

**Engel v Economy Plumbing & Heating Co., Inc.**

2009 NY Slip Op 30050(U)

January 12, 2009

Supreme Court, Suffolk County

Docket Number: 13025/2008

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

Hon. Paul J. Baisley, Jr.

\_\_\_\_\_  
CARL ENGEL

Plaintiff(s),

-against-

ECONOMY PLUMBING & HEATING CO., INC.

\_\_\_\_\_  
Defendant(s).

**ORIG. RETURN DATE:** November 18, 2008  
**FINAL RETURN DATE:** January 5, 2009  
**MTN. SEQ. #:** 001-MG  
**CROSS MTN. #:** 002-MD

**PLTF'S ATTORNEY:**  
CARTIER BERNSTEIN AUERBACH, PC  
100 AUSTIN STREET BLDG 2  
PATCHOGUE, NY 11772

**DEFT'S ATTORNEY:**  
JEFFREY S. SHEIN & ASSOCIATES  
575 UNDERHILL BLVD. STE. 112  
SYOSSET, NY 11791

Upon the following papers numbered 1 to 21 read on this motion and cross motion: Notice of Motion and supporting papers 1 - 5; Notice of Cross Motion and supporting papers 6 - 13; Affirmation in Opposition and supporting papers 14 - 16; Reply Affirmation and supporting papers 17 - 21; it is,

**ORDERED** that the plaintiff's unopposed motion (001) for leave to supplement the summons and amend the complaint to reflect an additional defendant is granted; and it is further

**ORDERED** that the proposed Supplemental Summons and Amended Complaint submitted with this motion shall be deemed served upon the original party defendant; and it is further

**ORDERED** that the plaintiff is directed to serve said Supplemental Summons and Amended Complaint within 20 days of the date herein by service upon the additional defendant All County Sewer & Drain, Inc. pursuant to CPLR 311 and to file said Supplemental Summons and Amended Complaint along with proof of service with the Clerk of the Court; and it is further

**ORDERED** that that part of the same motion seeking leave to discontinue a related action brought against the additional defendant herein but under a similar though erroneous corporate name and which action has yet to be commenced (index no. 3538/08) is granted and said action is discontinued in accordance with CPLR 3217; and it is further

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**ORDERED** that the plaintiff is directed to serve said Supplemental Summons and Amended Complaint within 20 days of the date herein by service upon the additional defendant All County Sewer & Drain, Inc. pursuant to CPLR 311 and to file said Supplemental Summons and Amended Complaint along with proof of service with the Clerk of the Court; and it is further

**ORDERED** that the caption in this action shall now read as follows:

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CARL ENGEL,

Plaintiff,

-against-

Index No. 13025/08

ECONOMY PLUMBING & HEATING CO., INC.  
and ALL COUNTY SEWER & DRAIN, INC.,

Defendants.

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and it is further

**ORDERED** that the defendant Economy Plumbing & Heating Co., Inc.'s cross motion (002) for summary judgment dismissing the complaint as to it is denied without prejudice; and it is further

**ORDERED** that pursuant to 22 NYCRR 202.8(f) the parties are directed to appear for a preliminary conference on February 9, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

The plaintiff commenced this action to recover damages for personal injuries arising out of a trip and fall in the garden center area of a Home Depot; his employer. The plaintiff learned of additional facts during early discovery proceedings that would support a further finding of negligence against the proposed additional defendant All County Sewer & Drain, Inc. (hereinafter All County). The plaintiff seeks leave in this motion to add this proposed additional defendant and to supplement the summons and amend the complaint to reflect this addition.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing parties (see, CPLR 3025 [b]; *Sarro v Sarro*, 238 AD2d 330, 656 NYS2d 916 [1997]). Inasmuch as the defendant does not oppose this application and does not claim any prejudice if this relief is granted and, in addition, the fact that no preliminary conference order has been entered into as yet, this application for leave to supplement the summons and to amend the complaint is granted.

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That part of this application to discontinue a related action (Index No. 3538/08) against this proposed additional defendant which was brought under an incorrect corporate name is granted even though the plaintiff is entitled to such a discontinuance as a matter of right since the complaint in that related action has never been served (*see* CPLR 3217[a][1]).

