

Vecchio v Miller Place Realty, LLC
2007 NY Slip Op 31465(U)
May 30, 2007
Supreme Court, Suffolk County
Docket Number: 0011078/2005
Judge: Arthur G. Pitts
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Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

COPY

HON. ARTHUR G. PITTS
JUSTICE OF THE SUPREME COURT
JOHN VECCHIO and KIM VECCHIO,

ORIG. RETURN DATE: 12/14/06
FINAL SUBMIT DATE: 3/15/07
MOTION SEQ. NO.: 005-MG
006-MG

Plaintiffs,

-against-

MILLER PLACE REALTY, LLC, NB
REALTY, LLC and RACANELLI
CONSTRUCTION COMPANY, INC.

PLTF'S/PET'S ATTY:
BRECHER, FISHMAN, PASTERNAK, POPISH,
HELLER, REIFF & WALSH
Attys for John & Kim Vecchio
222 Broadway, 19th Floor
New York, New York 10038-2510

Defendants.

RACANELLI CONSTRUCTION COMPANY,
INC.,

DEFT'S/RESP'S ATTY:
MALAPERO & PRISCO
By Ian B. Forman, Esq.
Attys for Deft/Third Party Racanelli Construction Comp.
295 Madison Avenue
New York, New York 10017

Third-Party Plaintiff,

-against-

DAME CONTRACTING, INC.,

CASCONE & KLUEPFEL, LLP
Attys for Miller Place Realty & NB Realty
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

Third-Party Defendant.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP
Attys for Third-Party Dame Contracting
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers numbered 1 to 36 read on this motion /summary judgment/discovery
Notice of Motion/OSC and supporting papers 1-14; Notice of Cross-Motion and supporting papers 15-28
Affirmation/affidavit in opposition and supporting papers 29-32/33-34; Affirmation/affidavit in reply and supporting papers 35-36
Other _____; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendants Miller Place Realty, LLC and NB Realty, LLC.'s motion and under separate notice defendant / third party plaintiff Racanelli Construction Company, Inc.'s motion each for summary judgment are granted under the circumstances presented herein. (CPLR 3212)

The matter at bar is for personal injuries sounding in negligence. The following salient facts are not in dispute: Defendant / third party plaintiff Racanelli Construction Corporation was retained by

non-party RT Long Island Franchise as a general contractor to construct a new Ruby Tuesday Restaurant at 385 Route 25A, Miller Place Suffolk County, New York. The shopping center and the area of the parking lot where the restaurant was being constructed is owned by moving defendants Miller Place Realty LLC and NB Realty LLC and leased to RT Long Island Franchise. During the construction of the restaurant the site was fenced in. On February 2, 2004 plaintiff John Vecchio alleges that while employed by subcontractor and third party defendant Dame Contracting, Inc. he slipped and fell on ice which resulted in his sustaining a serious injury. His spouse, Kim Vecchio has brought a derivative claim. Defendants Miller Place Realty, LLC and NB Realty, LLC now move for summary judgment as to its cross complaint against third party defendant Dame Contracting, Inc. seeking contractual indemnification.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York* 49 N.Y.2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]).

Although summary judgment is an extreme remedy, it is appropriate in cases where the documentary evidence only allows one interpretation (*Loblaw v. Employers' Liability Assur. Corp., Ltd.* 57 N.Y.2d 872 [1982] 456 N.Y.S.2d 40, 43; *Sutton v. East Riv. Sav. Bank*, 55 N.Y.2d 550, 554-555, 450 N.Y.S.2d 460; *Hartford Acc. & Ind.Co. v. Wesolowski*, 33 N.Y.2d 169, 172, 350 N.Y.S.2d 895; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 291, 344 N.Y.S.2d 925) On November 20, 2003 defendant/third party plaintiff Racanelli Construction Company, Inc., and third party defendant Dame Contracting , Inc., executed a subcontractor agreement. Such agreement provided in part as follows:

To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, Architect, General Contractor and all additional insurers referred to in the "Insurance Coverage" provisions hereof (collectively, the "Indemnities") from and against any and all claims, losses, costs, injuries, damages and expenses, including reasonable attorney's fees for counsel of their choice, that may be incurred by any of them as a result of, or in any way arising out of the performance or breach of contract by Subcontractor and/or any errors or omissions of Subcontractor. However, this agreement to indemnify does not cover liability of the Indemnities

for damages and injuries, to the extent that such damages and injuries are contributed to, caused by, or result from the sole or partial negligence of the Indemnities.

However, in opposition thereto the plaintiff cites General Obligations Law 5-322.1 which provides as follows:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent

Pursuant to such statute, third party defendant Dame Contracting, Inc. avers that indemnification is barred in favor of an owner or contractor by a contractor or subcontractor which performs "construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances" where the owner or contractor is responsible for the injury, either in whole or in part. (*Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172, 556 N.Y.S.2d 991 [1990]) However, it has consistently been held that injuries that occur when the employee of the subcontractor is either leaving or reaching their workplace is deemed to be, as a matter of law, to have arisen out of the contracted work. (*O'Connor v. Serge Elevator Co.* 58 N.Y.2d 655, 458 N.Y.S.2d 518 [1982] ; *Chelsea Associates LLC. v. Laquila-Pinnacle*, 21 A.D.2d 379, 801 N.Y.S.2d 15 [1st Dept 2005]) Herein, the plaintiff, the third party defendant's employee, was entering the building at the fenced in job site when he fell on a patch of ice. Clearly he was on his way to his workplace when his injury occurred. As such, the indemnification clause contractually agreed upon by the parties is enforceable and accordingly, defendants Miller Place Realty LLC, NB Realty LLC and defendant/third party plaintiff Racanelli Construction Company, Inc.'s motions for summary judgment as to their cross claims and third party

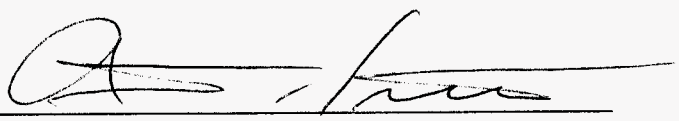
complaint seeking contractual indemnification respectively, are granted

This shall constitute the decision and order of the Court.

Submit judgment.

So ordered.

**Dated: Riverhead, New York
May 30, 2007**



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION ___ DO NOT SCAN