

Fernandez v Nastasi Assoc.
2007 NY Slip Op 32158(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0109280/2004
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

AMANDA FERNANDEZ,

INDEX NO. 109280/04

Plaintiff,

- v -

MOTION DATE 4/5/07

MOTION SEQ. NO. 002

NASTASI ASSOCIATES, CONTINENTAL
MARBLE INC., TURNER CONSTRUCTION and
BROOKFIELD PROPERTIES,

MOTION CAL. NO. 37

Defendants.

The following papers, numbered 1 to 18 were read on this motion for summary judgment and cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-R	<u>1-2</u>
Answering Affidavits — Exhibits A-I; Exhibits A-G	<u>3-7</u>
Notice of Cross Motion— Affidavits — Exhibits A-C	<u>8-9</u>
Answering Affidavits — Exhibits A-B; Exhibits A-B	<u>10-12</u>
Reply Affirmation — Exhibits A-C; Reply Affirmation	<u>13-14</u>
Additional Opp. Affirmation — Exhibits A-B	<u>15</u>
Further Opp. Affirm — Exhibits A-B; Further Opp. Affirmation — Exhibit A	<u>16-17</u>
Supplemental Reply Affirmation — Exhibit A	<u>18</u>

FILED

JUL 19 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 7/11/07
New York, New York


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
AMANDA FERNANDEZ,

Plaintiff,

- against -

Index No. 109280/2004

NASTASI ASSOCIATES, CONTINENTAL MARBLE, INC.,
TURNER CONSTRUCTION and BROOKFIELD
PROPERTIES,

Defendants.

-----X
CONTINENTAL MARBLE, INC.,

Decision and Order

Third-Party Plaintiff,

- against -

Third-Party Index No.
590068/2005

CONVENTIONAL STONE & MARBLE CORP.,

Third-Party Defendant.

-----X

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiff Amanda Fernandez alleges that, on July 9, 2002, she was struck by an eight-foot high wood fence surrounding the construction site at One Liberty Plaza as she was walking by the site after leaving from work. One Liberty Plaza Co., LLC, sued herein as defendant Brookfield Properties (BFP), is the alleged owner of the building at One Liberty Plaza. BFP allegedly hired Turner Construction Company, sued herein as defendant Turner Construction (Turner) as the general contractor. Turner hired defendant Nastasi Associates (Nastasi) to erect the fence around the construction site and hired defendant Continental Marble, Inc. (Continental Marble) to perform marble work. Continental Marble orally subcontracted some work to third-party

defendant Conventional Stone & Marble Corp. (Conventional Stone).¹

Conventional Stone moves for summary judgment dismissing the complaint as against it, along with all cross claims and Continental Marble's third-party action. Continental Marble cross-moves for summary judgment dismissing the complaint as against it, and for summary judgment in its favor against Conventional Stone in the third-party action. After the motion and cross motion were submitted, the Court ordered the parties to conduct the deposition of Keithroy Williams, a Turner laborer, who submitted an affidavit stating that he believed that workers from Conventional Stone had removed sandbags placed along the barricade fence for support. The parties were then given a opportunity to supplement their motion papers.

The standards for summary judgment are well settled.

“[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted). “Summary judgment is a drastic remedy. In deciding whether a question of fact concerning a core issue exists, the court must give the moving party the benefit of all reasonable inferences that may be drawn from the competent evidence introduced in connection with the motion.” Gonzalez v American Oil Co., ___ AD3d ___, 2007 NY Slip Op 04892, 2 (1st Dept, June 7, 2007).

¹Plaintiff claims to have amended the complaint to name Conventional Stone as a direct defendant. However, the official caption still lists Conventional Stone as a third-party defendant. For ministerial corrections to the official caption, plaintiff must consult with the Court's Trial Support Office (60 Centre St Rm 300).

Conventional Stone's Motion for Summary Judgment

Conventional Stone argues that it is not liable for plaintiff's injuries because it had no responsibility for construction or maintenance of the fence, either under common-law or by contract. It is undisputed that Nastasi constructed the fence.

