'S ATTORNEY:**
HAMMILL, O'BRIEN, CROUTIER,
DEMPSEY & PENDER, ESQS.
154 TERRY ROAD, P.O. BOX 883
SMITHTOWN, NEW YORK 11787

Upon the following papers numbered 1 to 6 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Answering Affidavits and supporting papers 4;
Reply Affirmation and supporting papers 5, 6; it is,

ORDERED that this motion by defendant, CNS CONTRACTING & DEVELOPMENT, INC. ("CNS"), for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint and all cross claims as asserted against CNS, is hereby **DENIED** for the reasons set forth herein.

The instant action is to recover damages for personal injury, in that plaintiff AUGUSTO GONCALVES alleges that on September 29, 2001, while pouring concrete foundations for a housing complex located at 143 Shliegel Boulevard, North Amityville, New York, he fell, sustaining injuries. Plaintiffs have alleged violations of Labor Law §§ 200, 240 and 241(6).

In the instant application, CNS seeks dismissal of plaintiffs' complaint and all cross claims as asserted against CNS, arguing that CNS was neither the owner nor the general contractor at the construction site. CNS alleges that at the time of the subject incident, co-defendant NORTH MANOR ESTATES, INC. ("NORTH MANOR") was the owner of the property and also the general contractor of the construction project. CNS submits that it was only involved in the initial negotiations for the purchase of the subject property and did no building on the property prior to the change of ownership from CNS to NORTH MANOR. Thereafter, CNS alleges that when NORTH MANOR purchased the property, CNS was dissolved and NORTH MANOR "took over" as owner and general contractor, and CNS' only involvement was to submit subdivision plans to the local municipality. In support of the foregoing, CNS submitted the deposition transcript of CHRISTOPHER STALLWORTH, who had testified as an officer of both CNS and NORTH MANOR. As such, CNS seeks summary judgment dismissing the complaint and all cross claims, arguing that CNS cannot be found liable to plaintiffs for the damages sought herein.

In opposition, plaintiffs allege that substantial issues of fact preclude the granting of summary judgment to CNS. Specifically, plaintiffs argue that questions of fact exist as to CNS' role and actions during the construction work that was ongoing immediately prior to plaintiff's accident, which may impart liability on CNS. Plaintiffs alert the Court that MR. STALLWORTH testified at his

deposition that he was the secretary of NORTH MANOR for the period 1999 or 2000 to April of 2004, and was also the president of CNS until that corporation was dissolved, which, according to MR. STALLWORTH, occurred in 2001. Plaintiffs argue that MR. STALLWORTH testified that he was present on the jobsite on a daily basis when actual work began in 2001, and that he had the authority to supervise and direct CHRISTOPHER KEEGAN, NORTH MANOR's site manager handling construction activities. As such, plaintiffs contend that questions of fact exist as to MR. STALLWORTH's "dual role" at the construction site which would preclude the granting of summary judgment to CNS.

In reply, CNS alleges that plaintiffs have merely submitted an affirmation of counsel which is of no probative value in opposition to a motion for summary judgment. CNS further alleges that CNS was dissolved on September 23, 1998, well before plaintiff's accident, and has annexed a certificate from the Secretary of State as evidence of same. However, the Court notes that this date of dissolution is three years prior to the date of dissolution indicated by MR. STALLWORTH, CNS' president, during his deposition testimony.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the instant application, the Court finds that CNS has failed to submit evidence in admissible form to establish entitlement to judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Dempster v Overview Equities, Inc.*, 4 AD3d 495, *supra*). CNS relies upon an affirmation of counsel, and an unsigned, unsworn deposition transcript of CHRISTOPHER STALLWORTH in support of the motion. Ironically, CNS criticizes the affirmation of counsel submitted in opposition to its motion as insufficient to establish a question of fact. However, CNS similarly submitted only affirmations of counsel, and failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the absence of any material issues of fact which would warrant the granting of summary judgment to CNS. Counsel's affirmations in support of the motion, made without personal knowledge of the facts, are without any evidentiary value and are insufficient to support a motion for summary judgment (see *S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). In addition, CNS failed to establish that the unsigned deposition transcript of MR. STALLWORTH was forwarded to him for his review and signature pursuant to CPLR 3116(a). Hence, the transcript is not admissible evidence (see CPLR 3116[a]; *McDonald v Mauss*, 2007 NY Slip Op 2521 [2d Dept]; *Pina v. Flik Intl. Corp.*, 25 AD3d 772 [2006]; *Santos v Intown Assoc.*, 17 AD3d 564 [2005]; *Lalli v Abe*, 234 AD2d 346 [1996]; *Palumbo v Innovative Communications Concepts*, 175 Misc 2d 156 [Sup Ct, New York County 1997], *affd* 251 AD2d 246 [1998]).

The failure of CNS to make an initial *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*; *Smith v City of New York*, 288 AD2d 369 [2001]; *Sipourene v County of Nassau*, 266 AD2d 450 [1999]). Accordingly, this motion by CNS for summary judgment is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: April 11, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court