

Hopewell v Fifth on the Park Condo, LLC

2009 NY Slip Op 32124(U)

September 16, 2009

Supreme Court, New York County

Docket Number: 108449/08

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Timothy Hopewell and LONETTE Hopewell

INDEX NO. 108449/08

MOTION DATE _____

- v -
Fifth on the Park Condo, LLC et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Fifth on the Park Condo, LLC and Artimus Construction, LLC for an order, pursuant to CPLR §3212, granting them summary judgment, dismissing the Complaint of plaintiffs Timothy Hopewell and Lonette Hopewell and the cross-claim of defendant Bethel Gospel Assembly, Inc. is granted; and it is further

ORDERED that plaintiffs' Complaint and Bethel's cross-claim against Fifth on the Park and Artimus are dismissed; and it is further

ORDERED that counsel for plaintiffs and Bethel appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 27, 2009 at 2:15 p.m.; and it is further

ORDERED that Fifth on the Park and Artimus serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court

Dated: 9/16/09

FILED
 SEP 18 2009
 COUNTY CLERK'S OFFICE
 NEW YORK
 HON. CAROL EDMED J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 35

-----X
TIMOTHY HOPEWELL and LONETTE HOPEWELL,

Plaintiffs,

Index No. 108449/08

-against-

DECISION/ORDER

FIFTH ON THE PARK CONDO, LLC, BETHEL
GOSPEL ASSEMBLY, INC. and ARTIMUS
CONSTRUCTION, LLC,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

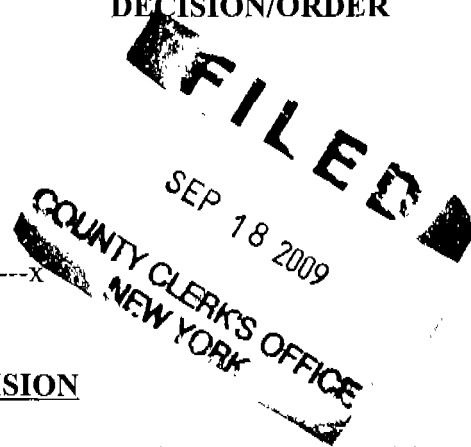
In this action, plaintiffs Timothy Hopewell ("Mr. Hopewell) and Lonette Hopewell (Mrs. Hopewell") (collectively "plaintiffs") seek to recover against defendants Fifth on the Park Condo, LLC ("Fifth on the Park"), Bethel Gospel Assembly, Inc. ("Bethel") and Artimus Construction, LLC ("Artimus") (collectively "defendants") for personal injuries Mr. Hopewell allegedly suffered at a construction site.

Fifth on the Park and Artimus ("co-defendants") now move for an order, pursuant to CPLR §3212, granting summary judgment dismissing the Complaint and Bethel's cross-claim.

Background¹

On November 10, 2006, Mr. Hopewell was working as a demolition worker at 2-26 East 120th Street, New York, New York 10035 (the "Premises"), when a trash chute he was holding onto slipped and fell on him. In their Complaint, plaintiffs allege that the injuries Mr. Hopewell suffered resulted from defendants' negligence (first cause of action) and violations of Labor Law

¹Information is taken from plaintiffs' Verified Complaint and Verified Bill of Particulars, and Bethel's Amended Verified Cross-Claim.



§§200, 240, and 241 (second cause of action), as well as the following provisions of 12 NYCRR 23 of the Industrial Code: 23-1.5, 23-1.7(b) and (c), 23-1.16, 23-1.24, 23-1.24(b), 23-1.20, 23-2.1(b), 23-6; 23-6.1(d) and 23-6.2(a).²

In its cross-claim, Bethel seeks common law and contractual contribution and indemnification against co-defendants.

Co-defendants' Motion

Co-defendants argue that in order to impose liability against a defendant, there first must be a finding of a duty owed by the defendant to the plaintiff. Here, as co-defendants had no connection with the construction site where Mr. Hopewell allegedly was injured, co-defendants could not have a duty to Mr. Hopewell.

Similarly, plaintiffs' claims on the second cause of action under Labor Law §§200, 240, and 241 presuppose co-defendants' connection in some way with the construction site. Co-defendants contend that the affidavits of Robert Ezrapour ("Mr. Ezrapour"), the vice president of Artimus, and Eytan Benyamin ("Mr. Benyamin"), a member Fifth on the Park, clearly set forth that co-defendants are neither owners of nor contractors at the Premises. Further, co-defendants did not repair, operate, manage or in any other way control the Premises. Accordingly, co-defendants have no duty under the Labor Law with respect to the work Mr. Hopewell was doing when he alleges he was injured.