Nastasi, Turner, and BFP believe that Conventional Stone's employees may have removed sandbags placed on angle braces supporting the base of the barricade fence. Turner's superintendent at the site, Martin Rutter, learned from a laborer, Keithroy Williams, that Conventional had removed sandbags. See Roher Affirm., Ex N [Rutter EBT], at 47-49; 55-56; 74. In opposition to Conventional Stone's motion, Williams states that, while he was walking by the fence, he observed that sandbags were missing from where they had been placed on the barricade fence, and the only contractor working in the immediate area of the sandbags at the time was Conventional Stone. See Williams Aff. ¶¶ 5-6. Nastasi, Turner, and BFP also believe that Conventional Stone cut overhead braces that supported the fence. Salvatore Biscula, a general foreman from Nastasi at the time of plaintiff's accident, testified at his EBT that the barricades were supported by two by four angle braces, as well as overhead braces attached to planter boxes at One Liberty Plaza. See Roher Affirm., Ex R [Biscula EBT], at 22, 46. Biscula believed that "the stone guys doing the stone sidewalk" had cut the overhead braces to permit a "high-low," i.e., a forklift, to get past the overhead braces. Id., at 45-46.

Conventional Stone contends that the case against it is based upon hearsay and speculation. Conventional Stone points out that, at Williams's deposition, he stated that he never saw anyone remove sandbags from the bottom of the fence. See Lewis Additional Opp. Affirm., Ex B [Williams EBT], at 48. Conventional Stone maintains that Williams believed that Conventional Stone had

removed sandbags only after Rutter had suggested that someone had taken sandbags. Moreover, Williams testified that the name of the contractor putting paving stones down in the fence area was “Continental or something like that, I think.” Id. at 14. When he was asked if he was sure it was Continental or Conventional that put in stones, Williams answered, “I’m not sure I’m positive positive [sic].” Ibid. Williams later testified that “When I was there, all I heard that [Marty Rutter] was calling them Continental all the time.” Id. at 43. When asked why he had named Conventional Stone in his affidavit, Williams testified that he thought they were the same. See id. at 44.

Conventional Stone’s project executive, Edward McGuinness, maintains that Conventional Stone supplied its own sand for the work it performed. See Roher Affirm, Ex O [McGuinness EBT], at 84-85. When Conventional Stone’s on-site foreman, Sean Pues, was asked if its employees ever used bags of sand that were not ordered through its supplier, Harold Anthony, he answered, “No, everything comes from Harold Anthony.” See Roher Affirm., Ex P at 111.

Conventional Stone argues that Biscula’s testimony is speculative because he testified that he did not know how long the high-low had been present at the scene of plaintiff’s incident, and did not know when the stone sidewalk had been completed. See Biscula EBT, at 140-141.

The record is not clear whether overhead braces that had been cut were a proximate cause of plaintiff’s alleged injuries. Although Biscula believes that the wall came down because half the sandbags were used and the braces were cut (Biscula EBT, at 84), Nastasi, Turner, and BFP do not cite any portion of Biscula’s EBT wherein he states whether the overhead braces of portion of the fence that fell onto plaintiff had been cut.

Nevertheless, when viewed in a light most favorable to the non-movants, the evidence raises a triable issue of fact as to whether Conventional Stone removed sandbags placed on the angle braces

supporting the wooden fence, and whether that lack of support proximately caused plaintiff's injuries. The allegations of Conventional Stone's liability is based not on speculation, but on circumstantial evidence, albeit weak. Deposition testimony places Conventional Stone's employees near the sandbags, and Conventional Stone uses sand in its work. As plaintiff indicates, Williams testified that the sandbags which carry the masonry sand that Conventional Stone uses resemble the sandbags supporting the fence. See Williams EBT, at 40.

Conventional Stone's remaining arguments are without merit. The issue of whether the removal of sandbags proximately caused the wall to collapse is for the jury to determine. Conventional Stone cannot establish as a matter of law that, based on a photograph, the condition of the sandbags were so worn that removal of the sandbags would not have made any difference in causing the fence to fall onto plaintiff.

Continental Marble's Cross Motion for Summary Judgment

Assuming that a marble subcontractor had removed the sandbags supporting the portion of the fence that fell onto plaintiff, Continental Marble asserts that it did not remove any sandbags from the fence outside surrounding One Liberty Plaza. Continental Marble's president, Christopher McConnell, maintains that Continental Marble performed only interior marble work at One Liberty Plaza, because it subcontracted exterior marble work to Conventional Stone, which McGuinness confirmed. See Roher Affirm., Ex Q, [McConnell EBT], at 25-26; see McGuinness EBT, at 11. Continental Marble maintains that it provided only stone for the exterior marble work. See McConnell EBT, at 43. Although Continental Marble had a safety coordinator on site, Steve Piccininni, Conventional Stone says that Piccininni did not perform any physical labor. McGuinness EBT, at 79-80.

