

<b>Ferrante Immobiliare, LLC v Pace</b>
2007 NY Slip Op 31732(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0108089/2006
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Freedman  
Justice

PART 39

Index Number : 108089/2006

FERRANTE IMMOBILIARE, LLC

EX NO. \_\_\_\_\_

vs

GUIDO A. PACE, R.A.

OTION DATE \_\_\_\_\_

Sequence Number : 002

OTION SEQ. NO. \_\_\_\_\_

DISMISS

OTION CAL. NO. \_\_\_\_\_

The following papers:

tion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the accompanying memorandum of law.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/18/07

*Hej*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 39

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FERRANTE IMMOBILIARE, LLC d/b/a  
FERRANTE PLLC,

Plaintiff,

-against-

Index No. 108089/06

GUIDO A. PACE, R.A. d/b/a PACE ARCHITECTS  
and GOLDMAN COPELAND ASSOCIATES, P.C.,

Defendants.

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**HELEN E. FREEDMAN, J:**

In this action, involving the renovation of the tenth floor of a cooperative building at 5 West 19<sup>th</sup> Street for offices, plaintiff FERRANTE IMMOBILIARE, LLC d/b/a FERRANTE PLLC (“Ferrante”) sues the architect, PACE and PACE ARCHITECTS (“Pace”) for breach of contract and negligent supervision in connection with the installation of the HVAC system. Defendant Goldman Copeland Associates (“Goldman”), was the engineering subcontractor allegedly responsible for the design and supervision of the HVAC installation. Vanguard Construction & Development Co., Inc. (“Vanguard”) was hired to be the general contractor on April 21, 2003.

Defendant PACE moves pursuant to CPLR 3211(a)(7) and CPLR 3211 (a)(10) to dismiss the within action against it for failure to state a cause of action and failure to name Vanguard as a defendant, and seeks a stay of discovery pending resolution of this motion. The Court has referred this matter to mediation, but the parties agree that a decision on this motion should precede a mediation session. Defendant avers that it was the general contractor who is responsible for purchasing the proper equipment and proper installation of that equipment.

Defendant further avers that the mechanical subcontractor never provided the “as built” drawings and the general contractor is the entity that must make sure that the elements of the design for the HVAC system are properly implemented. Pace also submits that plaintiff’s failure to pay Vanguard caused the latter to stop performing its work as general contractor and to file various mechanic liens against the property. Defendant states that it remained on the project even after it was not longer getting paid for its services. Although plaintiff has settled with Vanguard, Pace contends that not all of its (Vanguard’s) work for plaintiff comes within the settlement agreement. Pace contends that Vanguard is a necessary party because it is not possible to determine the alleged problems with the HVAC system, plumbing and electricity without its presence. Plaintiff alleges that Vanguard may have purchased defective equipment in the first place.

Finally, defendant Pace contends that it had not been hired to supervise any work, rather it was hired to translate the design work of the Italian Architect and Art Director who created the original designs into construction documents and to meet periodically with Plaintiff to visit the site. Pace also contends that it was not supposed to obtain permits, certificates or certificates of occupancy, and submits various documents which it claims demonstrate that its responsibility for the alleged HVAC system does not extend to the claims for which it is being sued.

In opposition, plaintiff through its principal Frank Ferrante submits that Pace was in charge of designing and supervising the installation of the electrical and mechanical systems and that Pace retained Goldman, who in turn, installed systems that did not work properly. Ferrante denies that Pace’s only responsibility was translating the design work of the Italian Architect and Art Director and to meet periodically at the site to assess the progress of the Project. He states

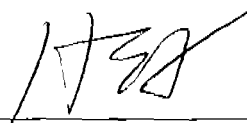
that Pace was retained to be the sole architect for the Project from its inception to its conclusion and to directly design plans and supervise the installation of the mechanical and electrical systems. Ferrante further contends that should discovery disclose liability on the part of Vanguard, either Ferrante or Pace could bring Vanguard into the action, but that at this juncture, Vanguard's culpability is unknown to Ferrante.

Although defendant Pace has interposed an answer and limited discovery has taken place, a motion to dismiss predicated upon failure to join a necessary party may be made at this time, *State v. Wolowitz*, 96 A.D.2d 47, 468 N.Y.S.2d 131 (2d Dept. 1983). Thus, Pace's contention that Vanguard is a necessary party because it was responsible for implementation of the HVAC installation and that Ferrante's settlement with Vanguard did not fully resolve claims against Vanguard, is timely.

However, on a motion to dismiss, the court must look not only at whether a cognizable cause of action is stated, but whether in fact one exists. *Guggenheimer v. Ginsberg*, 43 N.Y.2d 263 (1977); *Leon v. Martinez*, 84 N.Y.2d 83 (1994). As set forth in the Complaint, there are issues of responsibility for the HVAC installation which cannot be determined on a motion to dismiss. The contract between Ferrante and Pace appears to indicate some supervisory function and requires field inspections during the progress of the work. Pace apparently hired Goldman as mechanical contractor and supervised its work. If discovery discloses that Vanguard is a necessary party, plaintiff may add Vanguard as a defendant or Pace may interpose a third party claim against Vanguard as a joint tortfeasor. Pace may also assert its lack of responsibility as a defense to Ferrante's claims. But, at this juncture, it does not appear that Vanguard is a necessary party to the current proceedings.

Based on the above, the motion is denied and parties are directed to proceed to mediation as previously ordered and report to the Court on July 17, 2007 or at a mutually agreed upon date (with notification to the Court) if the mediation has not taken place.

Enter:



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Helen E. Freedman, J.S.C.