

**Deimel v Aboff**

2007 NY Slip Op 32480(U)

August 7, 2007

Supreme Court, Suffolk County

Docket Number: 0019093/2006

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Present:

Hon. SANDRA L. SGROI

Mot Seq: 002 MG  
003 MD

Adj'd Date: 7-19-07  
Return Date: 6-20-07

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KATHLEEN M. DEIMEL,  
Plaintiff,

-against-

MICHAEL ABOFF, ABOFFS, INC., TOMO  
HIBACHI, INC., ALBERTO MAKALI, LTD,  
SOLEIL, LLC, TOWN OF HUNTINGTON, and  
ABCON ASSOCIATES, INC.,  
Defendants.

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Upon the following papers numbered 1 to 35 read on this Motion and Cross Motion: Notice of Motion and supporting papers 1-9; Notice of Cross Motion and supporting papers 10-17; Affirmation in opposition to Cross Motion and supporting papers 18-29; Reply Affirmation in support of dismissal and supporting papers 30-31; Reply Affirmation and supporting papers 32-33; Further affirmation in opposition and supporting papers 34-35; it is,

**ORDERED** that the motion of Abcon Associates, Inc. to dismiss the Plaintiff's Third Supplemental Complaint that added Abcon Associates, Inc. as a Defendant is granted and this Complaint is dismissed only as to the Defendant Abcon Associates, Inc.; and it is further

**ORDERED** that the cross motion to add Abcon Builders, Corp. as a Defendant and to sanction the attorney for Abcon Associates, Inc. is denied.

On or about May 31, 2005, the Plaintiff was injured on property located on New Street, Huntington, New York. The third amended complaint alleges that all of the Defendants are owners, lessees, or responsible for the maintenance and control of the property on which the Plaintiff was injured and it further alleges that the Defendants were negligent in the operation, control and maintenance of the premises causing injury to the Plaintiff.

After the Plaintiff's motion for leave to serve the third amended summons and complaint was granted by this Court, an amended summons and complaint was served on Abcon Associates, Inc. (hereinafter "Abcon Associates") in or about March 30, 2007, and the affidavit of service was filed on April 13, 2007. The motion to dismiss was made on May 15, 2007. Although this motion would have been untimely if the parties had not stipulated to an extension of time to plead, the moving Defendant alleges that the Plaintiff did extend the time to interpose an answer until May 16, 2007.

According to an affidavit submitted by Keith Zenobio, the Project Manager of Abcon Associates, it was not the owner of the property where the Plaintiff's accident occurred and it had not engaged in any construction in the area of the Plaintiff's accident. Keith Zenobio further asserts that it has not performed any construction work since 2001, more than four (4) years before the Plaintiff's accident occurred. Additionally, Keith Zenobio alleges that Abcon Associates has never provided any services or performed any work in the vicinity of the Plaintiff's accident. Keith Zenobio did state in his affidavit that Abcon Builders Corp., an entity that is not a party to this law suit at this time, was hired on January 3, 2006 by the Co-Defendant Soleil, LLC, to provide construction management services after a prior construction manager was terminated from the project by Soleil, LLC. While Zenobio avers that he does not know the name of the prior entity, he states that Abcon Builders Corp was not employed in any capacity in the vicinity of the Plaintiff's accident on May 31, 2005, when the accident occurred.

In opposition to this motion, the Plaintiff's attorney does not dispute these allegations but instead asks to add Abcon Builders Corp. as a party Defendant and to sanction Elizabeth R. Gorman, Esq., the attorney for Abcon Associates.

The cross motion to amend the complaint to add Abcon Builders, Corp. as a party must be denied. The

facts before this Court do not support a motion to add the proposed Defendant as a party (see, *Demant v. Town of Oyster Bay*, 23 A.D.3d 333, 804 N.Y.S.2d 107; *Rinzler v. Jafco Associates*, 21 A.D.3d 360, 800 N.Y.S.2d 719).

Since the Plaintiff has failed to make the required evidentiary showing that a valid cause of action existed against the proposed additional Defendant, the cross motion to add a party must be denied (see, *Ortiz v. Cormier*, 10 A.D.3d 389, 780 N.Y.S.2d 768; *Toscano v. Toscano*, 302 A.D.2d 453, 754 N.Y.S.2d 888; *Bartone v. County of Nassau*, 286 A.D.2d 354, 356, 729 N.Y.S.2d 171).

In the cross motion, Steven D. Dollinger, Esq., the attorney for the Plaintiff, has criticized Elizabeth Gorman, Esq., the attorney for Abcon Associates, alleging that the paralegal for Plaintiff's attorney was told that an answer to the Complaint would be received on May 16, 2007. According to the affirmation of Steven D. Dollinger, Esq., Elizabeth Gorman, Esq. orally misrepresented to the Plaintiff's attorney during a telephone conversation on or about May 16, 2007 that she was in possession of a signed stipulation extending the time to file an answer. However, he does admit that Elizabeth Gorman, Esq. returned a telephone call to the office of Plaintiff's attorney on May 16, 2007 and informed the paralegal of Plaintiff's attorney that she did not have a signed stipulation covering this case. Elizabeth Gorman, Esq. allegedly stated that she was given "an oral stipulation" by an "EBT clerk" in Plaintiff's office. Apparently, during the course of one of the conversations that transpired on May 16, 2007, Elizabeth Gorman, Esq. allegedly told the attorney Steven D. Dollinger, Esq. and Dollinger's paralegal that the Defendant's answer would be received by 5:00 p.m. on May 16, 2007. When the package of papers from the office of Elizabeth Gorman, Esq. was received by the Plaintiff, it apparently contained this motion to dismiss.

In response to these allegation, Elizabeth Gorman, Esq. alleges that on April 16, 2007, she received this file and upon receiving the file, Trisha T. Campbell, her paralegal, contacted Plaintiff's counsel and requested an extension of time to answer the complaint up to and including the date of May 16, 2007. This paralegal has attached an affidavit wherein she states that she talked to an individual by the name of Deserae<sup>1</sup> who agreed to permit an extension of time for Elizabeth Gorman, Esq. to serve an answer to the Complaint. By letter dated April 17, 2007, Campbell wrote to Plaintiff's counsel indicating that her letter serves to confirm her April 16, 2007 telephone conversation with Deserae and a copy of this letter is attached as Exhibit "C" to Defendant's affirmation in opposition. The attorney for the moving Defendant also has provided this Court with proof that in addition to the motion, an answer was served on May 16, 2007. The Court notes that there was never any agreement between the attorneys that a motion by Abcon Associates seeking *CPLR* 3211 relief would be waived if an extension of time to serve an answer was granted.

The attorney for the Plaintiff has not shown that the attorney for Abcon Associates improperly conducted herself during this litigation and the motion to sanction that attorney is denied.

*CPLR* 2104 requires that all stipulations be written and subscribed by those to be bound unless they are

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<sup>1</sup>The Court has used this spelling because this is the form used by the attorney for the Plaintiff.

made in open court. The purpose of requiring a writing before the Court will permit the enforcement of the stipulation is “to assure irrefutable proof of the agreement” (Siegel, *New York Practice* § 204, at p. 323). This being said, the Plaintiff would be precluded from invoking CPLR 2104 to avoid the enforcement of an oral stipulation if it appears that the stipulation actually was made and that the adverse party relied upon that agreement (see, *Juseinoski v. Board of Educ. of City of New York*, 15 A.D.3d 353, 790 N.Y.S.2d 162; *DiIorio v. Antonelli*, 240 A.D.2d 537, 658 N.Y.S.2d 453). Here, there is sufficient evidence to conclude that the oral stipulation extending Abcon Associates’ time to answer was, in fact, made between the paralegals in the firms of the attorney for the Plaintiff and the attorney for the moving Defendant (see, *Wilson v. Nembhardt*, 180 A.D.2d 731, 734, 580 N.Y.S.2d 70). Further, in response to the cross motion, the attorney for the movant has provided the Court with proof that an answer was served on May 16, 2007.

Without proof that the Plaintiff agreed to extend the Defendant’s time to answer, Abcon Associates would be in default in answering the complaint. Here, although there is a dispute as to whether the attorney for Abcon Associates improperly surprised the attorney for the Defendant with the motion to dismiss, both the attorney for the Plaintiff and the attorney for Abcon Associates agree that there was an oral stipulation that the Plaintiff would not enter a default judgment if an answer was served by May 16, 2007. However, even if Abcon Associates was in default in answering the complaint, it has shown both an excuse for that default and a meritorious defense to the action and that default would be vacated (see, *DiIorio v. Antonelli*, 240 A.D.2d 537, 658 N.Y.S.2d 453). The Court will therefore address the motion of the Defendant on its merits.

The facts before this Court require that this Court dismiss the action of the Plaintiff as against the moving Defendant only (see, *Tillem v. Cablevision Systems Corp.*, 38 A.D.3d 878, 832 N.Y.S.2d 296; *Demant v. Town of Oyster Bay*, 23 A.D.3d 333, 804 N.Y.S.2d 107; *Rinzler v. Jafco Associates*, 21 A.D.3d 360, 800 N.Y.S.2d 719).


A finding of negligence based on the breach of a duty requires a threshold determination of whether the alleged tortfeasor owed a duty of care to the injured party (see, *Darby v. Compagnie Natl. Air France*, 96 N.Y.2d 343, 347, 728 N.Y.S.2d 731, 753 N.E.2d 160; *Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019). In *Espinal v. Melville Snow Contractors, Inc.*, (98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120), the Court of Appeals stated:

\*\*\**Moch, Eaves Brooks* and *Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm” ( *Moch*, 247 N.Y. at 168, 159 N.E. 896); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties ( see *Eaves Brooks*, 76 N.Y.2d at 226, 557 N.Y.S.2d 286, 556 N.E.2d 1093) and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely ( see *Palka*, 83 N.Y.2d at 589, 611 N.Y.S.2d 817, 634 N.E.2d 189). These principles are firmly rooted in our case law, and have been generally recognized by other authorities ( see e.g. *Restatement [Second] of Torts* § 324A).

Here, Abcon Associates, the movant, did not have a contractual relationship with the owner of the property or the entity responsible for the property until some time after the date when the accident occurred injuring the Plaintiff. No other facts have been shown that would demonstrate the liability of Abcon Associates. Since the Plaintiff has failed to make the required evidentiary showing that a valid cause of action existed against the Defendant Abcon Associates, the motion to dismiss the Complaint must be granted as against this Defendant only (see, *Ortiz v. Cormier*, 10 A.D.3d 389, 780 N.Y.S.2d 768; *Toscano v. Toscano*, 302 A.D.2d 453, 754 N.Y.S.2d 888 ; *Bartone v. County of Nassau*, 286 A.D.2d 354, 356, 729 N.Y.S.2d 171).

At the present time, the Plaintiff has not shown that the addition of another party, Abcon Builders, is warranted.

Dated: 8/7/07

  
SANDRA L. SGROI, J. S. C.