

| |
|--|
| Grande v Suffolk Grand, Inc. |
| 2008 NY Slip Op 31764(U) |
| June 12, 2008 |
| Supreme Court, Nassau County |
| Docket Number: 9571-06/ |
| Judge: Daniel Martin |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

5

**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

VINCENT GRANDE, III and DENISE GRANDE.

**TRIAL/IAS, PART 31
NASSAU COUNTY**

Plaintiffs.

**Sequence No.: 001
Index No.: 009571/06**

- against -

SUFFOLK GRAND, INC. And ROBY, INC.

Defendants.

The following named papers have been read on this motion:

| | Papers Numbered |
|---|------------------------|
| Notice of Motion and Affidavits Annexed | X |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | X |
| Replying Affidavits | X |

Upon reading the papers submitted and due deliberation having been had herein, defendant Suffolk Grand, Inc.'s (hereinafter "Suffolk") motion for summary judgment dismissing the complaint as asserted against this defendant is granted.

The following facts are undisputed. Defendant Suffolk is the owner of real property located at 248-250 West Montauk Highway, Lindenhurst, New York. Defendant Roby, Inc. (hereinafter "Roby") is a contractor which was performing renovation work on said property on October 15, 2003. Plaintiff Vincent Grande, III, whose sister Michelle Grande is the "principal" of defendant Suffolk, intended to lease office space at the property for use as a law office. On October 15, 2003 Mr. Grande stopped by the property to see the progress of the work and suffered personal injuries when he stepped on a piece of plywood that was one of several pieces constituting sub flooring on the upper floor at the structure which gave way. Mr. Grande fell through to the first floor onto scaffolding, equipment and debris.

Plaintiffs commenced the instant action, alleging negligence and violations of the Labor Law against defendants. The Labor Law claims have since been discontinued. Defendant Suffolk now moves for summary judgment dismissing the complaint upon the grounds that defendant Suffolk had no notice of the condition and did not create it.

In moving for summary judgment defendant Suffolk must demonstrate that there are no

issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing the motion plaintiff must demonstrate a triable issue of fact through admissible evidence. *Id.*

In support of its motion defendant Suffolk first relies upon the deposition testimony of plaintiff Vincent Grande, III. At his deposition Mr. Grande testified that at the time he came by the project to inspect it, there was plywood sub flooring in place on the second floor. Plaintiff was walking on the second floor sub flooring and inspecting the work when he stepped on a piece of plywood which slipped out from under him. Plaintiff fell through to the first floor. Defendant Roby had been retained by Suffolk to perform renovation work at the property. (See, deposition transcript of Robert Ricciardi, pp. 15-16, 60-62, 70-72, 82-84, 87-89).

More importantly to defendant Suffolk's motion Robert Ricciardi, defendant Roby's "principal" testified that:

- 1) Roby was a contractor at the property performing renovations;
- 2) the only time he observed defendant Suffolk's "principal", Michelle Grande, at the property was when she was considering purchasing it, one and one half years prior;
- 3) Roby never received instructions from Ms. Grande on how to perform its work;
- 4) prior to plaintiff's arrival on the date of the accident Mr. Ricciardi and two "helpers" installed the plywood sub flooring;
- 5) same was affixed with glue which has a twenty four hour set time and nails;
- 6) just prior to plaintiff's arrival Mr. Ricciardi installed the last piece of plywood by gluing it but did not nail it down; and
- 7) it was on this piece of plywood that plaintiff fell. (See, deposition transcript of Robert Ricciardi, pp. 7, 15-16, 21-24, 32-34, 38).

Michelle Grande testified that she retained Roby to perform the renovations and never gave the contractor instructions as to how to perform its work. (See, deposition transcript of Michelle Grande, pp. 6-7, 11-12).

Where, as here, a property owner demonstrates that it had no notice of a dangerous condition on its property which allegedly caused plaintiff to suffer injuries and that it did not create the condition, it has met its *prima facie* burden on a summary judgment motion to dismiss the complaint. See, Cruceta v. Funnel Equities, Inc., 18 A.D.3d 693 (2nd Dep't 2005); Bongiorno v. Penske Auto Center, 289 A.D.2d 520 (2nd Dep't 2001).

Defendant Suffolk having met its *prima facie* burden, the burden now shifts to plaintiffs to demonstrate a triable issue of fact. Zuckerman v. City of New York, *supra*.

In opposition plaintiffs take two positions. First, plaintiffs claim that there is an issue of fact as to whether defendant Suffolk can be viewed as having created the condition or had notice of same because Mr. Ricciardi testified that the "helpers" who assisted him in installing the sub flooring were provided by defendant Suffolk.

At his deposition Mr. Ricciardi testified that 1) the helpers were provided to him by Mr. Grande, the plaintiff herein; and 2) Mr. Ricciardi was paid \$300 per diem and was required to pay the helpers from said payment. (See, Ricciardi deposition transcript, pp. 15-17, 28-29). Nowhere in said transcript did defendant Mr. Ricciardi testify, as urged by plaintiffs, that the helpers were provided by defendant Suffolk. Neither is the fact that Mr. Ricciardi paid the helpers from his share that came from Suffolk evidence that Suffolk employed them.

Further, plaintiffs assert that defendant Suffolk should be viewed to have been the employer of the helpers because plaintiff Vincent Grande, III provided the helpers to defendant Roby "as an agent for defendant Suffolk." The plaintiffs urge the court to conclude that Mr. Grande was acting as defendant Suffolk's agent because he "has no interest in the property." (See, affirmation of plaintiffs' attorney, ¶ 10, referencing deposition testimony of plaintiff Vincent Grande, III, pp. 11, 18). Nowhere, however, does Mr. Grande provide evidence in admissible form in which he demonstrates that he was an agent of Suffolk.

Plaintiffs also assert that an issue of fact exists as to whether defendants Suffolk and Roby were actually partners in a partnership and thus jointly liable for each others conduct. In support of this position, plaintiffs point to Mr. Ricciardi's testimony that he had informed Suffolk of the property and opportunity, that defendant Roby did the renovation work and Suffolk provided "capital, plans and some workers." See, plaintiffs' attorney's affirmation, ¶ 14).

The factors the court will consider in determining whether or not a partnership exists are 1) the parties' intent express or implied; whether there was 2) joint control and management; 3) sharing of profits; 4) sharing of losses; and 5) a combination of property, skill or knowledge. See, Cleland v. Thiron, 268 A.D.2d 842 (3rd Dep't 2000); Robinson v. Jewish Hospital and Medical Center of Brooklyn, 221 A.D.2d 328 (2nd Dep't 1995); Boyarsky v. Froccaro, 131 A.D.2d 710 (2nd Dep't 1987). Nothing in the record to which plaintiff herein points reflects that there is evidence from which this court could conclude that an issue of fact exists as to whether defendants Suffolk and Roby had a partnership for which the defendants would be jointly liable for each others torts.

Accordingly, based upon the foregoing, defendant Suffolk's motion is granted and the complaint as asserted against defendant Suffolk is dismissed.

So Ordered.

Dated: June 12, 2008

ENTERED
 JUN 19 2008
 Nassau County
 COUNTY CLERK'S OFFICE
 Daniel Martin
 A.J.S.C.