

**Paci v Rosebank Repiping & Heating Corp.**

2007 NY Slip Op 31333(U)

May 22, 2007

Supreme Court, Richmond County

Docket Number: 0012992/2004

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

**DCM PART 3**

**Calendar Nos.: 282 - 004  
620 - 005**

**Index No: 12992/04**

**JOHN PACI and ANTOINETTE PACI,**

*Plaintiff(s),*

*-against-*

**DECISION & ORDER  
HON. JOSEPH J. MALTESE**

**ROSEBANK REPIPING and HEATING CORP.,  
FORMICA CONSTRUCTION CO. INC.,  
WILLIAM J. O'ROURKE and KENNETH FORMICA,**

*Defendant(s).*

**x**

The following papers numbered 1 to 4 were submitted on these motions the 20<sup>th</sup> day of April, 2007:

Notice of Motion with Supporting Papers and Exhibits (dated February 6, 2007).....	1
Affirmation in Opposition with Exhibit (dated February 26, 2007).....	2
Affirmation in Opposition with Exhibits (dated February 26, 2007).....	3
Notice of Motion with Supporting Papers and Exhibits (dated March 30, 2007).....	4

Upon the foregoing papers, the motion (No. 282) for summary judgment of defendants FORMICA CONSTRUCTION CO., INC. and KENNETH FORMICA is granted; the cross motion (No. 620) for like relief of defendants ROSEBANK REPIPING and HEATING CORP., and WILLIAM J. O'ROURKE, is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by JOHN PACI (hereinafter plaintiff) while he was employed as a laborer by defendant FORMICA CONSTRUCTION CO., INC. of which codefendant KENNETH FORMICA is a partner (hereinafter collectively FORMICA). It has been alleged that on December 15, 2003, plaintiff and fellow employee,

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Lorenzo Pavia were instructed by FORMICA to descend into a trench and locate plumbing pipes for the purpose of connecting certain homes then under construction by FORMICA to the City sewer system. It has been further alleged that the walls of the trench, which were not properly shored, subsequently collapsed, burying Pavia and plaintiff. Pavia died as a result, and plaintiff, who sustained, *inter alia*, serious injuries to his shoulders, neck, back and nervous system, required extensive medical treatment. FORMICA was subsequently convicted of criminally negligent homicide.

Shortly after the accident, plaintiff applied for and was awarded workers' compensation benefits as a result of the injuries he sustained in the subject accident. He then commenced this action, seeking additional damages as a result of FORMICA's alleged negligence. In its answer, FORMICA raised the defense that plaintiff is barred from filing a civil lawsuit against it by the provisions of the Workers' Compensation Law.

In moving for summary judgment dismissing the complaint as against it, FORMICA contends that plaintiff's exclusive remedy against his employer for injuries occurring during the course of his employment is the workers' compensation benefits which he has already received. According to FORMICA, permitting plaintiff's civil lawsuit to continue would violate the legislative intent of the Workers' Compensation Law, which was to insure the quick compensation of injured workers while limiting their employers' liability to respond in damages. FORMICA contends that having sought and received workers' compensation benefits, plaintiff is barred from commencing a separate civil action against it.

In opposition, plaintiff contends that FORMICA's motion should be denied as defendants have failed to complete discovery, in particular, providing plaintiff with copies of its construction records.

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Plaintiffs further contend that questions of fact exist regarding the responsibilities of each of the defendants at the jobsite with regard to the plumbing work. According to plaintiff, it was the responsibility of codefendant ROSEBANK REPIPING and HEATING CORP. (hereinafter ROSEBANK) to perform the necessary plumbing and sewer connections at the jobsite pursuant to a permit issued to it by the New York City Buildings Department. Nevertheless, FORMICA deliberately placed plaintiff, who was hired as an interior handyman/carpenter, into a perilous position by ordering him into the trench. It is plaintiff's contention that since FORMICA compelled him to perform services outside the scope of his employment, his receipt of worker's compensation benefits should not bar his separate common-law action for negligence.

In its cross motion, codefendant ROSEBANK is seeking the dismissal of the complaint as against it on the ground that FORMICA was solely responsible for the happening of this accident. In support, ROSEBANK points to FORMICA's conviction of criminally negligent homicide with regard to the death of Lorenzo Pavia. ROSEBANK further contends that while it had obtained the permit from the Buildings Department to dig a trench and connect sewer lines for this project, FORMICA began the job on its own, without ROSEBANK's knowledge or consent, and without ROSEBANK even being present on the site. Accordingly, ROSEBANK contends that there are no triable issues of fact regarding its involvement in plaintiff's injury, and that the complaint and all cross claims against it should be dismissed.

