

**City of N.Y. v Barney Skanska Constr. Co.**

2008 NY Slip Op 32623(U)

September 23, 2008

Supreme Court, New York County

Docket Number: 0403612/2004

Judge: Judith J. Gische

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PRESENT: JUDITH J. GISCHE, J.S.C.

PART \_\_\_\_\_

*Justice*

Index Number : 403612/2004

CITY OF NEW YORK

vs

BARNEY SKANSKA CONSTRUCTION

Sequence Number : 004

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ was read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
SEP 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 9/23/08

JUDITH J. GISCHE, J.S.C. *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: PART 10

-----X  
THE CITY OF NEW YORK,

Plaintiff,

-against-

BARNEY SKANSKA CONSTRUCTION CO.,  
SKANSKA USA BUILDING, INC., MASPETH  
WELDING, INC., MILLER DRUCK SPECIALTY  
CONTRACTING, INC.,

Defendants.  
-----X

MASPETH WELDING, INC.,

Third-Party Plaintiff,

-against-

MYMARL CONTRACTING CO., INC.,

Third-Party Defendant.  
-----X

**Decision/Order**

Index No.: 403612/04

Seq. No. : 004

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**  
SEP 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
Index No.: 50606/06

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
MDSC n/motion [3212/mt] w/SKW affirm, exhs .....	1
Maspeth Welding opp w/MJM affirm, exhs .....	2
Mymarl opp w/ MC affirm, exhs .....	3
MDSC reply affirm (SKW), exhs .....	4

*Upon the foregoing papers, the decision and order of the court is as follows:*

The main action is for contractual damages. Defendant Miller Druck Specialty Contracting, Inc. ("MDSC") now moves for an order: [1] dismissing without prejudice the claims asserted by plaintiff City of New York (the "City"), defendants Barney Skanska

Construction Co. And Skanska USA Building, Inc. (collectively "Skanska") and third-party defendant BASF Construction Chemicals, LLC ("BASF") against MDSC because these parties have executed a stipulation voluntarily discontinuing their claims (CPLR § 3217 [b]); [2] dismissing the cross-claims by defendant Maspeth Welding, Inc. ("Maspeth") and third-party defendant Mymarl Contracting Co., Inc. ("Mymarl") against MSDC for failure to state a cause of action and/or for summary judgment (CPLR §§ 3211; 3212); and [3] pursuant to NYCRR 130-1.1, awarding MDSC its costs, expenses and attorneys' fees incurred in defending against Maspeth and Mymarl's cross-claims and for sanctions against Maspeth, Mymarl and their counsel.

Maspeth and Mymarl oppose the motion in its entirety. The remaining parties have not take any position on this motion, although MDSC has provided proof of service of the motion.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The following facts are undisputed. On or about November 5, 1998, the City retained Skanska to perform certain work in connection with the reconstruction of City Hall Park, located at Chambers Street, Park Row, Broadway and Centre Street, New York, New York (the "Project"). Skanska, in turn, retained MDSC to provide and install granite post bases and granite curbs for the project. Skanska also retained Maspeth to fabricate and install iron fencing and gating into the granite bases at the Project. Maspeth thereafter retained Mymarl to install the fencing at the Project.

Maspeth and Mymarl both used a grout known as Thorogrip to anchor the fencing

into the granite bases and curb. Sometime during 2002/2003, the City observed cracks in the granite bases and curbs at City Hall Park. The City conducted an investigation and, in a report dated March 14, 2003, opined that the cracks in the granite were caused by the improper use of a grouting material. The City thereafter advised Skanska of the cracks in the granite. Skanska then arranged for testing of the grout. Samples of the grouting material were tested by Steve Hermanson of DeGussa Construction Chemicals ("DeGussa"), who made the following conclusions based thereon in a report dated November 21, 2003:

- The material is Thorogrip®
- The material was overwatered.
- The extensive segregation demonstrated in the field is consistent with Thorogrip® having been overwatered.

There is no dispute that MDSC did not use Thorogrip at the Project.

The City commenced this action wherein it alleges that granite post bases and curbs at the Project have been damaged as a result of the improper installation and grouting of the fence and seeks to recover the cost to repair and/or replace the damages granite and fence. After issue was joined and a third party action commenced, the City, Skanska and BASF executed a stipulation of discontinuance dated August 3, 2007 in which they agreed to voluntarily discontinue, without prejudice, their respective claims against MDSC. The only parties who have refused to voluntarily discontinue their claims against MDSC are Maspeth and Mymarl. Maspeth has asserted cross-claims for contribution and common law indemnification. Mymarl has asserted cross-claims for common law and contractual indemnification. The court's decision follows.

