

WDF, Inc. v E.E. Cruz & Co., Inc.

2009 NY Slip Op 30349(U)

February 11, 2009

Supreme Court, New York County

Docket Number: 604243/05

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 604243/2005

WDF

VS.

E.E. CRUZ & COMPANY

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. 604243/05

MOTION DATE 10/23/08

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-7

FILED

FEB 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/11/09

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
WDF, Inc.,

Plaintiff,

-against-

Action No. 1

Index No.: 604243/05

E. E. CRUZ & COMPANY, INC., THE CITY OF
NEW YORK and MALCOLM PIRNIE, INC.,

Defendants.

-----X
MALCOLM PIRNIE, INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No.:
590233/07
FILED
FEB 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

URS CORPORATION (f/k/a URS CONSULTANTS,
INC. and/or URS CORPORATION GROUP
CONSULTANTS),

Third-Party Defendant.

-----X
URS CORPORATION - NEW YORK,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No.: 591105/07

WINSTON SMITH, P.E., P.C.,

Second Third-Party Defendant.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
DURR MECHANICAL CONSTRUCTION, INC.,

Action No. 2

Plaintiff,
-against-

Index No.: 602906/07

E. E. CRUZ & COMPANY, INC., URS CORPORATION
(f/k/a URS CONSULTANTS, INC. and/or URS
CORPORATION GROUP CONSULTANTS), and
MALCOLM PIRNIE, INC.,

Defendants.

-----X
URS CORPORATION – NEW YORK,

Third-Party Index
No.:591124/07

Third-Party Plaintiff,

-against-

DECISION AND ORDER

WINSTON SMITH, P.E., P.C.,

Third-Party Defendant.

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is a property damage action arising from a September 8, 2004 flood of the Flushing Bay CSO Retention Facility, a City project then under construction. Plaintiffs WDF, Inc. (“WDF”), an HVAC contractor on the Project, and Durr Mechanical Construction, Inc. (“DURR”), a subcontractor, allege that defendant Malcolm Pirnie, Inc. (“MPI”), the Construction Manager, negligently allowed others to install improper coverings on holes made in the sewers at the facility and failed to ensure that the openings were properly secured, resulting in damage and destruction to plaintiffs’ equipment. MPI moves for summary judgment against both plaintiffs,

citing a lack of evidence that it owed any duty to plaintiffs, that it committed an affirmative act of negligence, or that it launched a force or instrument of harm. MPI has submitted the pleadings, the parties' contracts with the City of New York, deposition transcripts, and other documents. Plaintiffs WDF and DURR oppose, arguing that MPI's duty arose from its contract with the City and its ability to have prevented the damage.

By Complaint dated December 2, 2005, as amended September 14, 2006, WDF claimed damages resulting from negligence and breach of contract by defendant E.E. Cruz & Company, Inc. ("Cruz"), and negligence by MPI.¹ MPI then commenced a third-party action URS Corporation, which in turn commenced its own second third-party action against Winston Smith, P.E., P.C. On or about August 28, 2007, DURR commenced a separate action against Cruz, MPI and URS, raising similar allegations to those made by WDF. URS then brought a third-party action against Winston Smith.

Summary of Undisputed Facts²

MPI, an engineering firm, entered a contract with the City of New York, Department of Environmental Protection, ("the City") for construction management and resident engineering inspection services in connection with construction of the Flushing Bay Combined Sewer Overflow Retention Facility ("the Project"). The Project included the underground installation of fifteen concrete sewage retention tanks, diversion chambers, and connections. Exh. N (MPI/City

¹WDF also named the City as a defendant. A Stipulation of Discontinuance as to the City was filed September 29, 2008, and the City withdrew its Motion for summary Judgment and related documents.

²The Court relies on the parties' contracts with the City, transcripts of depositions taken of the City's on-site Engineer/Project Manager Vladimir Radulescu, the Resident Engineer employed by MPI, John O'Sullivan, and the Project manager for Cruz, Charles J. Montalbano.

