

Garner v Advanced Remodeling of LI, Inc.

2007 NY Slip Op 33624(U)

November 14, 2007

Supreme Court, Nassau County

Docket Number: 1425-06/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ELLIOT GARNER,

Plaintiff(s),

INDEX No. 1425/06

-against-

MOTION DATE: 8/29/07

ADVANCED REMODELING OF LI, INC.,
s/h/a ADVANCED REMODELING and
ADVANCED GUTTER CLEANERS INC.,

MOTION SEQ. No. 2-MG

Defendant(s).

The following papers read on this motion:

- Advanced Gutter Notice of Motion/Affirmation/Exhibits
- Advanced Remodeling Affirmation
- Plaintiff Affirmation in Opposition/Exhibits
- Reply

Defendant ADVANCED GUTTER CLEANERS INC. seeks an Order granting it summary judgment dismissing all claims and cross claims asserted against it. Defendant ADVANCED REMODELING and plaintiff oppose.

In this action plaintiff home owner is seeking damages from the defendants contending that on February 1, 2005, in the evening, he slipped and fell on ice in his driveway which had accumulated due to faulty work performed on his home by the defendants.

At his deposition, plaintiff ELLIOT GARNER testified that he redesigned and reconstructed his driveway and walkways without input from either defendant. He testified that ADVANCED GUTTER installed new gutters and leaders from his home, placing them in the same location as the pre-existing replaced gutters and leaders. Plaintiff did not testify or offer evidence regarding who contracted with him to perform

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the driveway and walkway design and construction. He argues that the leaders and gutters contributed to a hazardous condition in the driveway.

It is undisputed that the plaintiff entered into a contract with ADVANCED REMODELING for a renovated roof, siding and installation of gutters and leaders. ADVANCED REMODELING subcontracted the gutter and leader work to the defendant ADVANCED GUTTER. It is further undisputed that there was no written contract between the plaintiff and the subcontractor, and that the agreement between the defendants was oral.

ADVANCED REMODELING produced a witness for deposition, its principal, Roy Lamberson, who testified that the plaintiffs never told him about future plans to redesign the driveway. Thus, he testified that he never notified ADVANCED GUTTER of any such project.

ADVANCED GUTTER produced a witness for deposition who testified that plaintiff's wife was present during the installation of the gutters and leaders, and participated in a conversation regarding where they were to be placed. According to the witness the plaintiff's wife did not mention any upcoming renovation to the driveway and walkways, and she did not direct that the gutters or leaders be placed in any other location. The witness also testified that the plaintiff's wife did not complain about the installation as performed.

ADVANCED GUTTER also argues that neither the plaintiff, nor his wife complained orally or in writing regarding the placement of the gutters and leaders after installation, and paid the bill sent for the work performed.

The plaintiff opposes, and offers affidavits from himself and his wife wherein they state that they had numerous discussions with Mr. Lamberson from ADVANCED REMODELING prior to the installation of the gutters, wherein they informed him that they wanted the leader moved because they were intending on expanding the driveway. They both also state that when they found it was not moved, they tried to contact both defendants to have the work corrected. Finally, they both state that Mr. Lamberson was notified in person in September 2004 that they wanted the leader moved, but it was not done until after the plaintiff's accident. They note that ADVANCED GUTTER moved it at that time, at no further cost to them. (Opposition, Exh. A, E)

At her deposition the plaintiff's wife testified that she had meetings with ADVANCED REMODELING prior to the installation, but not ADVANCED GUTTER. She also testified that she was not present when the installation was performed, and that the only time she spoke to anyone from their company

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was after her husband's accident. She testified however, that after the installation and prior to the accident, she left telephone messages for ADVANCED GUTTER complaining of the placement of the leader. She testified that someone from ADVANCED GUTTER called about a week after the accident and came over to move the gutter to where she wanted it.

