

**Della-Monica v Kuno Steel Prods. Corp.**

2008 NY Slip Op 30746(U)

March 6, 2008

Supreme Court, Nassau County

Docket Number: 0242-06/

Judge: Arthur M. Diamond

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**SUPREME COURT - STATE OF NEW YORK**

Present:

**HON. ARTHUR M. DIAMOND**  
Justice Supreme Court

-----X  
SALVATORE DELLA-MONICA

**Plaintiff,**

**-against-**

**KUNO STEEL PRODUCTS CORP., DESCO MASONRY  
CORP. and F&F ROOFING COMPANY, JERRY  
SPIEGEL ASSOCIATES, INC., JESCO CO., J.S.  
REALTY GENERAL GROUP, J.S. REALTY GENERAL  
GROUP d/b/a JESCO CO., JERRY SPIEGEL,  
JERRY SPIEGEL d/b/a JESCO CO., EMILY SPIEGEL,  
EMILY SPIEGEL d/b/a JESCO CO.**

**Defendant.**

-----X

**TRIAL PART: 21  
NASSAU COUNTY**

**INDEX NO: 10242/06**

**MOTION SEQ. NO: 2,3**

**SUBMIT DATE: 2/14/08**

**The following papers having been read on this motion:**

- Notice of Motion ..... 1**
- Cross-Motion..... 2**
- Opposition ..... 3,4,5**
- Reply.....6,7**

The motion by Kuno Steel Products Corp. (Hereinafter referred to as "Kuno") and the cross motion by F&F Roofing Company (Hereinafter referred to as F&F), both seeking summary judgment are granted for the reasons set forth herein.

The plaintiff brought this action to recover for personal injuries allegedly sustained on August 6, 2003. Plaintiff states he was walking on a sidewalk adjacent to 1004 Willis Avenue, Albertson, N.Y. when he was struck on the head by falling bricks ( Cross-Motion, Exhibit G, pgs. 34-35). Both Kuno and F&F , named as defendants herein, deny any liability in the incident.

Defendant Kuno presents the affidavit of Walter Weckenmann, vice president of Kuno (Notice of Motion, Exhibit). Mr. Weckenmann states that Kuno did not start work nor did its

subcontractor, JSR, on the roof of the 1000-1004 building until August 9, 2003, three days after the August 6, 2003 incident. (Notice of Motion, Exhibit F). Further, Mr. Weckenmann states the work by JSR did not involve brick work or any work at the location from which the bricks fell. Based on the above, Kuno seeks summary judgment as to the plaintiff's complaint as well as any cross claims by co-defendants. F&F presents the affidavit of Frank Giugliano, the president of F&F (Cross-motion Exhibit H ). Mr. Giugliano states his firm did not start its first day of work at the subject premises until August 23, 2003, some two weeks plus after the plaintiff's incident. Mr. Giugliano notes his firm performed roofing work only, and the work did not involve masonry work and/or brick work. His affidavit is corroborated by the letter dated September 4, 2003 sent by defendant to Spiegel Associates specifying the dates the work was performed, and the cost of same. (Cross-Motion, Exhibit I).

Defendants Jerry Spiegel Associates, Jesco Co., J.S. Realty General Group, J.S. Realty General Group d/b/a Jesco, Jerry Spiegel, Jerry Spiegel, Jerry Spiegel d/b/a Jesco, Emily Spiegel, Emily Spiegel d/b/a Jesco Co. ( hereinafter referred to as the "Spiegel defendants") contend that the address cited by Mr. Weckenmann is not correct, i.e., 1000 Willis Avenue. The Spiegel defendants note the incident occurred at 1004 Willis Avenue. An objective examination of Mr. Weckenmann's affidavit indicates Kuno worked on August 9, 2003, three days after the incident, at 1000 Willis Avenue and not 1004 Willis Avenue. Mr. Weckenmann's firm, Kuno, was hired to repair a stress fracture of the parapet wall at 1000 Willis Avenue ( Plaintiff's Affirmation in Opposition to Cross-Motion, Exhibit C, pgs. 49-52). The Albertson Shopping Center's address (where the accident site is located) is 1000-1048 Willis Avenue, Albertson, New York with the various stores "connected."

Also, the Spiegel defendants, citing the deposition testimony of Ms. Mastrocinque, a property manager with Spiegel Associates, note F&F worked on the roof of the Albertson Shopping Center ( Spiegel defendants' affidavit in opposition, Exhibit B). Ms. Mastrocinque notes F&F worked on the seafood store in the center on January 8, 2003 and the dry cleaners on June 24, 2003. Both

incidents were well north of the incident site and both involved roof flashings around air condition units; neither job was related to the August, 2003 work for parapet wall removal/steel beam replacement, i.e., no brick work involved (pgs. 84-85). The photo of the store location in the shopping center (Spiegel defendants' affidavit, Exhibit C) indicates that the seafood store and dry cleaners were well north of the plaintiff's incident.

The Spiegel defendants contend more discovery is needed before summary judgment can be considered. They argue Kuno has not yet been deposed. The Spiegel defendants allege they need to know if and when the preparatory work was done by Kuno and/or its subcontractors before the incident date of August 6, 2003.