Contract), MPI Mot. The City also contracted with WDF in 2001 to be the prime HVAC contractor on the project, and with Cruz to provide general contracting services on the Project. Montalbano EBT, pg. 36, Exh. J, MPI Mot. DURR subcontracted with Cruz to perform process mechanical work for the Project. Exh. P, MPI Mot.

MPI's and the contractors' duties and responsibilities are laid out in the various contracts. MPI and each plaintiff had its own contract with the City. They were not named as third party beneficiaries of each other's contract. MPI, in Article II(A)(1) of its contract, agreed to provide,

...all Construction Management Services including resident engineering inspection of construction required in connection with the actual construction of the Project, which includes all general construction and incidental work as well as determining and advising the Commissioner whether the construction conforms to the plans, specifications and requirements of the construction contract documents and good construction practice.

In another key provision, Article II(B)(5), MPI and the City agreed that,

The Services to be performed by the CM shall at all times be subject to the control and approval of the Commissioner whose decision shall be final and binding upon the CM as to all matters arising in connection with or relating to this Agreement.

In Attachment 1 to the Agreement, ¶ 2.1, entitled "Specific Requirements," MPI and the City further defined MPI's duties and responsibilities:

The CM [MPI] shall be the representative of the Department at the site, and subject to review by the Commissioner or his/her duly authorized representative, shall have the power, in the first instance, to inspect the performance of the work

....

The CM agrees that it will endeavor to safeguard the City against defects and deficiencies in the work....

The Commissioner, through his/her duly authorized representative, the Chief, water Quality and Pumping Station Construction, will monitor the performance of the CM. Situations incapable of disposition in the field should be brought to the

immediate attention of the Commissioner, through his/her authorized representative.

It is the responsibility of the construction contractors, and not the responsibility of the CM, to determine the means and methods of construction and the safety procedures and programs applicable to the work, as defined in Article 12, Paragraph 16 of the Agreement Section of the Construction Contracts Documents. However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property ..., such means and methods must be reported to the Commissioner, or to his/her duly authorized representative.

Article 12 of the Agreement Section of the Construction Contracts Documents provides, in pertinent part,

[T]he Contractor shall coordinate the work to be done hereunder with the work of ... other Contractors The Contractor shall not commit or permit any act which will interfere with the performance of work by any other Contractor. ...

The Construction Contracts provided for liquidated damages and for indemnification running between the Contractors and between each of them and the City.

At some point during construction, Cruz, the general contractor on the Project, as a method to facilitate the steel installation, cut additional openings in the walls that were slated for future removal once the facility became operational. Cruz bulkheaded these openings with multiple sheets of plywood bolted to the existing sewer walls. Cutting the holes and construction of the bulkheads were Cruz' means and methods of construction, and Cruz did not seek MPI's approval. Although the bulkheads were in place for over one year, the extreme rainfall on September 8, 2004, caused the bulkheads to fail. Water flowed through the holes and flooded the facility under construction, damaging plaintiffs' property.

Discussion and Rulings

To obtain summary judgment, a movant must establish its cause of action or defense

sufficiently to warrant the court, as a matter of law based on undisputed material facts, in directing judgment in its favor. CPL.R. 3212(b); *see Owusu v. Hearst Communications, Inc.*, 52 A.D.3d 285 (1st Dep't 2008) (summary judgment denied for plaintiff on Labor Law § 240(1) claim, and granted for defendant on negligence claim). A movant must support its cause with evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 560-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. *Id.* at 560; CPL.R. 3212(b). *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967-968 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v. Depew & Schetter Agency*, 154 A.D.2d 513, 515 (2d Dept. 1989).

The Complaints sound in tort. The MPI Contract provided, in Article 13,

Nothing in this Agreement shall be construed to give any person other than the City and the Engineer any legal or equitable right, remedy or claim under this Agreement, except as may otherwise be provided for in this Agreement; but, it shall be held to be for the sole and exclusive benefit of the City and the Engineer.