Mr. Benyamin attests that Fifth on the Park owns the property located at 1481-95 5th Avenue, New York, New York, which partially adjoins the Premises (see the "Benyamin Aff."). Although a construction project is going on at 1481-95 Fifth Avenue, "it involves no work at the

² Plaintiff's third cause of action is for loss of consortium.

location where plaintiff claims he was injured.” Fifth on the Park hired Artimus as a contractor for the construction project at 1481-95 Fifth Avenue (see the “Contract”).

Mr. Ezrapour also attests that the project at 1481-95 5th Avenue had “absolutely no connection” to the Premises other than the fact that these parcels of land partially adjoin each other (see the “Ezrapour Aff.”). In addition, both affidavits confirm that Mr. Hopewell’s alleged employer, Aegis U.S. Inc. (“Aegis”), was not employed as a contractor or subcontractor at 1481-95 5th Avenue. Therefore, co-defendants argue, they have no liability to plaintiffs herein.

Plaintiffs’ Opposition

Plaintiffs argue that co-defendants’ motion should be denied as premature and legally incorrect.

First, citing CPLR §3212(f) and caselaw, plaintiffs argue that no party has been deposed to establish any connection or lack of connection between the defendants and the construction site on which the plaintiff was injured. Plaintiffs recently have filed a summons and complaint adding another party to the action, the Helen Fuld School of Nursing³ (“the Nursing School”). To date, the Nursing School has not appeared. Plaintiffs further argue that no party has been deposed, and co-defendants’ “self-serving affidavits” do not establish the lack of nexus to Mr. Hopewell’s injury warranting “the drastic remedy of summary judgment” depriving plaintiffs of their day in Court. Plaintiffs further contend that in order to oppose the motion, they “are not at liberty to seek affidavits” from Bethel or the Nursing School. Instead, they must wait for depositions to be held. If this motion is entertained prior to the holding of any depositions,

³ A printout of the Nursing School’s website, provided as Exhibit A with the co-defendants’ reply, indicates that the name is the “Helene Fuld College of Nursing.”

plaintiffs are left with no means to oppose this motion and are again unjustly deprived of their day in Court.

Second, plaintiffs argue that, based on the Benyamin and Ezrapour affidavits co-defendants have a “significant connection to the on going construction” that injured Mr. Hopewell. First, 1481-95 Fifth Avenue, the property owned by Fifth on the Park, adjoins the Premises. Next, construction was under way at 1481-95 Fifth Avenue at the time of Mr. Hopewell’s accident at the Premises. Co-defendants are mistaken in concluding that because they did not own the Premises and because Mr. Hopewell was injured when working at the Premises for another company, they owed no duty to Mr. Hopewell. Citing NY Pattern Jury Instructions 2:216, plaintiffs argue that a clear reading of the Labor Law indicates that a “duty to use reasonable care to provide and maintain a safe work place . . . to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein *or lawfully frequenting such places.*” The Labor Law is not limited to those working within the four walls of the site, as the co-defendants would have the Court believe.

Moreover, the “place of work” is a flexible concept defined not only by location but also by the circumstances of the work to be done, plaintiffs contend. Citing caselaw, plaintiffs argue that a work site can include not only the building under construction but also the area surrounding such a building under construction. Owners and general contractors are responsible for the places of work they provided and “the ways and approaches to such places of work.” The duty imposed on the owner and general contractor under Labor Law extends to the whole construction site, not only those areas immediately involved in the work.

Clearly, a breach of the duty to keep a construction work site safe can lead to foreseeable

dangers to those working next to the construction site, plaintiffs argue. Absent discovery, plaintiffs do not know what safety precautions were taken by co-defendants, what role co-defendants had with respect to the chute, and what knowledge they had of any workers in the adjoining work site, further indicating that co-defendants' motion is premature.

Co-Defendants' Reply

Co-defendants first point out that Bethel has not submitted an opposition;⁴ therefore, Bethel's cross-claim should be dismissed.

Co-defendants also argue that as plaintiffs' opposition consists solely of an attorney's affirmation, it is lacking in probative value and, therefore, insufficient to defeat their motion.

Co-defendants further maintain that on October 23, 2008, co-defendants wrote to plaintiffs, asking that the action against co-defendants be discontinued (see the October 23, 2008 Letter). In that letter, co-defendants informed plaintiffs of co-defendants' lack of involvement at the Premises and of a possible connection with the Nursing School, which apparently has an address that is contained within the address listed as the site of Mr. Hopewell's accident, *i.e.*, 2-26 East 120th Street. Co-defendants contend that plaintiffs' acknowledgment that they have begun an action against the Nursing School is a "tacit admission" that plaintiffs have gone after the wrong parties insofar as they named co-defendants in this case.