The Spiegel defendants point to the fact that a contract proposal dated July 24, 2003, two weeks before the incident, may indicate Kuno activity at the incident site before the incident occurred, i.e., Kuno or a subcontractor could have brought bricks on site, loosen bricks on site, stacked bricks, etc., before the August 6, 2003 incident.

The court notes the deposition of Loretta Mastrocinque (Spiegel's affidavit in opposition, Exhibit B). Ms. Mastrocinque was looking at a contract proposal between Kuno and Albertson Shopping Center, a Spiegel property. The contract proposal was dated July 24, 2003 (Spiegel's affidavit in opposition, Exhibit B, pg. 60). The court would note a contract proposal dated July 24, 2003, some two weeks before the incident, does not negate the affidavit of Mr. Weckenmann that work did not commence until August 9, 2003, three days after the incident. A mere proposal does not indicate when a job is to commence. Mr. Weckenmann's sworn affidavit indicates that Kuno started work at the site on August 9, 2003, three days after the incident. This is corroborated by fax from the Spiegel Associates to defendant Kuno indicating that the work to be performed is Saturday, August 9, 2003. (Notice of Motion, Exhibit F).

Plaintiff also seeks further discovery. Plaintiff contends the cross motion of F&F should be denied pending further discovery including the deposition of F&F by a person with knowledge. F&F

has stated, by the affidavit of Mr. Giugliano, it did not start its non-brick-involved roof repair job near the incident site until August 23, 2003. Further, the record, as noted, indicates F&F's previous jobs at the shopping center were not near the August 6, 2003 incident site and involved roof flashings, i.e., non-brick work jobs.

A denial of summary judgment because discovery remains outstanding requires a showing that the request for additional discovery is calculated to yield facts that would warrant the denial of summary judgment (*Town of Brookhaven v Mascia*, 38 AD3d 758).

Although a determination of a summary judgment motion may be delayed to allow for further discovery where the evidence necessary to oppose the motion is unavailable to the opponent, a determination of summary judgment cannot be avoided by a claimed need for discovery unless there is some evidentiary basis offered to suggest that discovery may lend to relevant evidence (*Lambert v Brasco*, 18 AD3d 619).

The mere expression of hope by Spiegel defendants and plaintiff that discovery would reveal something helpful to the defense provides no basis for the denial of the summary judgment motion (*see Marcel v Chief Energy Corp.*, 38 AD3d 502; *Davidson v E.Q.K. Green Acres, L.P.*, 298 AD2d 546).

As to the affidavits of Weckenmann and Giugliano, the fact that an affiant is an employee of a party does not affect its admissibility on a motion for summary judgment since every affidavit submitted by a party is self-serving in the sense that it is submitted to serve the interests of the party (*Zambotti v Reading*, 162 AD2d 991; *Whelan v GTE Sylvania, Inc.*, 182 AD2d 446). Here, the affidavits from Mr. Weckenmann and Mr. Giugliano are, based on an objective reading of the record, un-controverted.

A contractor is not liable for injuries sustained by a worker where the uncontroverted documentary evidence showed the contractor had not commenced any work at the worker's location where the incident occurred (*see Goldfeder v Herman Miller, Inc.*, 176 AD2d 440).

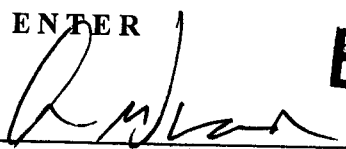
[\* 5 ]

Of course, the finding herein that Kuno and F&F were not liable to plaintiff for the personal injuries he allegedly sustained as a result of the incident necessarily defeats any cross claims for indemnification and contribution asserted against Kuno and F&F by the co-defendants herein (*see Stone v Williams*, 64 NY2d 639).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. (*Ayotte v Gervasio*, 81 NY2d 1062). Kuno and F&F have met their respective burdens, and plaintiff and co-defendants have failed to rebut same. (*Zuckerman v. City of New York*, 49 N.Y.2d 557)

This constitutes the decision and order of this Court.

DATED: March 6, 2008

ENTER  
  
HON. ARTHUR M. DIAMOND  
J.S.C.

ENTERED

MAR 10 2008

NASSAU COUNTY  
COUNTY CLERKS OFFICE

To:

Attorney for Plaintiff  
STUART SEARS, ESQ.  
SHAEVITZ & SHAEVITZ, ESQS.  
148-55 Hillside Ave.  
Jamaica, New York 11435  
(718) 291-3400

Attorney for Defendant/Kuno  
SCOTT GURTMAN, ESQ.  
59 Maiden Lane  
New York, New York 10038  
(212) 972-1000

Attorney for Defendant/F&F  
TRAUB, EGLIN, LIEBERMAN & STRAUSS,  
LLP  
7 Skyline Drive  
Hawthorne, New York 10532  
(914) 347-2600

Attorney for Defendant/Desco  
EPSTEIN, RAYHILL & FRANKINI  
45 Crossways Park Drive, Suite 102  
Woodbury, New York 11797-2905  
(516) 364-7900