In opposition to the cross motion, plaintiff contends that ROSEBANK has also failed to produce court-ordered discovery. Plaintiff further contends that triable issues of fact exist regarding ROSEBANK's presence and involvement in the work performed at the jobsite. It is plaintiff's

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contention that he observed FORMICA consulting with ROSEBANK's WILLIAM J. O'ROURKE, while the trench was being dug and immediately prior to the accident. Moreover, plaintiff contends that it was ROSEBANK's responsibility, as the plumbing subcontractor, to correct any unsafe conditions which presented a threat to the safety of the trench workers in preparation for the plumbing work, including the erection of proper shoring. According to plaintiffs, these facts require the denial of ROSEBANK's summary judgment motion.

It is well settled 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 (*see Alvarez v. Prospect Hospital*, 68 NY2d 320). Once that initial burden has been satisfied, the burden of production shifts to the party opposing the motion to produce sufficient evidence of the existence of a material issue of fact to require a trial of the action (*id.*).

Here, it is the opinion of this Court that FORMICA has met its burden by submitting sufficient proof to establish its entitlement to judgment as a matter of law. In opposition, plaintiffs have failed to raise an issue of fact.

Workers' Compensation Law §§10 and 11 provide that the liability of an employer thereunder shall be exclusive and in place of any other liability whatsoever (*see O'Rourke v. Long*, 41 NY2d 219). As the *quid pro quo* for the swift and secure payment of benefits to injured employees without regard to fault (Workers' Compensation Law §10), the Workers' Compensation Law generally requires that employees forfeit their common-law right to maintain a tort action against their employer for work-related injuries (*see Billy v. Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159). Here, it is undisputed that plaintiff applied for, and received workers' compensation benefits. Implicit in any such award by

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the Worker's Compensation Board is a finding that plaintiff's injuries arose out of and during the course of his or her employment (*see* O'Rourke v. Long, 41 NY2d at 227). While there are limited exceptions, *e.g.*, where the injury is the product of an intentional or deliberate act by the employer directed at causing harm to a particular employee (*see* Myroie v. GAF Corp., 81 AD2d 994, 995, *affd* 55 NY2d 893), plaintiff has failed to establish that FORMICA deliberately performed any act which was intentionally directed at causing harm to this plaintiff. In any event, by accepting the award of workers' compensation benefits, plaintiff forfeited any right he may have had to maintain an action at law on the theory of intentional tort (*id.*, 55 NY2d at 894). Finally, plaintiff has offered only the hope and speculation that further discovery might uncover information that may be relevant in opposing FORMICA's motion. Such a showing is insufficient to warrant the denial of summary judgment (*see* Rodgers v. Yale Univ., 283 AD2d 415, 416).

With regard to ROSEBANK's cross motion, however, it is the opinion of this Court that triable issues of fact exist regarding this defendant's involvement in the construction project which requires the denial of its motion. As a drastic remedy, summary judgment will not be granted if there is any doubt as to the existence of a triable issue (*see* Rotuba Extruders v. Ceppos, 46 NY2d 223). Credibility is never in issue, and a plaintiff is entitled to the view of the evidence most favorable to his or her position (*id.*; Capelin Assocs. v. Globe Mfg. Corp., 34 NY2d 338, 341).

Here, while ROSEBANK denies any involvement in the work performed by plaintiff at the time of the subject accident, plaintiff has contradicted these claims and specifically averred that he recalls seeing ROSEBANK's principal officer, codefendant WILLIAM O'ROURKE, conferring with defendant KENNETH FORMICA immediately prior to the collapse of the trench. This, in addition to the

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undisputed fact that ROSEBANK was hired as the plumbing subcontractor and was the holder of the permit issued by the Buildings Department, combine to present genuine issues of fact regarding its role, if any, in plaintiff's injury. The policies underlying the Workers' Compensation Law do not preclude the maintenance of a common-law tort action against third-parties who may be responsible, in whole or in part, for an employee's injuries (*see* Billy v. Consolidated Mach. Tool Corp., 51 NY2d at 160).

Accordingly, it is hereby:

ORDERED that the motion of defendants FORMICA CONSTRUCTION CO., INC., and KENNETH FORMICA is granted, and the complaint as against them is hereby severed and dismissed; and it is further

ORDERED that the cross motion of defendants ROSEBANK REPIPING and HEATING CORP., and WILLIAM O'ROURKE is denied; and it is further

ORDERED that the clerk enter judgment accordingly.

All parties shall appear for a status conference in DCM Part 3 at 9:30 a.m. on **June 4, 2007**.

E N T E R,

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J.S.C.

Dated: May 22, 2007