## **Discussion**

At the outset, the court grants MDSC's motion to dismiss without prejudice the claims asserted by the City, Skanska and BASF against MDSC based on the stipulation of discontinuance executed by these parties.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> dept. 2003).

MDSC sustained its burden of showing that it is not responsible for the damages.

It *prima facie* established that the damage was caused by over-watering grout and that it did not do the grouting work.

Maspeth and Mymarl have each asserted a cross-claim for common law indemnification. Common law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (Baron v. Grant, 48 AD3d 608 [2d Dept 2008]). Maspeth and Mymarl each argue that MDSC has failed to establish that its work did not cause or contribute to plaintiff's alleged damages. Maspeth has submitted the affidavit of George W. Marschhausen, a professional engineer licensed in New York. Marschhausen's affidavit is based on a review of the documents provided to Maspeth and Mymarl by the City.

On the issue of MDSC's alleged liability, Marschhausen states that "it cannot be said to any degree of scientific certainty that the granite itself and/or the installation thereof did not cause or contribute to the damage sustained by the granite." This assertion is not an affirmative statement that MDSC's actions caused the damages alleged. Moreover, while MDSC supplied and installed the granite, there are no facts presented on how that granite was defective or in what way it was improperly installed. Therefore, this statement is merely speculative, and is insufficient to raise an issue of fact on this motion.

Marschhausen further states that whether the granite and/or its installation caused or contributed to the damage "could easily have been determined if the City had performed, or authorized the performance of, destructive testing of the subject granite." To the extent that Maspeth and Mymarl are arguing that summary judgment is premature

because destructive testing has not been conducted, this argument is unavailing. This action was commenced in 2004, and Maspeth and Mymarl has not demonstrated that it has ever previously sought to take samples of the granite and/or conduct testing thereof. Nor have Maspeth and Mymarl offered any justifiable explanation for their failure to conduct such tests within a timely matter. Maspeth and Mymarl's failure to prosecute their respective claims has, therefore, resulted in a waiver of any right that they had to seek such discovery and cannot now be used as a basis to deny summary judgment.

The record is devoid of any evidence that MDSC performed any act which caused, contributed to and/or aggravated the damage to the fence and granite curbs. Therefore, MDSC has indeed met its burden on this motion. Accordingly, MDSC is entitled to summary judgment on Maspeth and Mymarl's claims for common law indemnification.

Mymarl's cross-claim for contractual indemnification must be dismissed, as a matter of law, because there was no contractual relationship between MDSC and Mymarl, and therefore, Mymarl has failed to demonstrate that MDSC expressly agreed to hold it harmless for any of the claims arising from this action.

Maspeth's claim for contribution against MDSC must also fail. A claim for contribution exists only when two or more tortfeasors share in responsibility for an injury, in violation of duties they respectfully owed to the injured party (Sommer v. Federal Signal Corp., 79 NY2d 540 [1992]). Here, there is no dispute that MDSC did not breach a duty it owed to plaintiff which thus contributed to plaintiff's alleged damages. Moreover, contribution is not available when the damages suffered by plaintiff are purely economic and are due solely to breach of contract (other than products liability) (Board of Education v. Webster, Crenshaw & Foley, 71 NY2d 21 [1987]).

MDSC also seeks an order awarding it its costs and imposing sanctions against Maspeth, Mymarl and their attorneys. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. While Maspeth and Mymarl's arguments were rejected by the court, the court cannot say that they were frivolous within the meaning of the court rule.

Accordingly, MDSC's motion is granted to the following extent: [1] the claims asserted by the City, Skanska and BASF against MDSC are dismissed without prejudice; and [2] MDSC is granted summary judgment dismissing the cross-claims by Maspeth and Mymarl against MSDC. The motion for sanctions is denied.

**Conclusion**

In accordance herewith, it is hereby


**ORDERED** that MDSC's motion is granted to the following extent: [1] the claims asserted by the City, Skanska and BASF against MDSC are dismissed without prejudice; and [2] MDSC is granted summary judgment dismissing the cross-claims by Maspeth and Mymarl against MSDC; and it is further

**ORDERED** that MDSC's motion is otherwise denied.

Any relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
September 23, 2008

So Ordered  
  
HON. JUDITH J. GISCHE, J.S.C.