As noted by the movant, there is no evidence that the gutters or leaders were improperly installed. Nor is there any evidence from an expert, engineer or general contractor that the original installation was performed in a negligent manner or caused or created a dangerous condition at the premises at the time of the installation. There is no evidence that gutters or leaders functioned improperly after the installation.

ADVANCED GUTTER argues that plaintiff's own affidavit wherein he states that the patch of ice resulted from a snow melt on his roof which came down through the gutters and leaders, is insufficient to establish that the gutter and leader placement caused the accident.

The Court agrees, as this opinion is not supported by any expert opinion, nor is it supported by the plaintiff's deposition testimony that he never observed ice in that area prior to the date of the accident and that on the date of the accident there was no ice visible on or running from the leader. (Motion, Exh. B, pp. 109-112). The current self-serving affidavit from the plaintiff, without more, is not given evidentiary weight. *Wu v. City of New York*, 839 NYS2d 548 (2nd Dept. 2007).

The movant argues that the mere existence of an isolated patch of ice is insufficient to establish negligence and liability. *Bonfrisco v. Marlid Corp.*, 24 NY2d 817 (1969) The movant argues that the plaintiff has not demonstrated that the subsequent remodeling of the driveway caused a recurring dangerous condition, nor has the plaintiff established that ADVANCED GUTTER was made aware of the remodeling plans prior to discussing where the gutters and leaders were to be placed, thus ADVANCED GUTTER argues that there is no direct cause of action against this defendant by the plaintiff.

Based on the proof presented in this instance, there is no duty owed by the movant subcontractor, ADVANCED GUTTER, directly to the plaintiff, and no demonstration of a breach in tort or contract. *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002).; *Martinez v. White Cottage Enterprises*, 2 AD3d 506 (2nd Dept 2003).

ADVANCED GUTTER argues that it is undisputed that the driveway and walkways of the plaintiff's house was markedly different from the time the gutters were installed to the date of the accident. It notes that when the front leader was originally installed, it emptied into a garden bed, subsequent to the installation, the

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driveway was widened and vegetation was removed and pavers were installed. The defendant argues that as a result of the redesign, the leader now emptied onto the pavers installed in the driveway, not the original garden area.

Based on the proof presented that portion of the motion of ADVANCED GUTTER for an Order dismissing the claims in the Complaint asserted against it, is Granted. *Martinez v. White Cottage Enterprises*, 2 AD3d 506 (2nd Dept. 2003). In this instance, the plaintiff has not offered competent evidence that the gutters and leaders were negligently installed, nor failed to properly work after installation. The plaintiff has not demonstrated that ADVANCED GUTTER knew of any plans for redesign of the driveway, nor is there any expert evidence that the leaders should have been relocated even if such plans were known to the defendant. Finally, the Court agrees with the defendant that the plaintiff has failed to offer proof that the placement or installation of the gutters and leaders caused the ice accumulation which allegedly caused the plaintiff to fall.

ADVANCED REMODELING argues that if the Complaint is not dismissed, it has a valid cross claim for indemnification against ADVANCED GUTTER. The Court disagrees. According to the sworn testimony of the principal for ADVANCED REMODELING, he had no knowledge of the plaintiff's wish to move or relocate the leader prior to the accident, and therefore he did not tell ADVANCED GUTTER to do so. He also testified that he was satisfied with the work performed by ADVANCED GUTTER. Thus, there can be no claim for contractual indemnification. Further as there is no evidence that the gutters and leaders were improperly installed or defective, the Court finds that there is no showing of any negligence on the part of ADVANCED GUTTER which could substantiate a claim for common law indemnification, thus, the Court finds that the portion of the motion seeking dismissal of the indemnification claim must also be dismissed.

Based on the proof presented, the motion of ADVANCED GUTTER seeking an Order granting it summary judgment dismissing all claims and cross claims asserted against it, is Granted.

It is, SO ORDERED

Dated:

Nov 5, 2007


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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