

**Kenney v Cobra Constr. Concepts, Inc.**

2007 NY Slip Op 34110(U)

December 12, 2007

Supreme Court, New York County

Docket Number: 0600932/2005

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 600932/2005  
KENNEY, CHARLES  
vs  
COBRA CONSTRUCTION CONCEPTS  
Sequence Number : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/6/07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |
|-----------------|
| <u>1-2</u>      |
| <u>3-6</u>      |
| <u>7-8</u>      |

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 12/12/07

HON. SHIRLEY WERNER KORNREICH  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CHARLES KENNEY,

Plaintiff,

-against-

COBRA CONSTRUCTION CONCEPTS, INC.,  
J.E. LEVINE BUILDER INC., CEDAR &  
WASHINGTON ASSOCIATES, LLC,  
MASTERWORKS DEVELOPMENT CORPORATION,  
130 OWNERS GROUP, LLC, B.C.R.E.-90 WEST  
STREET, LLC, and PARADISE ELECTRICAL  
CONTRACTORS, INC.,

Defendants.  
-----X

SHIRLEY WERNER KORNREICH, J.

Index No. 600932/05

DECISION & ORDER

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action for personal injuries, defendants Cedar & Washington Associates, LLC (“C&W”), Masterworks Development Corp. (“Masterworks”) and 130 Owners Group, LLC (“130 Owners”)(collectively, “movants”), move for summary judgment, or, alternatively for common law indemnification against Cobra Construction Concepts, Inc. (“Cobra”), 90 West Street, LLC (“90 West”) and Paradise Electrical Contractors (“Paradise”).

Plaintiff alleges that, on February 5, 2004, at approximately 9:30 a.m., he slipped and fell in the street on black ice as he stepped off of a piece of plywood, forming a ramp in a curb cut, at the corner of West and Albany streets in the Borough of Manhattan, City of New York. After the fall, as he lay in a puddle of water, he saw a hose running from inside a building and under the plywood. Plaintiff heard the water running in the hose, although he did not see it. There is no dispute that the temperature was below freezing on the day of the incident.

Two adjoining buildings near the corner where plaintiff fell were under construction at the time of the accident. Defendant J.E. Levine Builder, Inc. ("JE"), was involved in a renovation project at 90 West Street, New York, NY ("West Building"), which is located at the corner of Albany and Cedar Streets. There also was construction taking place on the same day at the adjoining building located at 130 Cedar Street ("Cedar Building").

According to the deposition of the Masterworks witness, Christopher Colbourne, Masterworks was the developer on the Cedar Building project. Defendant C&W might have had a leasehold on the Cedar Building and was "part of a Masterworks group," but Mr. Colbourne said he wasn't sure of C&W's legal relationship to the property. He also did not know whether 130 Owners owned the Cedar Building. Mr. Colbourne was told that the cause of the flood was the opening of a water valve that had been turned on by a contractor doing civil engineering in the street, which allowed water to enter through a pipe with a broken valve in the Cedar Building.

Cobra was the general contractor and had a contract with Masterworks to perform work at the Cedar Building. Alan Kerley, Cobra's witness, testified that on the day of the accident, the Cedar Building's basement was flooded up to the first floor due to an opened valve in the street that fed its main water pipe. It was Cobra, not movants, who hired Paradise to pump the water out of the basement of the Cedar Building. The witness produced by Cobra did not speak to any representative of movants concerning the flooding that began the day before the accident or regarding the decision to hire Paradise to resolve it. EBT Alan Kerley, p. 74

At Cobra's request, Paradise sent two men who pumped the water out of the Cedar Building's basement, from the night of February 4 until early in the morning, approximately 5 a.m., on the day of plaintiff's accident. The Paradise employees were instructed by their

superiors at Paradise to pump the water into the sewer on the street corner where plaintiff fell. EBT Mohamed Hassim, pp. 53-54. Mr. Hassim's supervisor at Paradise, August Badalamenti, confirmed that Paradise made the decision to place the end of the hose into the street sewer. EBT August Badalamenti, pp. 25-27.