A defendant stands liable in negligence only for breach of a duty of care owed to the plaintiff. *See Palka v. Edelman*, 40 N.Y.2d 781, 782 (1976). The threshold question in this motion then is whether MPI owed the plaintiff contractors a duty of care. The "existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors." *Church v. Callanan Indus.*, 99 N.Y.2d 104, 110-111 (2002); *see Hamilton v.*

Beretta U.S.A. Corp., 96 N.Y.2d 222, 232 (2001).

MPI argues that the evidence fails to show it owed plaintiffs a duty of care, or that it undertook any affirmative act that could have proximately caused the flood. MPI first asserts that the claims against it are “framed in what MPI allegedly failed to do, i.e., correct an alleged dangerous condition created by” Cruz. MPI Memo of Law, pg. 6. WDF’s Fifth Cause of Action, the only one against MPI, alleges that:

40. ... [MPI] was generally responsible for the day to day oversight of the Project.

41. ...[MPI] owed a duty of care to Plaintiff [WDF] to act with reasonable care in performing and supervising work at the Project.

MPI Mot., Exh. B. In paragraphs 42-48, WDF alleges that MPI either “failed” or “allowed” the flood to occur through the negligent exercise of its various duties under its contract with the City. Plaintiff DURR makes similar allegations in its Second Cause of Action, the only one brought against MPI. MPI Mot., Exh. F. Consequently, plaintiffs’ claims against MPI are based solely on MPI’s alleged failure to perform, or faulty performance (through inaction) of its contractual obligations to the City.

The New York Court of Appeals has consistently held that, “ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor.” *Church, supra*, 99 N.Y.2d at 111; *see Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 (1990); *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928) (Cardozo, J.). As discussed in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002), there are, however, three recognized situations in which a party who enters into a contract to render services may be said to have assumed a duty of care to third persons. These include: (1) where the contracting party, in failing to exercise reasonable care in

the performance of his duties, "launches a force or instrument of harm" (*Moch, supra*, 247 N.Y. at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks, supra*, 76 N.Y.2d at 226) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka, supra*, 83 N.Y.2d at 589). *Id.* None of these exceptions apply here.

Force or Instrument of Harm

There is no disputed evidence that MPI launched "a force or instrument of harm." Even viewing the evidence "in a light most favorable to the party opposing the motion," (*Lakeside Constr., supra*, 154 A.D.2d at 515), as the Court must on summary judgment, it does not establish that MPI did anything to *cause* the holes to be cut by Cruz or to cause the bulkheads to be constructed out of plywood (instead of steel), the apparent reason for their failure. Indeed, Cruz' Project manager testified that Cruz did not submit its plan for cutting the holes, to MPI and that they were Cruz' means and methods for constructing the original design. MPI Mot., Exh. I, pgs. 85-86 and Exh. J, pgs. 127-128.

In addition, under the MPI/City contract,

It is the responsibility of the construction contractors, and not the responsibility of the CM, to determine the means and methods of construction and the safety procedures and programs applicable to the work....

Plaintiffs rely on the language in the MPI/City contract:

[I]f it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property ..., such means and methods must be reported to the Commissioner, or to his/her duly authorized representative.

This clause does not demonstrate MPI's tort liability since plaintiffs do not identify any evidence to show that a hazard became "apparent" to MPI or that if one had become apparent, MPI had the

responsibility to do anything other than report it to the City. That MPI might have directed Cruz or other contractors to perform or not to perform work at times, as evidenced in memoranda submitted by WDF (Walsh Affid., Exh. F), does not create an inference that MPI directed Cruz to employ the means and methods at issue here—the cutting of holes and installing of plywood bulkheads.

