

Spence v Island Estates at Mt. Sinai II, LLC

2009 NY Slip Op 32365(U)

October 5, 2009

Supreme Court, Suffolk County

Docket Number: 06-5045

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 5-12-09
ADJ. DATE 9-8-09
Mot. Seq. # 003 - MD
004 - XMD

-----X
MICHAEL J. SPENCE, :
 :
 : Plaintiff, :
 :
 : - against - :
 :
 ISLAND ESTATES AT MT. SINAI II, LLC., :
 GESSIN CONTRACTING CO., INC. and :
 ISLAND ESTATES CONTRACTING, LLC., :
 :
 : Defendants. :
-----X

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-----X
ISLAND ESTATES AT MT. SINAI II, LLC. and :
 GESSIN CONTRACTING CO., INC., :
 :
 : Third-Party Plaintiffs, :
 :
 : - against - :
 :
 LAKEVILLE INDUSTRIES, INC., :
 :
 : Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 30, read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-12; Notice of Cross Motion and supporting papers (004) 13-16; Answering Affidavits and supporting papers 17 - 23; 24-26; Replying Affidavits and supporting papers 27-28; 29-30; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendants/third-party plaintiffs, Island Estates at Mt. Sinai II, LLC, Gessin Contracting Co. Inc. and Island Estates Contracting, LLC, pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff Michael J. Spence's complaint is denied;

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and further order granting defendants/third-party plaintiffs, Island Estates at Mt. Sinai II, LLC and Gessin Contracting Do., Inc. summary judgment on the third-party claims against the third-party defendant Lakeville Industries, Inc., is denied; and it is further

ORDERED that this motion (004) by the third-party defendant, Lakeville Industries, Inc., pursuant to CPLR 3212 for an order granting summary judgment dismissing the third-party complaint is denied.

This is an action wherein the plaintiff Michael J. Spence (Spence) seeks damages for personal injuries sustained March 31, 2005 when he was delivering a countertop to a home located at lot 15, Mount Sirai, County of Suffolk, State of New York, in the Island Estates development which was under construction when, while carrying the countertop, his foot was caused to hit a rut or deep crevice in the ground, causing him to sustain injury. The plaintiff was employed at the time by Lakeville Industries, Inc. (Lakeville). Causes of action sounding in negligence, violation of NY Labor Law Sections 200, 240, 241(6) and 12 Title 12 NYCRR 23 of the State of New York, including but not limited to 23-1.5, 23-1.7, 23-1.7(d) and 23-1.7(e) have been asserted in separate complaints against the defendants in the main action. The third-party complaint sets forth causes of action against Lakeville for common-law indemnification, negligence, contractual indemnification, contribution, and breach of agreement to provide liability insurance.

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 issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of motion (003), the moving defendants have submitted, inter alia, an attorney’s affirmation; copies of the pleadings and answers; plaintiff’s bill of particulars; a copy of a construction contract agreement; and copies of the transcripts of the examinations before trial of Michael J. Spence, Jim Meyn, and Richard Sirlin.

By way of an agreement dated April 21, 2004 between Island Estates at Mt. Sinai II, LLC and Lakeville Industries, Inc., Lakeville as a subcontractor, agreed, inter alia, to perform all work necessary

to supply and deliver kitchen and bath cabinets and countertops at each new home in the subdivision known as Mount Sinai II. Lakeville agreed to indemnify and hold the contractor Island Estates harmless and was to provide Worker's Compensation and public liability insurance, inter alia. It further provides that the insurance shall include a "Hold Harmless" clause for Island Estates and the owner of the property and Lakeville shall indemnify and hold harmless from any and all liability, actions or claims. The agreement at item 13 provides that the subcontractor shall inspect the job and report to the Contractor any unsatisfactory conditions which may exist prior to the commencement of this work and commencement of work by the subcontractor shall signify his acceptance of the existing conditions. A separate Hold Harmless/Indemnification Agreement, a waiver of subrogation, inter alia, have been included at the end of the agreement but is not dated or signed by the parties.

Michael Spence testified at his examination before trial on November 28, 2007 that on March 31, 2005 he was employed as a truck driver by Lakeville Industries for the purpose of delivering cabinets and countertops for kitchens and bathrooms and had a helper. He was delivering a countertop to a house located at the Island Estates development. The countertop, which he lifted into his truck with his helper and some other workers at the Lakeville warehouse, was about twenty to twenty-two feet long and four feet wide and weighed about 800 or 900 pounds, described as the biggest countertop he ever delivered for Lakeville. His warehouse manager told him to ask for help from the builders to unload it, so upon arrival at the trailer at the worksite, he spoke with someone from Island Estates who was waiting for the delivery and asked that person for help. He was thereafter sent someone from Island Estates to help. He drove the truck down the circle of the paved street, and reached the dirt construction site about fourteen or fifteen houses down and backed up as far as he could, about twenty feet from the house, but was concerned as the truck was sinking down into the mud. There was no sidewalk or walkway leading to the house. When he got out of the truck with his helper, the construction site around the house was described as having "ruts and discarded materials" such as sheet rock and wood. He had conversation with his helper and the worker from Island Estates to the effect that he would push the countertop off, one would take one end and one would be in the middle. They had no discussion about the condition of the ground. They carried the countertop after about ten or fifteen feet to the house over uneven, rut filled, muddy ground. He was looking towards the door when his right foot hit a four or five inch deep rut or crevice in the ground and he lost balance causing everything to shift. He did not see the rut or crevice before he hit it with his foot, but afterwards saw that the rut had tire or tread marks in it running parallel to the front of the house. He was feeling pain in his left shoulder, neck, back and arm, but continued to deliver the countertop into the house. His helper was aware he was experiencing pain thereafter. He had made deliveries to Island Estates two or three times before the date of the accident and testified that he had seen ruts on prior occasions and had to walk over them but did not complain to anyone about the condition of the ground prior to the accident.

