

Mohring v Kimco Realty Corp.

2007 NY Slip Op 32750(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0025975/2002

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

<p>LORENA MOHRING and ROBERT MacDONALD,</p>	<p>Plaintiffs,</p>
<p>- against -</p>	
<p>KIMCO REALTY CORP, CENTEREACH PLAZA, 444 CONTRACTING CORP and TEAM CONSTRUCTION,</p>	<p>Defendants.</p>
<p>KIMCO REALTY CORP and CENTEREACH MALL ASSOCIATES, LP s/h/a CENTEREACH PLAZA,</p>	
	<p>Third-Party Plaintiffs,</p>
<p>- against -</p>	
<p>TEAM CONSTRUCTION,</p>	<p>Third-Party Defendant.</p>

INDEX NO.: **2002-25975**

MOTION SEQ. NO.: 004 - MG *CASEDISP*
 ORIG. MOTION DATE: 01/08/07

FINAL SUBMIT DATE: 06/06/07

UPON the following papers numbered 1 to 98 read on this Motion:

- Defendants - 3rd-Party Plaintiffs KIMCO-CENTEREACHs' Motion (Pages 1-15 & Exhibits A-G);
- Plaintiffs' Opposition (Pages 16-61 & Exhibits A-D and Appendix);
- Defendants - 3rd-Party Defendants TEAM' Opposition (Pages 62-76 & Exhibits A-D);
- Defendants - 3rd-Party Plaintiffs KIMCO-CENTEREACHs' 1st Reply (Pages 77-87 & Exhibits A-B);
- Defendants - 3rd-Party Plaintiffs KIMCO-CENTEREACHs' 2nd Reply (Pages 88-98 & Exhibits A-C);

it is,

ORDERED, that the application of Defendants-3rd-Party Plaintiffs KIMCO-CENTEREACH is hereby granted in all respects.

Defendants - 3rd-Party Plaintiffs KIMCO-CENTEREACH move this Court for an Order seeking remedies set forth in CPLR 3212, granting:

- a) Summary Judgment against Plaintiffs dismissing the Summons and Complaint against Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH;
- b) Summary Judgment against Defendant - 3rd-Party Defendant TEAM for contractual indemnification and/or common law indemnity;
- c) Dismissing all claims and cross-claims asserted against Defendants-3rd-Party Plaintiffs KIMCO-CENTEREACH.

This action arises out of claims for recovery for personal injuries allegedly suffered by Plaintiff MOHRING as the result of a slip and fall on wet cement on November 13, 2000, on the sidewalk in front of Joann's Craft Store, located in the Centereach Mall shopping center, while carrying her infant son in a front pouch.

Plaintiffs claim that Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH were negligent in hiring Defendant - 3rd-Party Defendant TEAM and negligent in the performance of construction work at the site, in creating and failing to protect a dangerous and defective condition on the public sidewalk, in failing to maintain the premises properly, in failing to follow proper procedures, and in failing to give warning of their work.

Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH maintain that the property manager of the site had entered into a contract on their behalf with Defendant - 3rd-Party Defendant TEAM, a corporation in the business of parking area maintenance for commercial parking lots, for repair of the concrete sidewalks at the site in question, and that Defendant - 3rd-Party Defendant TEAM had regularly inspected and serviced said location in the year 2000 and the years prior thereto, providing various services, including sweeping, snow and ice removal and pot hole repair, on an as need basis.

Pursuant to written agreements between the parties, Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH demonstrated to this Court that Defendant - 3rd-Party Defendant TEAM had the responsibility to obtain and maintain a policy of insurance providing defense and indemnification coverage to Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH, and to indemnify same for all claims arising from or in connection with performance of duties under said agreement, citing the language of the agreement and exhibits attached thereto regarding “SCOPE OF THE WORK”, “LIABILITY FOR DAMAGES” and “HOLD HARMLESS/INDEMNIFICATION PROVISION”.

Furthermore, Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH demonstrated to this Court that, in his deposition testimony the President of Defendant - 3rd-Party Defendant TEAM admitted that Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH never knew that a subcontractor would be performing the sidewalk repair work that they had been contracted to perform.

As adeptly pointed out by Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACHs’ Counsel, the duty to indemnify involves an attempt to shift the entire loss from one who is compelled to pay, without regard to their own fault, to another party who should more properly bear responsibility for the loss (*See: Phillips v YMCA*, 215 AD2d 825 [3 Dept 1995]; *Rogers v Dorchester Associates*, 32 NY2d 553 [1973]); a party is entitled to full contractual indemnification provided the “intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*See: Watral & Sons, Inc v OC Riverhead 58, LLC*, 34 AD3d 560 [2 Dept 2006]; *Torres v Diesel International, Inc*, 14 AD3d 401 [1 Dept 2005], *citing Drzewinski v Atlantic Scaffold & Ladder Co, Inc*, 70 NY2d 774 [1987]). Furthermore, pursuant to the agreement between said parties, Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH has demonstrated that Defendant - 3rd-Party Defendant TEAM is obligated to pay for the reasonable costs and attorney’s fees associated with the defense of this action by virtue of the indemnity language therein (*See: Springstead v Ciba-Geigy Corp*, 27 AD3d 720 [2 Dept 2006]; *DiPerna v ABC*, 200 AD2d 267 [1 Dept 1994]). Still further, in order to impose liability under the theory of negligent hiring, the party pleading same must establish that the party against whom they are alleging it had either actual or constructive notice of a contractor’s propensity for the conduct which caused the injury (*See: Bellere v Gerics*, 304 AD2d 687 [2 Dept 2003]; *Sato v Correa*, 272 AD2d 289 [2 Dept 2000]), which is obviously impossible herein, given the facts.

The opposition submitted by Defendant - 3rd-Party Defendant TEAM clearly flies in the face of the facts,

and the language of the agreements reviewed by the Court herein, and is effectively rebutted by Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH's reply, carefully walking the Court through the erroneously placed but effective initialing of the pages of the agreements.

Furthermore, even if this Court were to find Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH vicariously liable for the alleged negligence of the contractor and its subcontractor herein, in failing to adequately guard against the repair work being performed on the date of the incident in question, nothing in the law bars Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH's right to indemnity from the primary wrongdoers, Defendant - 3rd-Party Defendant TEAM and the subcontractor performing the work under its direction (*See: Salisbury v Walmart Stores, Inc.*, 255 AD2d 690 [3 Dept 1999]; *Thomassen v J&K Diner, Inc.*, 152 AD2d 421 [2 Dept 1989]; *Bello v Lefrak*, 236 AD2d 571 {2 Dept 1997}; *Rogers v Dorchester Associates, Supra*; *Schwartz v Merola Bros Constr Corp.*, 263 AD 631 [1 Dept 1942]).

It must be noted that the Opposition affidavit submitted by Plaintiff MOHRING alleges that "It is also submitted in support of Plaintiff's cross motion to correct the name of J & M Contracting Corp., the subcontractor hired by defendant team Construction, Inc., which due to the defendant's negligence was misnamed herein as 444 Contracting Corp. ...", yet the Court finds evidence of no such Cross-Motion having been made by any party herein, and therefore will not grant said relief.

In order for the Court to grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The 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 eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp, supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*Zuckerman v City of New York, supra*).

Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH has clearly and unequivocally met its burden herein, which has not been successfully controverted by the opposition submitted, and therefore the relief requested must be granted by this Court.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application Defendants - 3rd-Party Plaintiffs KIMCO-CENTEREACH for an Order granting the requested relief is hereby granted as follows:

- a) Summary Judgment against Plaintiffs dismissing the Summons and Complaint against Defendants -3rd-Party Plaintiffs KIMCO-CENTEREACH is hereby granted in all respects;
- b) Summary Judgment against Defendant - 3rd-Party Defendant TEAM for contractual indemnification and/or common law indemnity is hereby granted in all respects;
- c) Dismal of all claims and cross-claims asserted against Defendants-3rd-Party Plaintiffs KIMCO-CENTEREACH. is hereby granted in all respects;

and it is further

ORDERED, that the caption of this action is, therefore, amended to read as follows:

LORENA MOHRING and ROBERT MacDONALD,
 Plaintiffs,
 - against -
444 CONTRACTING CORP and TEAM CONSTRUCTION,
 Defendants.

INDEX NO.: 2002-25975

and it is further

ORDERED, that Counsel for Defendants-3rd-Party Plaintiffs KIMCO-CENTEREACH is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties, upon the Calendar Clerk of this Court and upon the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk..

**Dated: Riverhead, New York
 September 4, 2007**



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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