There is no evidence in the record that the decision to run the hose from the pump into the public sewer was made by movants. There is also no evidence that movants had actual or constructive notice prior to the accident that Paradise was pumping water into the sewer on a regular basis. The testimony of Mr. Colbourne relied upon by plaintiff is taken out of context. Mr. Colbourne said that prior to the accident, there had been repeated flooding of the Cedar Building basement due to roof leaks and frozen pipes. However, he testified that the Cedar Building had *internal* sump pumps connected by temporary pipes into the sewer outfall and that, prior to the accident, flooding had been resolved through use of the sump pumps and natural seepage of ground water. EBT Charles Colbourne, p. 23, 32-34, 41-43. Mr. Colbourne denied any prior knowledge that water was pumped from the Cedar Building into the street. *Id.* The first time Mr. Colbourne learned that water had been discharged to the street was after the accident. *Id.* at 54-55. He denied ever having seen a hose running from the Cedar Building to the street. *Id.* at 61.

Movants are entitled to summary judgment dismissing the complaint against them. It is well settled that a principal cannot be held liable for an independent contractor's torts unless the principal has actual or constructive notice that the contractor is involved in an inherently dangerous activity, *Wright v. Tudor City Twelfth Unit, Inc.*, 276 N.Y. 303, 306 (1938); *McDonald v. Shell Oil Co.*, 20 N.Y.2d 160 (1967), or the duty is non-delegable by law, *Chainani*

v. *Board of Educ.*, 87 N.Y.2d 370, 380-381 (1995).

In this case, the entity that pumped the water into the street sewer was a subcontractor, Paradise, of an independent contractor, Cobra, who was hired by Masterworks, one of the moving defendants. There is no evidence that Masterworks, or the other two movants, C&W and 130 Owners, had any involvement in the decision to pump the water into the sewer by way of the hose the Cedar Building, or had any part in controlling or supervising Paradise's work. Nor is there evidence that movants had actual or constructive notice that water had been pumped into the street at any time until after the accident. The act of pumping water is not inherently dangerous. Although there was a recurring water condition in the basement, the prior flooding was less severe and was resolved, so far as movants knew, by pumping internally and natural seepage. The danger, if any, which caused the accident was the decision to pump the water into the public sewer in the street, which was a decision not made by movants and was not a recurrent practice.<sup>1</sup> With respect to 130 Owners and C&W, there is no evidence in the record that they did anything. The record does not establish who owned the Cedar Building or the exact relationship of C&W to the Cedar Building.

The cases relied upon by plaintiff concerning liability for discharging water into a public street did not involve independent contractors. *Roark v. Hunting*, 24 N.Y.2d 470 (1969); *Griffin v. 19-20 Industry City Assoc.*, 37 A.D.3d 412 (2<sup>nd</sup> Dept. 2007); *Fitzgerald v. Adirondack Transit Lines*, 23 A.D.3d 907 (3<sup>rd</sup> Dept. 2005). *Wright v. Tudor City Twelfth Unit, Inc.*, 276 N.Y. 303

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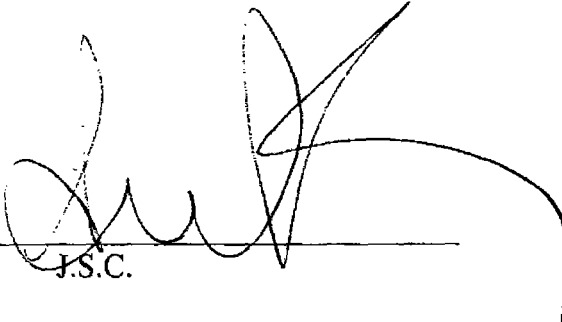
<sup>1</sup>The court expresses no opinion as to the merits of the claim that Paradise's hose caused the icy condition that led to plaintiff's fall. There is conflicting evidence in the record as to whether a second hose, leading from the West Building, caused or contributed to the ice formation, whether there was ice in the area before Paradise connected its hose and whether Paradise carefully connected its hose so that water was discharged into the sewer but not onto the sidewalk.

(1938) is distinguishable because the defendant hotel owner had actual or constructive notice of the independent contractor's recurrent practice of washing mats on a busy sidewalk for six months. Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is dismissed as against Cedar & Washington Associates, LLC, Masterworks Development Corp. and 130 Owners Group, LLC, their cross-claims for common law indemnification are dismissed as moot and, upon service upon him of a copy of this order and decision with notice of entry, the Clerk of the court is directed enter judgment accordingly and sever the remainder of the action, which shall continue.

Dated: December 11, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
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