Co-defendants also argue that, notwithstanding plaintiffs' claim, there is no liability to adjoining site owners and general contractors based merely upon the fact that the co-defendants' "construction site and the plaintiff's construction site were adjoining and contemporaneous

⁴ After the motion was submitted on the August 31, 2009 return date, Bethel submitted its opposition papers to the Court on September 9, 2009. In any case, Bethel's opposition only argues that co-defendants' motion is premature for lack of discovery, an argument already raised by plaintiffs.

construction endeavors.” The Benjamin and Ezrapour affidavits, as well as the Contract, constitute *prima facie* proof that there was no connection between co-defendants’ work and the work performed at the Premises. The affidavits also clearly state that Mr. Hopewell’s employer, Aegis, was not a subcontractor on co-defendants’ job site. While plaintiffs contend that co-defendants have a duty to maintain a safe workplace for all persons employed at a work site and any persons lawfully frequenting such places, plaintiffs do not allege that Mr. Hopewell was injured while visiting the co-defendants’ construction site. To the contrary, plaintiffs have always alleged that Mr. Hopewell’s accident occurred at the Premises. Insofar as co-defendants have established that they did not work at the Premises, it would be incumbent on plaintiffs at this juncture to provide some proof that co-defendants’ construction work at an adjoining work site had some nexus to Mr. Hopewell’s accident. As plaintiffs have not provided any proof of such a nexus, co-defendants’ motion should be granted.

Co-defendants further argue that plaintiffs have not demonstrated the need to conduct additional discovery, pursuant to CPLR §3212(f). Plaintiffs have not submitted any affidavits from anyone in opposition to the motion. Plaintiffs merely speculate and surmise about what a deposition of co-defendants’ representatives might reveal.

Analysis

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient

“evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Common Law Negligence and Labor Law §200

Labor Law §200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site (*Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], citing *Blessinger v Estee Lauder Companies, Inc.*, 271 AD2d 343 [2000]). An “implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *Torkel v NYU Hospitals Center*, 883 NYS2d 8, 12 [1st Dept 2009] [“To support a finding of liability under Labor Law §200 . . . a plaintiff must show that the defendant supervised and controlled the plaintiff’s work”]; *Arrasti v HRH Const. LLC*, 60 AD3d 582, 583 [1st Dept 2009] [“The evidence fails to raise a triable issue of fact that defendants supervised or controlled plaintiff’s work at the construction site Accordingly, the claims based on common-law negligence and violation of Labor Law §200 should have been dismissed”]).

Here, co-defendants have established a *prima facie* case for their entitlement to judgment as a matter of law under common law and Labor Law (*Zuckerman v City of New York* at 562).

Co-defendants have demonstrated through the affidavits of Mr. Ezrapour and Mr. Benyamin and

the Contract that they owed absolutely no duty to Mr. Hopewell that would give rise to a cause of action of negligence against them. First, the Contract between co-defendants establishes that Artimus was to perform construction work at 1481-95 Fifth Avenue only (Contract, p. 1). Second, the evidence in the record establishes that neither co-defendant performed or authorized any construction work at the Premises where Mr. Hopewell was injured. The record establishes that neither co-defendant owned, managed or controlled the Premises, and that co-defendants did not repair, operate, manage or in any other way control the Premises. Finally, the record establishes that neither co-defendant engaged Mr. Hopewell's employer or controlled or supervised his work at the Premises. Plaintiffs even concede as much in their opposition (opp., p. 6).

In their opposition, plaintiffs fail to provide any evidence that would defeat co-defendants' *prima facie* case for summary judgment. Plaintiffs only allege that co-defendants' duty arises from the facts that 1481-95 Fifth Avenue, the property owned by Fifth on the Park, adjoins the Premises, and that construction was under way at 1481-95 Fifth Avenue at the time of Mr. Hopewell's accident at the Premises. However, plaintiffs provide no caselaw that support such a proposition. Instead, plaintiffs cite *Holgerson v South 45th St. Garage, Inc.*, 16 AD2d 255, 258 [1st Dept 1962], *aff'd* 12 NY2d 1011 [1963]), for the proposition that "the place of work" where Mr. Hopewell was injured may include co-defendants' adjoining construction site.

The Court in *Holgerson* states that the "place to work is a useful but also a flexible concept, defined not only by the place but by the circumstances of the work to be done" (*id.* at 258). However, the Court in *Holgerson* applies this principle to the facts of that case by narrowly defining the place of work. In *Holgerson*, the plaintiff, an elevator repairman, was

injured after the area where he stepped – a plank and screens that constituted the roof of a freight elevator – shifted, and he fell. The Court dismissed the plaintiff’s complaint against the defendant owner, holding that “because the plank and screens were not a place to work for this plaintiff, defendant owner breached no duty toward him” (*Holgerson* at 258). The case *Holgerson* cites, *Chaney v New York City Transit Authority* (12 AD2d 61 [1st Dept 1960], *affd* 10 NY2d 871 [1961]), is more instructive. *Chaney* states “that included in the owner’s obligation to provide a safe place to work is the obligation *to keep the ways and approaches to the place of work in a reasonably safe condition*” (*Chaney* at 65) (*emphasis added*).

