

<b>Barrera v Related Mgt. Co., L.P.</b>
2009 NY Slip Op 32988(U)
December 21, 2009
Supreme Court, New York County
Docket Number: 110064/07
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

*Justice*

Index Number : 110064/2007

**BARRERA, JULIA**

VS.

**ALLIED BARTON SECURITY**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 10/09/09

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

DEC 21 2009

NEW YORK  
COUNTY CLERKS OFFICE

The instant motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

**ORDERED** that third-party defendant Secureusa's motion for summary judgment and third-party defendant Delta Scientific Corporation's cross motion for summary judgment are granted and the third-party complaint is dismissed with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgement accordingly; and it is further

**ORDERED** that counsel for Secureusa shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for all parties.

Dated: 12/16/09

*[Signature]*

**HON. CAROL EDMEAD** S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
JULIA BARRERA,

Plaintiff,

Index No.: 110064/07

-against-

DECISION

RELATED MANAGEMENT COMPANY, L.P.,  
ALLIED BARTON SECURITY SERVICES, LLC,

Defendants.

-----x

ALLIED BARTON SECURITY SERVICES, LLC,

Third-Party Plaintiff,

-against-

SECUREUSA and DELTA SCIENTIFIC CORP.,

Third-Party Defendants.

-----x

**CAROL ROBINSON EDMEAD, J.:**

**BACKGROUND**

Third-party defendant Secureusa moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party action as against it. Additionally, third-party defendant Delta Scientific Corp. (Delta) cross-moves, pursuant to CPLR 3212, to dismiss the third-party action as against it.

Plaintiff instituted the present action seeking damages for personal injuries that she sustained on August 29, 2007, as a result of falling over a bollard that was raised under her feet

at premises managed by defendant/third-party plaintiff Related Management Company, L.P. (Related). Bollards are metal posts placed in front of entries to buildings' loading docks to prevent unauthorized vehicles from entering the building, and are activated so as to be raised and lowered by a security guard. The bollards in question were manufactured by Delta, and were installed by Secureusa.<sup>1</sup>

According to plaintiff's deposition, she was walking to her apartment building when she was called over by the security guard, Robert Fury (Fury), of the subject building, who asked plaintiff whether she had seen any coffee carts in the area. Ex. F, at 16-17. Plaintiff further testified that, while she and Fury were conversing, Fury backed up into the security booth to activate the bollards on which plaintiff was standing, which caused plaintiff to be propelled forward and fall. *Id.*, at 31-32. This testimony is corroborated by the building's surveillance tape, and stills taken from that tape, annexed as Exhibit G to the motion papers.

According to Allied Barton Security Services, LLC (Allied Barton)'s third-party bill of particulars, Allied Barton claims that Secureusa failed to install and maintain the bollards in a

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<sup>1</sup> In the moving and opposition papers, the parties refer to themselves as Secureusa, Inc. and Allied Security, LLC i/s/h as Allied Barton Security Services, but no party has moved to amend the caption. Therefore, for the sake of clarity and lack of confusion, the court uses the parties' names as they appear in the caption.

manner that allowed the security guard to see the sidewalk while raising and lowering the bollards. Allied Barton was retained by Related to provide security services for the building. Allied Barton's third-party claims against Secureusa are based on common-law indemnity and contribution, there being no contract between these two parties. Allied Barton's third-party claims against Delta are based on the allegation that Delta failed to provide proper and adequate installation instructions.

Bevan Clark, the president of Secureusa, stated in his affidavit that Secureusa was hired by Related in 2004 to install the subject bollards, and that at no time did Secureusa design the system or select the location of the bollard control panel. Subsequent to the installation, Secureusa was retained by Related to perform routine maintenance and emergency and non-emergency repairs on the subject bollard system. Motion, Ex. I.

In the third-party complaint against Delta, Allied Barton claims that the bollard system was unsafe because the control panel was placed in a position that did not afford the operator a vantage point from which he or she could view the sidewalk while raising and lowering the bollards. Allied Barton does not allege any breach of express warranty on the part of Delta, nor does it assert that the equipment malfunctioned in any way. Delta's position is that it merely manufactured and shipped the bollards, but was not involved in the placement or installation of the

bollards' control panel. Cross Motion, Ex. J.

In opposition, Allied Barton states that Delta provided detailed installation instructions which failed to indicate any warnings regarding the placement of the control panel. Opp, Ex. B. Further, Allied Barton maintains that summary judgment is premature because discovery has yet to be completed.

#### **DISCUSSION**

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Secureusa's motion for summary judgment on the third-party complaint as against it is granted.

In order to prove a *prima facie* case of negligence, a plaintiff, or third-party plaintiff, must establish: (1) the

existence of a duty on the part of the defendant to the plaintiff; (2) a breach of that duty; and (3) injury suffered as a result of that breach. *Solomon v City of New York*, 66 NY2d 1026 (1985).

There is no evidence, or allegation, that the bollards were either defective or inherently dangerous. See generally *Puma v New York City Transit Authority*, 55 AD3d 585 (2d Dept 2008). The only claim asserted by Allied Barton as against Secureusa is that Secureusa was somehow negligent in placing the bollards' control panel so that the bollard operator could not see the sidewalk when raising or lowering the bollards. However, the only evidence submitted indicates that Secureusa did not select the location of the control panel, but that Secureusa merely installed the control panel where the contractor indicated.