Turning now to the cross motion for summary judgment brought by the defendant Economy Plumbing & Heating Co., Inc. (hereinafter Economy), on a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.*, 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this cross motion, Economy submits an attorney's affirmation, a copy of the pleadings and a "Repair Work Order" issued by Home Depot to Economy for the repair of a "Backed up/clogged" drain in the "Garden Center" at the Farmingdale store with the following description of the problem: "Small drain in GC not properly draining. Store constantly needs to pump out sump pump." This document is dated June 25, 2007.

In addition, Economy incorporates by reference an exhibit to the plaintiff's motion for leave to supplement the summons and amend the complaint, to wit: an invoice from All County to Economy for work done on June 25<sup>th</sup> and 27<sup>th</sup>, 2007, in attempting to repair the clogged drain at issue. The actual accident occurred on that second day - June 27, 2007.

In further support of this cross motion and in response to the plaintiff's opposition, Economy submits a Reply consisting of an attorney's affirmation, a copy of the "Maintenance Contractor Agreement" between Home Depot and Economy and an affidavit from Economy's Chief Operating Officer.<sup>1</sup>

The principal contention by Economy in support of this application for summary judgment is that it subcontracted the work in its entirety with regard to the clogged drain to All County and had nothing whatsoever to do with that work and was not otherwise responsible for the work or any alleged negligent condition pertaining to the work.

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<sup>1</sup> The reply affidavit of the cross movant's Chief Operating Officer may not be considered on this application to show a prima facie entitlement to summary judgment as such evidentiary support was required to be submitted on the cross motion in chief in order to be considered by the court (*see Batista v Santiago*, 25 AD3d 326, 807 NYS2d 340 [1<sup>st</sup> Dept 2006]).

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In reviewing the evidence appropriate for consideration on Economy's cross motion for summary judgment, the court notes that there are discrepancies in the hours of labor performed on the respective days. According to All County's invoice, it worked on the clogged drain for two hours on June 25<sup>th</sup> and a half hour on June 27<sup>th</sup>.<sup>2</sup> According to Economy's invoice, however, the labor took four hours on June 25<sup>th</sup> and three hours on June 27<sup>th</sup>.

In sum, while All County's work can be accounted for two of the four hours on the 25<sup>th</sup> and one half hour of the three hours on the 27<sup>th</sup>, the remaining two hours and two and a half hours, respectively, are not accounted for.

In addition, a review of the Maintenance Contractor Agreement submitted in support of this cross motion by Economy contains a provision requiring Economy to acquire the written permission of Home Depot before subcontracting any of the services it is to provide to Home Depot (section 10.0). In this regard, Economy submits no evidence of such written permission for its subcontracting the work at issue to All County.

While, as a general rule, a party (such as Economy) which retains an independent contractor (such as All County) is not liable for the negligence of the independent contractor, there are exceptions to this rule such as if there can be shown to be a non-delegable duty owed to Home Depot by Economy (*see e.g. Brothers v New York State Electric and Gas Corp.*, 11 NY3d 251, 258 [2008][quoting Restatement (Second) of Torts § 409]).

In this case, based upon the contractual obligation of Economy to obtain written permission from Home Depot before subcontracting any of its work, the absence, on the evidence submitted on behalf of the movant, of any such written permission with regard to the work subcontracted to All County raises an issue of fact as to Economy's authority to subcontract or delegate this work and whether, in the absence of such authority, Economy can claim it had no responsibility for the work.

Accordingly, in view of the open issues as to whether All County actually performed all the work at issue and whether Economy, in any event, had the authority to delegate such work to a subcontractor, Economy has failed in its burden to make a prima facie showing of entitlement to summary judgment. In view of there being no showing of a prima facie entitlement to summary judgment, the opposition submitted by the plaintiff need not be considered and the cross motion for summary judgment is denied at this time without prejudice to being resubmitted in accordance with the applicable provisions of the CPLR.

In any event, even if Economy had made a prima facie showing of entitlement to summary

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<sup>2</sup> The court notes that according to All County's invoice, it was not able to remedy the problem and recommended further steps to be taken.

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judgment, the opposition submitted by the plaintiff sufficiently raises the same issues of fact as are raised in the context of the cross movant's prima facie showing itself.

This constitutes the decision and order of the court.

Dated: *January 12, 2009*

**HON. PAUL J. BAISLEY, JR.**  

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**HON. PAUL J. BAISLEY, JR., J.S.C.**