

Joseph v Turner Constr. Co.

2008 NY Slip Op 32716(U)

September 23, 2008

Supreme Court, Queens County

Docket Number: 6252/06

Judge: Lawrence V. Cullen

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SHORT FORM ORDER
NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. LAWRENCE V. CULLEN
Justice

IAS PART 12

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CAROL JOSEPH AND PAUL JOSEPH,

Plaintiffs,

Index No.: 6252/06

- against -

Motion Date: 7/16/08

TURNER CONSTRUCTION COMPANY, B&G
ELECTRICAL CONTRACTORS OF N.Y. INC.
and SOUND REFRIGERATION AND AIR
CONDITIONING, INC.,

Motion No.: 14

Motion Seq. No. 1

Defendants.

- - - - - x

The following papers numbered 1 to 19 on this motion:

	<u>Papers Numbered</u>
B&G Electrical Contractors of N.Y. Inc.'s Notice of Motion-Affirmation-Affidavits- Service-Exhibits & Memorandum of Law	1-5
Turner Construction Co. & Sound Refrigeration and Air Conditioning, Inc.'s Notice of Cross-Motion-Affirmation-Service-Exhibits & Memorandum of Law	6-10
B&G Electrical Contractors of N.Y. Inc.'s Affirmation in Opposition to Cross-Motion- Affirmation-Affidavits-Exhibits	11-13
Plaintiffs' Affirmation in Opposition- Affidavits-Exhibits	14-15
B&G Electrical Contractors of N.Y. Inc.'s Reply Affirmation-Exhibits	16-17
Turner Construction Co. & Sound Refrigeration and Air Conditioning, Inc.'s Reply Affirmation-Service	18-19

By notice of motion, defendant, B&G Electrical Contractors of N.Y. Inc. (B&G), seek an order of the Court pursuant to CPLR § 3212, granting them summary judgment and dismissal of the complaint and any and all cross-claims. Co-defendants, Turner

Construction Company and Sound Refrigeration and Air Conditioning, Inc. (Turner), file an affirmation in opposition and cross-move for leave to serve an amended answer asserting cross-claims for indemnification and breach of contract, and upon amendment granting co-defendants summary judgment on said cross-claims and pursuant to CPLR § 3212, granting co-defendants summary judgment and dismissal of plaintiffs' complaint as to them.

Plaintiffs and B&G file an affirmation in opposition to the cross-motion.

B&G files a reply to the opposition to their motion and Turner files a reply to the opposition to their cross-motion.

In the underlying action, plaintiff, Carol Joseph, makes a claim for damages as a result of an alleged trip and fall accident in the basement hallway of the North Pavilion of Winthrop University Hospital on March 21, 2003, at approximately 6:20 a.m.

Plaintiff claims that on that day and at that time and place, she slipped and fell in a puddle of water approximately three feet in dimension and one half inch deep, which appeared to have accumulated from leaking and dripping pipes and ceiling tiles in the ceiling above the hallway.

B&G was hired by Turner and Sound as a subcontractor to do certain electrical work which included hanging "Kindorf" conduit racks from the ceiling in the area where the accident occurred.

B&G relies on the deposition testimony and affidavit (Exhibits H and J, respectively) of their project manager, Gino Graziadei, to support their argument that they owed no duty to plaintiff, and that they neither created a dangerous condition nor had actual or constructive notice of any dangerous condition. While Graziadei admits that his company was hanging the "Kindorf" rack in the area in question the day before the accident (March 20, 2003), they did not remove or disturb any pipes in the area that would cause water to leak.

B&G also relies on the testimony of Chris Nocerino of Turner (see defendant's Exhibit F) that none of B&G's work involved plumbing, and that Nocerino had not heard of any complaints regarding leaks.

Moreover, B&G points to the testimony of Dan Abbruzzese, the Vice President of Facilities at Winthrop University Hospital (see

defendant's Exhibit I) who stated that he found no records of complaints of water leaks in the north basement area (where the accident occurred) in the hospital records.

Finally, citing to the deposition testimony of James Devine, project manager for Sound (see defendant's Exhibit G), B&G notes that Mr. Devine testified that Sound had a practice of maintaining daily worksheets. The work sheet for March 20, 2003, the day before the accident was missing.

Thus, on the basis of the testimony, defendant argues that they fulfilled their contractual obligation to install the conduit racks, without incident, and that there is no evidence to the contrary.

By cross-motion, Turner and Sound seeks to amend their answer to assert a cross-claim against B&G for indemnification and breach of contract. Turner and Sound maintain that B&G failed to secure insurance naming Turner as additional insured.

Moreover, Turner and Sound maintain that they had no duty to plaintiff to keep the hallway safe and they did not supervise B&G's work.

Turner also maintains that they neither created any dangerous condition, nor had any actual or constructive notice of any water leaks.

Turner states further that none of their personnel were working in the area of the accident. They did note, however, that B&G was working in the area of the north basement the week before the accident and on the same day. As part of their work, Turner maintains, B&G was required to drill one-half ($\frac{1}{2}$) inch holes in the ceiling to anchor the rods for the hanging "Kindorf" racks.

Finally, defendants Turner and Sound argue it was Winthrop University Hospital that had a duty to maintain safe hallways. It was Winthrop's maintenance staff that was called to mop the floors.

In plaintiff's affirmation in opposition she relies on her testimony before trial in which she describes an accident scene that includes a wooden step ladder and removed ceiling tiles in the area where she fell. She maintains that she saw water dripping from a pipe through the open ceiling.

For one to two weeks prior to the accident, plaintiff saw

men on wooden ladders working on the pipes in that area. The men she saw were wearing work shirts with the name "Sound" on them.

Christopher Nocerino who testified on behalf of Turner admitted that he and his company were aware that the hospital, including the basement of the North Pavilion (where the accident occurred) would continue to be working areas for the hospital while construction was ongoing. During March of 2003, Nocerino states B&G was involved in electrical work in the subject area and Sound was involved in pipe fitting. Nocerino also admitted that his company was responsible for work site safety including removal of debris, which included accumulated water.

One of the areas where Sound would have been working, Nocerino recalled, would have included Mechanical Room 11, which contained piping involving hot and cold water and steam pipes, although he could not recall if Sound was using Mechanical Room 11 in March of 2003.

James Devine of Sound, testified that not only was the report for March 20, 2003 missing, but for the week of March 7, 2003 to March 13, 2003 as well.

In an affidavit attached to her opposition, plaintiff maintains that she saw water leaking from a pipe in the ceiling, dripping into a bucket on the floor on March 20, 2003, the day before her accident.

In reply, defendant Turner's claim that it is only in plaintiff's affidavit in opposition that she raises issues to avoid summary judgment is unsupported by the record.

Upon all of the foregoing, the motion and cross-motion are decided as follows:

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form." Santanastasio v. Doe, 301 AD2d 511 (2d Dep't 2003).

"In reviewing a motion for summary judgment, the Court accepts as true the evidence presented by the non-moving party; and, must deny the motion if there is 'even arguably any doubt as to the existence of a triable issue.' (Baker v. Briarcliff School Dist., 205 AD2d 652, 653 (1994))." Fleming v. Graham, 34 AD3d 525, 526, 824 NYS2d 376 (2006).

In this instance, B&G has presented sufficient evidence to show that they neither created the alleged dangerous condition, nor had actual or constructive notice of such condition. Santoliquido v. Roman Catholic Church of Holy Name of Jesus, 37 AD3d 815, 816, 830 NYS2d 778 (2007); Young v. XYZ Corp., 245 AD2d 503, 504, 666 NYS2d 709 (1997).

In response, neither co-defendants Turner and Sound, nor plaintiff Carol Joseph raised any triable issues of fact to defeat summary judgment.

Co-defendants Turner and Sound's cross-motion seeking to allow them to amend their answer to assert a cross-claim for contractual indemnification and breach of contract is denied. CPLR § 3025(b) allows that leave to amend pleadings shall be freely given. However, despite such, the claims that co-defendants Turner and Sound seek to add as cross-claims at this late date should also be meritorious. Aiello v. Manufacturers Life Ins. Co. of New York, 298 AD2d 662, 748 NYS2d 818, leave to appeal dismissed in part, denied in part, 99 NY2d 575, 755 NYS2d 708 (2002).

In this instance, co-defendants Turner and Sound have failed to demonstrate that the work performed by B&G bore any relation to the alleged creation of a dangerous condition. Moreover, while co-defendant Turner objects to the form of co-defendant B&G's submission of proof that they were in fact named as additional insured as required, they fail to deny the accuracy of same.

Finally, plaintiffs' opposition to co-defendants' cross-motion for summary judgment and dismissal of the plaintiffs' complaint as to them raises numerous issues of fact regarding the creation of the dangerous condition as well as the issue of notice.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, defendant, B&G Electrical Contractors of N.Y., Inc.'s motion for summary judgment is granted and the complaint is severed and dismissed as against defendant B&G Electrical Contractors of N.Y., Inc. and the Clerk is directed to enter judgment in favor of said defendant; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
September 23, 2008

HON. LAWRENCE V. CULLEN
J.S.C.