"As a general rule, [a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow. Thus, a contractor who performs its work in accordance with contract plans may not be held liable unless those plans are so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous [internal quotation marks and citations omitted]."

*Hartofil v McCourt & Trudden Funeral Home, Inc.*, 57 AD3d 943, 945 (2d Dept 2008); *West v City of Troy*, 231 AD2d 825 (3d Dept 1996).

In opposition to Secureusa's motion, Allied Barton asserts that the misplacement of the control panel was the proximate cause of the accident causing plaintiff's injuries, and Allied

Barton alleges, with no actual evidentiary support, that the misplacement of the control panel was caused by Secureusa.

"[T]he question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury [internal quotation marks and citation omitted]." *Lee v New York City Housing Authority*, 25 AD3d 214, 219 (1<sup>st</sup> Dept 2005). Since Allied Barton has only conjectured that Secureusa was responsible for determining where to place the control panel, a conjecture that is rebutted by the sworn deposition of Secureusa's president who stated that Secureusa only installed the control panel where it was told to do so, the court finds that "[i]n opposition, the [third-party] plaintiff failed to raise a triable issue of fact as to whether the contract plans were so clearly defective that a contractor of ordinary prudence would not have performed the work." *Hartofil v McCourt & Trudden Funeral Home, Inc.*, 57 AD3d at 945-946.

Furthermore, the evidence submitted indicates that the security guard, employed by Allied Barton, was actually talking to plaintiff at the time that he operated the control panel, so that the cause of plaintiff's injuries was the security guard's actions. It would be reasonable to assume that the bollards should not be operated when someone is standing in their vicinity, and the guard was certainly aware of plaintiff's proximity to the bollards. *Liriano v Hobart Corporation*, 92 NY2d

232 (1998). Since Allied Barton's employee participated in the action that resulted in plaintiff's injuries, Allied Barton is precluded from obtaining common-law indemnification. *Trump Village Section 3, Inc. v New York State Housing Finance Agency*, 307 AD2d 891 (1<sup>st</sup> Dept 2003).

Consequently, Secureusa's motion for summary judgment dismissing the third-party action as against it is granted.

Similarly, Delta's cross motion for summary judgment dismissing the third-party action as against it is granted.

Allied Barton asserts that it was negligent on the part of Delta to omit including, in its installation instructions, a warning that the bollards' control panel should be placed in a position so that the operator could see the street where the bollards would be raised and lowered.

As stated by the Court of Appeals in *Liriano v Hobart Corporation* (92 NY2d at 241), "in appropriate cases, courts could as a matter of law decide that a manufacturer's warning would have been superfluous given [a party]'s actual knowledge of the specific hazard that caused the injury."

More recently, the Appellate Division, First Department, has stated that "where the [complaining] party was fully aware of the hazard through general knowledge, observation or common sense, or where the hazard is patently dangerous or poses an open and obvious risk, the duty to warn may be obviated [internal

quotation marks omitted].” *Stewart v Honeywell International, Inc.*, 65 AD3d 864, 865 (1<sup>st</sup> Dept 2009).

In the instant matter, the bollards were installed and used for over two years prior to the accident giving rise to this litigation, and common sense would indicate that the person operating the raising and lowering of the bollards would ensure that there are no pedestrians or vehicles on top of the moving metal rods. Under these circumstances, the potential hazard is so apparent that any manufacturer’s warning would be unnecessary, the potential danger being readily observable by the reasonable use of the operator’s senses. See generally *Tresgallo v Danica, L.L.C.*, 286 AD2d 326 (2d Dept 2001).

Lastly, Allied Barton’s argument that summary judgment is premature because of a lack of meaningful discovery is likewise found to be without merit.

Allied Barton has offered

“no submission that facts essential to justify opposition may exist that could not have been stated (other than a litany of theoretical questions followed by hypothetical speculations calculated to justify a fishing expedition).”

*Minister, Elders & Deacons of Reformed Protestant Dutch Church of City of New York v 198 Broadway, Inc.*, 59 NY2d 170, 175 (1983).

“It is well settled that the shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment’ [citation omitted].”

*Orange County-Poughkeepsie Limited Partnership v Bonte*, 37 AD3d

684, 687 (2d Dept 2007). Therefore, the court finds Allied Barton's argument that Delta's cross motion for summary judgment is premature to be unpersuasive.

**CONCLUSION**

Based on the foregoing, it is hereby

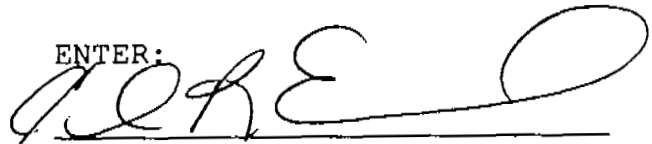
**ORDERED** that third-party defendant Secureusa's motion for summary judgment and third-party defendant Delta Scientific Corporation's cross motion for summary judgment are granted and the third-party complaint is dismissed with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgement accordingly; and it is further

**ORDERED** that counsel for Secureusa shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for all parties.

Dated: December 16, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

**FILED**  
**HON. CAROL EDMEAD**  
DEC 21 2009  
NEW YORK  
COUNTY CLERK'S OFFICE