Further, although there is some evidence that MPI, as the “Engineer,” had the “right to reject means and methods proposed by the Contractor” (Exh. O [Contractor Contract with City], Article 4, MPI Mot.), the evidence unequivocally shows that Cruz did not “propose” its plan regarding cutting holes and using plywood bulkheads to MPI. Finally, the fact that MPI Resident Engineer John O’Sullivan might have been aware of the plywood bulkheads being constructed does not establish that he knew or should have known that the use of plywood would be unduly hazardous. Regardless, the Court does not construe the “right” to reject as an affirmative obligation to prevent a contractor like Cruz from using hazardous means and methods, and the failure to do so as launching “a force or instrument of harm.” Nor would MPI’s failure to exercise a particular “right” or even make a mistake in failing to recognize the hazardous nature of plywood bulkheads, be a tortious *act* supporting a third party claim.

Detrimental Reliance

As to the second exception of detrimental reliance on the continued performance of the contracting party's duties, MPI has established that there is no evidence of plaintiffs’ reliance on MPI’s performance. Plaintiffs have not raised an issue of material fact in their opposing papers. Analysis of this issue begins with the seminal case of *Eaves Brooks, supra*, 76 N.Y.2d at 226. There, a commercial tenant sought to recover for property damage sustained when a sprinkler

system malfunctioned and flooded the premises. The Court found the sprinkler company had no duty in tort to the tenant, who was not privy to the sprinkler contract. The Court of Appeals, in *Espinal, supra*, 98 N.Y.2d at 140, explained:

For policy reasons, we refused to extend liability to encompass the defendant companies, noting that the building owners were in a better position to insure against loss. We adhered to the general rule that “a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries” (*Eaves Brooks*, 76 N.Y.2d at 226). We were careful to state, however, that tort liability may arise where “performance of contractual obligations has induced detrimental reliance on continued performance” and the defendant’s failure to perform those obligations “positively or actively” works an injury upon the plaintiff (*Id.*).

Id.

The rationale in *Eaves Brooks* is equally applicable here. The contractors, including Cruz and WDF, were in a far better position to insure against this loss than MPI. In fact, maintaining the proper insurance against loss caused by their own acts was a material element of all the contractors’ contracts with the City. Exh. O, Article 22, MPI Mot. Nor has WDF or DURR submitted any evidence establishing that they relied on MPI to monitor the safety of Cruz’ means and methods or that their property damage was actively caused by that reliance. It appears from the evidence that MPI served primarily as the City’s eyes and ears and that if something stood out as being particularly unsafe, MPI was obligated to report it to the City and could take action if necessary. That does not, however, establish that WDF and DURR relied on MPI to do so in all instances.

Displacement of the Duty to Maintain

Finally, the Court of Appeals decision in *Palka, supra*, 83 N.Y.2d at 589, illustrates the

third possible theory of tort liability, where the promisor assumes the promisee's safety responsibilities. In *Palka*, the Court held a maintenance company liable in tort for injuries to a nurse-employee of a hospital after a defectively maintained fan fell on her while she was caring for a patient. The Court found that the service contract was "comprehensive and exclusive" as to preventative maintenance, inspection and repair, thus making the defendant "the sole privatized provider for a safe and clean hospital premises." *Id.* at 588-589. This case is entirely inapposite. MPI's contract with the City was not to maintain the construction site or even to ensure the safety of all the construction. It was to notify the City of compliance and particularly hazardous situations. Exh. N, pg. SR-14, § 2.1, MPI Mot. Ironically, the MPI/City contract placed the responsibility for determining "means and methods of construction," as well as "the safety procedures and programs applicable to the work," squarely on the shoulders of the contractors. *Ibid.* Accordingly, it is

ORDERED that the motion for summary judgment of defendant/third-party-plaintiff MPI is granted and the case against it dismissed; and it is further

ORDERED that the Clerk shall enter Judgment for MPI forthwith; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Date: February , 2009
New York, N. Y.

ENTER:

[Signature]
J.S.C.
FILED
FEB 18 2009
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