Cortez v Pav-Lak Indus., Inc.
2007 NY Slip Op 31078(U)
May 3, 2007
Supreme Court, Suffolk County
Docket Number: 0004857/2005
Judge: Sandra L. Sgroi
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INDEX NO.4857-2005

PUBLISH

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 004 MD
005 MD

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 1-11-07
Return Date: 4-26-07

CHRISTINE CORTEZ and ALBERT CORTEZ,
Plaintiffs,

-against-

PAV-LAK INDUSTRIES, INC., FLEET MECHANICAL SERVICES CORP., EHASZ GIACALONE ARCHITECTS P.C. and "JOHN DOE" MECHANICAL ENGINEERING CO.,

Defendants.

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Upon the following papers numbered 1 to 22 read on these Motions: Notice of Motion and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-14; Affirmation in opposition and supporting papers 17-19; Reply Affirmation and supporting papers 20-22; Memorandum of Law 15-16; it is,

ORDERED that these motions by the Defendant Ehasz Giacalone Architects P.C. to reargue a decision of this Court dated November 2, 2006 is denied; and it is further

ORDERED that the motion of the Defendant Fleet Mechanical Service Corporation to reargue a decision of

this Court date November 2, 2006 is denied.

The Plaintiffs, Christine Cortez and Albert Cortez, commenced this action against the Defendant Ehasz Giacalone Architects P.C. (hereinafter "EGA"), Pav-Lak Industries (hereinafter "Pav-Lak"), and Fleet Mechanical Service Corp. (hereinafter "Fleet") alleging causes of action for negligence, strict liability and breach of warranty. It is alleged in the complaint that EGA negligently designed a HVAC system located at Christine Cortez's place of employment, the Fifth Precinct building located in Patchogue, New York.

Christine Cortez was employed as a Police Operations Aide at the Suffolk County Fifth Precinct and it is alleged that she began experiencing respiratory problems in or about November of 2003, as a result of calcium chloride and other irritants projected into the air by the HVAC system that served to provide the heat and air conditioning for the Fifth Precinct Building. It is alleged that Christine Cortez suffered from dyspnea with exertion, upper reactive airways disease syndrome, reactive airway dysfunction and calcified granuloma in her left lung and that the problems with the air quality in the building continued through February 6, 2004.

As noted previously by this Court, Pedneault Associates, Inc. (hereinafter "Pedneault") conducted air quality tests at the Fifth Precinct building in Patchogue at the request of the Employee Collective Bargaining Union that represented Cortez on February 6, 2004 and February 18, 2004, and according to an attachment identified as Exhibit D to the motion of EGA for summary judgment, John Pedneault stated that his company found that finely ground calcium chloride could have been re-circulated and that this condition could have caused the health problems to individuals in the building.

In the prior motion for summary judgment, Russell Ehasz, a registered architect, submitted an affidavit wherein he stated that he was a principal of the Defendant EGA and that EGA was retained by Suffolk County to act as a consultant to perform renovations and additions to the police precinct buildings in Patchogue, New York. As part of this contract with the County, employees of EGA prepared the drawings for heating, ventilating and air conditioning work and representatives of EGA were required to visit the work site at least once each week to supervise the progress of the work performed by the prime contractors hired by the County of Suffolk. These prime contractors included the former co-Defendants Pav-Lak Industries, Inc. and Fleet. The construction work on the project was completed in 1995, approximately nine years prior to the date that the Plaintiff, Christine Cortez, was allegedly injured by the air quality inside of the building. It was undisputed that "[a]fter construction was completed in 1995, EGA was not required to, nor did it, inspect, maintain and/or repair any aspect of the precinct buildings, including the HVAC system. From the completion of the construction in 1995 until the commencement of this lawsuit in February of 2005, EGA was not made aware of any complaints or problems with the HVAC at the precinct buildings." (Affidavit of Russel Ehasz dated June 14, 2006).

In his affidavit submitted in support of the prior motion for summary judgment, Ehasz stated:

> I have reviewed the plans and specifications for the design and installation of the HVAC system and determined that they were prepared in accordance with generally accepted architectural and engineering standards.

An expert witness must possess sufficient skill, training, education, knowledge, or experience from which it may reasonably be inferred that the information the expert gives and any opinion that the expert states is reliable (see, ***Matott v Ward***, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532; ***Kirker v Nicolla***, 256 AD2d

865, 681 NYS2d 689). The qualifications of the expert may be demonstrated by showing practical experience in the field, education or appropriate training (see ***Price ex rel. Price v New York City Housing Authority***, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167; ***Caprara v Chrysler Corp***., 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545). It is true that a Defendant who is also an expert may be required to give a professional opinion concerning the claims of negligence made against him or her, (see, ***McDermott v Manhattan Eye, Ear and Throat Hospital***, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469), and this rule is not limited to medical malpractice negligence actions but have been extended to other claims including actions sounding in negligence (see, ***Lippel v. City of New York,*** 281 A.D.2d 327, 722 N.Y.S.2d 511; ***Lingener v State Farm Mut. Auto. Ins. Co.***, 195 AD2d 838, 600 NYS2d 395).