In opposition, plaintiff and Nastasi argue that, even if Continental Marble did not perform exterior marble work, questions of fact arise as to whether Continental Marble had breached a duty of care in hiring or supervising Conventional Stone's work, in that an issue of fact may arise as to whether Conventional Stone's work was inherently dangerous, citing Kleem v Rheingold (81 NY2d 270 [1993]). Turner and BFP indicate that McConnell testified at his EBT that it was part of his job to inform Conventional Stone if he found that they were doing something that would create an unsafe condition at the job site. McConnell EBT, at 88. Consequently, Turner and BFP argue that summary judgment should be denied because Conventional Stone may be found negligent, which in turn implicates Continental Marble's liability.

Plaintiff and Nastasi fail to raise a triable issue of fact as to whether Conventional Stone's work was inherently dangerous, such that Continental Marble had a common-law duty of care in the hiring or supervision of Conventional Stone. Contrary to plaintiff and Nastasi's argument, it was not Continental Marble's prima facie burden to show that Conventional Stone's work was not inherently dangerous. Turner and BFP's argument only begs the question of whether Continental Marble had notice that Conventional Stone had created an unsafe condition at the job site. Even if Continental Marble knew that sandbags supporting the fence around the job site were missing, it would not necessarily have concluded that Conventional Stone's employees were taking the sandbags. McConnell testified that the construction-grade sand in the sandbags supporting the barricade is different from the sand that is used for installing stone, because the latter is finer than construction-grade sand. McConnell EBT at 159.

However, Continental Marble is denied summary judgment dismissing plaintiff's complaint. A disputed issue of fact arises as to whether Continental Marble was working outside, based on

Williams's EBT testimony. See Williams EBT, at 43. Although Williams named Conventional Stone in his prior affidavit, the inconsistent testimony raises a question of credibility that must be resolved by the jury.

The remaining branch of Continental Marble's cross motion seeks summary judgment in its favor in the third-party action against Conventional Stone. Continental Marble contends that Conventional Stone breached an agreement to procure insurance on behalf of Continental Marble. Conventional Stone named Continental Marble as an additional insured under a policy issued to Conventional Stone.² However, in another action, Judge Acosta declared that the policy did not cover Continental Marble. See BFP One Liberty Co. LLC et ano. v Continental Marble, Inc. et al., Sup Ct, NY County, Acosta, J., Index No. 113178/2004 [annexed as Ex C to Gironda Affirm.]. Judge Acosta found that the additional insured endorsement provided coverage only to those issued a certificate of insurance, and only where insurance is required by a written contract. Continental Marble was named as an additional insured on a certified of insurance (Gironda Affirm., Ex A), but it admittedly had no written contract with Conventional Stone.


Continental Marble claims that, based on the parties' course of dealings and the certificate of insurance, Conventional Stone agreed to procure insurance on Continental Marble's behalf, citing Travelers Indem. Co. of Am. v Royal Ins. Co. of Am. (22 AD3d 252 [1st Dept 2005]), Horn Maintenance Corp. v Aetna Cas. & Sur. Co. (225 AD2d 443 [1st Dept 1996]), and Morrison-Knudsen

²The Court notes that the third-party complaint does not allege that Conventional Stone breached an agreement. Rather, it alleges that an agreement existed between Continental Marble and Conventional Stone, and that Conventional Stone may be partly or entirely liable to Continental Marble if a judgment is entered against Continental Marble. See Roher Affirm., Ex F [Third-Party Complaint] ¶¶ 10, 14. However, Conventional Stone does argue that this was an unpleaded cause of action.

ORDERED that so much of the third-party action as purporting to allege a breach of contract is hereby severed and shall be tried after the trial of the main action; and it is further

ORDERED that the parties shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court and the Trial Support Office (60 Centre St Room 300).

Dated: 7/11/07
New York, New York

ENTER: 

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
JUL 19 2007
NEW YORK
COUNTY CLERKS OFFICE