Here, plaintiffs do not allege that the co-defendants’ construction site comprised “ways and approaches” to the Premises or that Mr. Hopewell was injured in the “ways and approaches” to the Premises. Plaintiffs allege only that he was injured while “on a demolition site at 2-26 East 120th Street,” *i.e.* on the Premises, which again, was not owned or controlled by co-defendants (Opp., p. 2; *see also* Complaint, ¶ 40) (*emphasis added*). Plaintiffs also do not provide any evidence indicating that co-defendants own, manage or control “the ways and approaches” to the Premises. Plaintiffs assert no facts in opposition, or submit any affidavit of the plaintiffs, indicating that any nexus between co-defendants’ worksite and the Premises where plaintiff’s accident allegedly occurred exists, sufficient to raise an issue of fact as to co-defendants’ liability.

Indeed, plaintiffs’ opposition comprises only an affirmation by their attorney. It is well settled that an attorney’s affirmation with no personal knowledge of the facts or supported by evidence in admissible form is insufficient to defeat a motion for summary judgment (*Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006], *citing* *Diaz v New York City Tr. Auth.*, 12 AD3d

316 [1st Dept 2004] and *Ramos v New York City Hous. Auth.*, 264 AD2d 568 [1st Dept 1999]; *see also Zuckerman v City of New York*, 49 NY2d 557, 563 *supra*).

Accordingly, as plaintiffs have failed to raise an issue of material fact as to co-defendants' liability under common law negligence and Labor Law §200, co-defendants' motion for summary judgment on those claims are granted.

Labor Law §§240 and 241(6)

Labor Law §240(1) imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452 [1985]). Labor Law §241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). However, “in the absence of any authority to control the work causing plaintiff's injury, [a defendant] may not be held liable under Labor Law § 240 or § 241(6)” (*Parra v Allright Parking Management, Inc.*, 59 AD3d 346, 347 [1st Dept 2009]; *Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [“unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law”]).

Here, based on the above, as co-defendants have established that they had no control or authority over the work at the Premises, neither Labor Law §240 or 241(6) applies to them. Accordingly, co-defendants' motion for summary judgment on plaintiffs' Labor Law §§240 and 241(6) claims are granted.

Insufficient Discovery

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery “is unavailing where the nonmoving party has failed to ‘produce some evidence indicating that further discovery will yield material and relevant evidence’” (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], quoting *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] [“Neither can [defendants] avoid summary judgment by claiming a need for discovery. The ‘mere hope’ of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough Defendants were bound to show there was a likelihood of discovery leading to such evidence, *i.e.*, that facts ‘may’ exist but cannot be stated at that time This they failed to do”]; *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984] [“The plaintiff’s later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint”]).

Here, contrary to plaintiffs’ arguments, the affidavits provided by co-defendants clearly establish the lack of a nexus between co-defendants and Mr. Hopewell’s injury. Further, plaintiffs provided no evidence in its moving papers indicating that further discovery will yield material and relevant evidence as to any duty co-defendants owed to Mr. Hopewell. Accordingly, the argument that co-defendants’ motion should be denied as premature lacks merit.

Bethel's Cross-Claim

Bethel's brief and untimely opposition merely repeats plaintiffs' arguments regarding discovery, and fails to cite to any evidence raising a material issue of fact as to co-defendants' liability to either plaintiffs or Bethel. Accordingly, the branch of co-defendants' motion seeking summary judgment dismissing Bethel's cross-claim for contribution and indemnity is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Fifth on the Park Condo, LLC and Artimus Construction, LLC for an order, pursuant to CPLR §3212, granting them summary judgment, dismissing the Complaint of plaintiffs Timothy Hopewell and Lonette Hopewell and the cross-claim of defendant Bethel Gospel Assembly, Inc. is granted; and it is further

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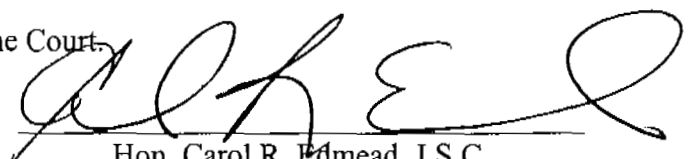
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Hon. Carol R. Edmead, J.S.C.

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