While Russell Ehasz attempted to act as the expert for the corporate Defendant Ehasz Giacalone Architects P.C., there is no showing herein that principal of the Defendant is qualified to act as his own expert other than for the fact that it is alleged that he is a registered architect (but see, ***Roundpoint v. V.N.A. Inc***., 207 A.D.2d 123, 621 N.Y.S.2d 161). There is no showing of the underlying basis for the conclusory opinion offered by Ehasz - that EGA was not negligent(see, ***Reddy v. 369 Lexington Ave. Co., L.P.,*** 31 A.D.3d 732, 819 N.Y.S.2d 776).

The New York Court of Appeals has stated that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v. Prospect Hosp***., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; see ***Winegrad v. New York Univ. Med. Ctr***., 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; ***Nissan Motor Acceptance Corp. v. Conn,*** --- N.Y.S.2d ----, 2006 WL 3026027, 2006 N.Y. Slip Op. 07719 (N.Y.A.D. 2 Dept. Oct 24, 2006)).

Here, the movant EGA has failed to offer an opinion by any other expert in addition to the cursory opinion tendered by the principal of the Defendant. Therefore, the Court was constrained to find that the Defendant EGA has failed to make a prima facie showing that it was entitled to summary judgment and a dismissal of the complaint of the Plaintiffs. Since the movant still has failed to make a prima facie showing on the motion for summary judgment, the Court will not address the sufficiency of the opposition interposed by the Plaintiffs (see, ***Restrepo v. Rockland Corp.***, 38 A.D.3d 742, 832 N.Y.S.2d 272).

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue (*see,* ***Alvarez v Prospect Hospital,*** 68 NY2d 320, 508 NYS2d 923; ***Bennett v Knipfing,*** 262 AD2d 260, 692 NYS2d 403). The Court will not determine issues of credibility or the probability of success on the merits on a motion for summary judgment, and issue finding rather than issue determination is the key to summary judgment (***Grahm v Columbia-Presbyterian Medical Center,*** 185 AD2d 753, 588 NYS2d 2). If material facts are in dispute or if different inferences may reasonably be drawn from the facts or testimony, a motion for summary judgment must be denied (*see,* ***Gusek v Compass Transp. Corp.,*** 266 AD2d 923, 697 NYS2d 886; ***McShane v Foster,*** 235 AD2d 462, 652 NYS2d 1004; ***Morris v Lenox Hill Hosp.,*** 232 AD2d 184, 647 NYS2d 753, *aff'd* 90 NY2d 953, 665 NYS2d 399). The decision to grant or deny summary judgment is based on the facts in the entire record and not simply the pleadings (*see,* ***McIntyre v State,*** 142 AD2d 856, 530 NYS2d 898), and these facts must be analyzed in a light most favorable to a non-moving party, here the Plaintiffs (***Jastrzebski v North Shore School District,*** 223 AD2d 677, 637 NYS2d 439). As the Appellate Division, Second Department stated in ***Restrepo v. Rockland Corp.***(supra) "[t]he defendant cannot meet its

Division, Second Department stated in ***Restrepo v. Rockland Corp.***(supra) "[t]he defendant cannot meet its burden by pointing to gaps in its opponent's proof (***Ramos v. Mac Laundry Hemp, Inc.***, 22 A.D.3d 822, 803 N.Y.S.2d 165; ***Wolff v. New York City Tr. Auth.***, 21 A.D.3d 956, 957, 801 N.Y.S.2d 345; ***Mennerich v. Esposito***, 4 A.D.3d 399, 400-401, 772 N.Y.S.2d 91; ***Dalton v. Educational Testing Serv.***, 294 A.D.2d 462, 463, 742 N.Y.S.2d 364).

The cross motion of the Defendant Fleet for summary judgment was also denied by this Court. On the motion for summary judgment Fleet submitted only the affirmation of its attorney and has chosen to rely on the motion papers of the Defendant EGA. As the Court has found above, the motion of EGA failed to demonstrate a prima facie right to judgment. The motion of Fleet to reargue the November 2, 2006 decision of this Court is denied (see also, ***Riglioni v. Chambers Ford Tractor Sales, Inc.,*** 36 A.D.3d 785, 828 N.Y.S.2d 520,. Generally, proximate cause is a question to be decided by the trier of the facts (see, ***Derdiarian v. Felix Contr. Corp.***, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666).

Dated: 5/2/07

SANDRA L. SGROI, J. S. C.