

Hick v Dormer Express, Inc.

2007 NY Slip Op 31883(U)

June 18, 2007

Supreme Court, Suffolk County

Docket Number: 0029059/2004

Judge: Joseph Farneti

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MARK S. HICK and ELLEN HICK,

Plaintiffs,

-against-

DORMER EXPRESS, INC., TITO GARCIA
and THOMAS J. BROOKSBANK,

Defendants.

DORMER EXPRESS, INC. and TITO
GARCIA,

Third-Party Plaintiffs,

-against-

JOSEPH BRUNO PLUMBING & HEATING,
INC.,

Third-Party Defendant.

ORIG. RETURN DATE: FEBRUARY 22, 2007
FINAL SUBMISSION DATE: MARCH 29, 2007
MTN. SEQ. #: 001
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers 4,
5; Replying Affirmation and supporting papers 6; Affirmation in response 7; it is,

ORDERED that this motion by third-party defendant, JOSEPH BRUNO
PLUMBING & HEATING, INC. ("BRUNO"), for an Order, pursuant to CPLR 3212,
granting summary judgment dismissing the third-party plaintiffs' complaint, is hereby
GRANTED for the reasons set forth hereinafter.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff MARK S. HICK as the result of an alleged assault committed against him by defendant THOMAS J. BROOKSBANK on March 14, 2002 at the Hicks' premises known as 103 Pamlico Avenue, Ronkonkoma, New York. Plaintiffs' verified complaint indicates that while defendant BROOKSBANK was acting in the course of his employment with defendant DORMER EXPRESS, INC. ("DORMER"), he caused plaintiff HICK to sustain certain personal injuries. By amended third-party complaint dated April 20, 2005, third-party plaintiffs DORMER and TITO GARCIA allege that defendant BROOKSBANK was actually an employee of third-party defendant BRUNO on the date in question. In addition, the third-party complaint alleges that third-party defendant BRUNO was working at the Hicks' premises pursuant to a contract agreement with third-party plaintiff DORMER.

BRUNO now moves for summary judgment dismissing the third-party plaintiffs' complaint, alleging that on March 14, 2002, defendant BROOKSBANK was not an employee of BRUNO. Further, BRUNO alleges that at no time had BRUNO entered into any contractual agreement with DORMER to perform any work at the Hicks' premises. In support thereof, BRUNO has submitted an affidavit of JOSEPH BRUNO, its president, who attests to the foregoing. BRUNO has also submitted a response to preliminary conference order, dated March 22, 2006, wherein third-party plaintiffs acknowledge that they are not in possession of any contracts, permits or work orders. Moreover, BRUNO has annexed a copy of a plumbing permit application, sworn to by plaintiff MARK S. HICK on February 26, 2002, which indicates that the plumber being utilized at the Hicks' premises was Vincent L. Agenjo, Jr., not BRUNO.

In opposition, third-party plaintiffs DORMER and TITO GARCIA have submitted an affirmation of counsel wherein counsel argues that the instant application is premature in that depositions have not yet been held and significant discovery remains outstanding. Further, third-party plaintiffs argue that facts essential to oppose the instant application may exist but are within the exclusive knowledge of BRUNO, and as such, the application is premature given the early stage of discovery. In addition, third-party plaintiffs allege that BRUNO had contracted with DORMER in the past, and have annexed a copy of a certificate of insurance of BRUNO naming DORMER as an additional insured. However, the Court notes that this certificate of insurance covers the period February 19, 2000 through February 19, 2001, and therefore predates the subject incident by approximately one year.

Plaintiffs have submitted an affirmation of counsel in response to the instant application taking no position on the motion.

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]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). 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 evidentiary proof in admissible form 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 case at bar, the Court finds that BRUNO has made a *prima facie* showing of entitlement to judgment as a matter of law (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). BRUNO has established, by evidence in admissible form, that BROOKSBANK was not an employee of BRUNO, and that at no time had BRUNO entered into any contractual agreement with DORMER to perform any work at the Hicks' premises. As such, the burden then shifted to third-party plaintiffs to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial of the action. Here, third-party plaintiffs have failed to do so. Third-party plaintiffs have submitted an affirmation of counsel in opposition to the motion, but have failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to BRUNO. Counsel's affirmation in opposition, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat 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];

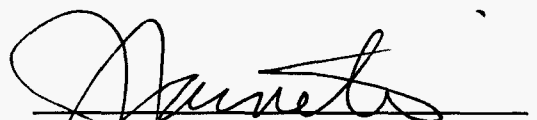
Hoffman v Eastern Long Island Transp. Enter., 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]).

Although third-party plaintiffs urge a denial of the motion, speculating as to what might be revealed during examinations before trial, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (see *Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]). Notwithstanding the fact that the causes of action in their complaint sound in breach of contract, third-party plaintiffs have failed to annex a copy of a contract between BRUNO and DORMER, or even allege that one exists. It was incumbent upon the third-party plaintiffs to include a copy of the written contract in their opposition papers or allege that the contract was never reduced to writing, or provide a reasonable excuse for the failure to include the contract. Even assuming *arguendo* that such a contract exists, it cannot be said that the contract is exclusively within BRUNO's knowledge and control so as to deny the instant motion for summary judgment. Furthermore, third-party plaintiffs have not refuted BRUNO's allegation that defendant BROOKSBANK was not an employee of BRUNO on the date of the subject incident.

In view of the foregoing, this motion by BRUNO for summary judgment dismissing the third-party plaintiffs' complaint is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: June 18, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court