Jim Meyn testified at his examination before trial on August 28, 2008 to the effect that he has been employed by Island Estates for twenty seven years and worked at the job site where the accident occurred on a daily basis as job supervisor, construction, and prepared the daily log. There was a contractor responsible for clean up at the site. On some jobs Island Estates would assist in a delivery from Lakeville because of the awkwardness of getting the items from the truck to the house. If he were there he would help. He had no knowledge of the incident involving the plaintiff or of the delivery being made.

Richard Sirlin testified at his examination before trial on August 28, 2008 that he is the president of Lakeville Industries, Inc. Michael Spence was his employee and was hired as a driver to unload and deliver cabinets and countertops to locations. Lakeville provided materials to Island Estates and he guessed the heaviest countertop they delivered was plastic laminate weighing about one hundred fifty to two hundred pounds and stated they did not deliver stone countertops, but did not have with him a copy of an invoice for the delivery being made at the time of the incident. Mr. Kretz was Mr. Spence's helper but no longer worked for him. Countertop delivery was done by hand without a machine.

It is determined that the moving defendants have not established prima facie entitlement to summary judgment as a matter of law. CPLR 3212 requires that a motion for summary judgment be supported by an affidavit from a person with knowledge. Although the moving defendants have submitted a copy of the transcript of the examination before trial of Jim Myen from Island Estates, Mr. Myen was not a person with knowledge of the event and had no knowledge of the delivery made. There has been no admissible evidence submitted with the moving papers to enable this court to determine who the owner of the construction site was and who the general contractor was. It is not known who Gessin Contracting Co, Inc. is and who Island Estates Contracting, LLC is. Nor is the relationship between the defendants set forth. Myen testified that there was a contractor responsible for cleaning up the site, but it is not known who the contractor was and by whom they were employed. There are therefore factual issues which preclude summary judgment dismissing the complaint. In that the moving defendants have not established prima facie entitlement to summary judgment, the burden has not shifted to the plaintiffs or third-party defendants to raise a triable issue of fact, see, Zuckerman v City of New York, supra.

It is further determined that even if the moving papers were sufficient pursuant to CPLR 3212, the opposing papers submitted by the plaintiff raise factual issues which preclude summary judgment. Lennard Axinn testified at his examination before trial on August 28, 2008 that he was a managing member of Island Estates at Mt. Sinai, II, LLC and he believes it is still in existence. Its purpose was to develop a 51 lot subdivision of residential homes in Mt. Sinai and it owned the property being developed. He stated Island Estates at Mt. Sinai was the general contractor, but then stated that the general contractor was Island Estates at Mt. Sinai or a related entity, Island Estates Contracting, LLC. He then stated he did not know who Gessin Contracting, Inc. was and that Gessin Contracting, LLC was the predecessor to Island Estates Contracting, LLC, but he did not know the dates of existence of Gessin and he did not know if it was Gessin Contracting, Inc. or Island Estates Contracting who were at the job site on the date of the incident, but thought it might be Island Estates Contracting. He testified that Island Estates Contracting had a project manager or project super and assistant project super and he believed they were the general contractors. Island Estates was the name placed on the building permit application. He also believed that granite counter tops might have been offered in some homes. With regard to the construction site, he rarely went to it and was unable to testify as to the condition and whether there was knowledge of the condition complained of. Based upon the foregoing, there are factual issues concerning who the actual general contractor was at the job site on the date of the incident and whether or not Gessin was actually at the site on the date of the incident in that it was not known when Gessin ceased to exist. It is not known who the general contractor was as the testimony indicates both Island Estates entities were the general contractor at one time or another,

Accordingly, that motion (003) is denied in its entirety.

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Motion (004) by Lakeville Industries, Inc., the third-party defendant, is supported with an attorney's affirmation and the affidavit of Richard Sirlin. The motion is not properly supported by copies of the pleadings as required by CPLR 3212 and is therefore insufficient on its face. Even if the pleadings were included with the motion, there are factual issues which preclude summary judgment on this motion.

Richard Sirlin sets forth in his supporting affidavit that on or about April 2004 that Lakeville Industries, Inc. agreed to supply and deliver certain kitchen and bath cabinets and countertops to new homes being built in Mt. Sinai, New York pursuant to the Construction Contract Agreement, but he states that he did not sign the addendum to the contract at page 12 denominated "Hold Harmless /Indemnification Agreement. He states it is his position that since the work his company agreed to provide called for it to pre-fabricate cabinets and countertops off site and deliver finished products to the job site, Lakeville Industries, Inc. would not undertake to Hold Harmless and/or Indemnify any other entity.

Gerald Friedman set forth in his opposing affidavit that he is a member of the Island Estates at Mt. Sinai II, LLC and executed the construction contract agreement which consists of seventeen consecutively numbered pages and that pages 12 through 17 were part of the original contract and are not an addendum to the contract.

Based upon the foregoing, there are therefore factual issues which preclude summary judgment relative to the nature and content of the contract agreement, what the parties actually agreed to, and whether pages 12 through 17 were part of the original contract.

Accordingly, motion (004) is denied.

Dated: Oct 5, 2009

Ralph J. Condit
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION