

**Katz v Eastern Constr. Dev. & Custom Homes, Inc.**

2011 NY Slip Op 31440(U)

May 6, 2011

Sup Ct, Suffolk County

Docket Number: 07-20634

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER  
**COPY**

INDEX No. 07-20634  
CAL. No. 10-01412OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 11-22-10  
ADJ. DATE 1-20-11  
Mot. Seq. # 004 - MG

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NIKOLAI KATZ, GENEVIEVE GACULA and	:	SHEPS LAW GROUP, P.C.
FARM FAMILY CASUALTY INSURANCE	:	Attorney for Plaintiffs
COMPANY a/s/o Nikolai Katz,	:	35 Pinelawn Road, Suite 106 East
	:	Melville, New York 11747
	:	
	:	FARBER BROCKS & ZANE, L.L.P.
Plaintiffs,	:	Attorney for Defendant Eastern Construction
	:	Developing & Custom Homes, Inc.
- against -	:	51 Charles Street, 2 <sup>nd</sup> Floor
	:	Mineola, New York 11501
EASTERN CONSTRUCTION DEVELOPING	:	
AND CUSTOM HOMES, INC., and FRANKS	:	FELDMAN RUDY KIRBY & FARQUHARSON
PLUMBING AND HEATING,	:	Attorney for Defendant Franks Plumbing & Heating
	:	410 Jericho Turnpike, Suite 315
Defendants.	:	Jericho, New York 11753
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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 19 - 22; 23 - 31; Replying Affidavits and supporting papers 32 - 36; 37 - 40; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant Eastern Construction Developing and Custom Homes, Inc. for summary judgment dismissing the complaint and any and all cross claims asserted against it is granted.

The plaintiffs commenced this subrogation and uninsured property damage action against the defendants seeking to recover for damages purportedly sustained during a fire at premises located at 53 Shinnecock Road, Hampton Bays, New York (hereinafter the premises). The premises is owned by plaintiff Nikolai Katz and his wife, plaintiff Genevieve Gacula, as a second home. Shortly after purchasing the premises, Katz, a licensed architect, prepared plans for its renovation. Pursuant to a written contract, dated September 17, 2005, Katz retained defendant contractor Eastern Construction Developing and Custom Homes, Inc. (hereinafter Eastern) to perform specified work at the premises with respect to the construction of a new dormer. This work included framing, installing windows, installing siding, installing roofing, and installing a new deck. The contract specifically provided, *inter alia*, that the homeowner was "responsible for the permits and all the inside work of the dormers." An agreement for



additional work, dated October 5, 2005, further provided that Eastern would remove existing vinyl siding and install new siding to the remainder of the premises, remove the existing roof, install new white gutters, replace rotted wood, and scrape down and paint the soffits. It also provided “Eastern construction is reasonable [sic] for the outside work only.” Defendant Franks Plumbing and Heating (hereinafter Franks) was, thereafter, retained to perform plumbing work at the premises in connection with the renovations. This plumbing work included the relocation of certain piping so that the dormer could be constructed. Eastern and Franks were both working at the premises on the date of the fire.

In the complaint, the plaintiffs allege, *inter alia*, that on the date of the fire the defendants were in the course of performing certain plumbing work at the premises and that, as a result of their negligence in connection with the use of torching and heating equipment in the performance of such plumbing work, a fire ignited at the premises. Specifically, the complaint and the bill of particulars, allege that Eastern is liable for the fire damages as a result of its negligence in utilizing torching equipment, permitting a fire to occur as a result of the use of torching equipment; allowing the use of torching equipment in a dangerous and reckless manner; failing to properly screen individuals to ensure that they possessed the necessary certification for the use of torching equipment; failing to supervise the utilization of torching equipment; failing to ensure that the premises was safe from damage by properly inquiring into the skill of its subcontractor; failing to ensure that the premises was safe from damage by supervising its subcontractor in a reasonable manner; failing to do those things which were necessary to protect the premises; and failing to maintain, inspect, repair and/or protect the premises from the risk of fire damage. A cause of action is also asserted against Eastern for breach of a purported verbal agreement between it and plaintiff Katz, which obligated it to properly operate, maintain, inspect, repair and protect the premises from the risk of fire damage. In their respective answers, the defendants each assert a cross claim against the other for indemnification and/or contribution.

Eastern now moves for summary judgment dismissing the complaint and any and all cross claims asserted against it on the ground that it is not liable for the damage to the premises.

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 demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*).

Eastern established a *prima facie* entitlement to summary judgment dismissing the complaint and all cross claims asserted against it. In support of its motion, Eastern submitted the affidavit of Gary Walsh, a report prepared on behalf of the plaintiff by Guardian Investigation Group, Inc., the deposition testimony of Nikolai Katz, the deposition testimony of Gary Walsh, the deposition testimony of Dennis Franks, signed agreements between Eastern and Katz dated September 17, 2005 and October 5, 2005, and the report prepared by a Town of Southampton fire marshal, John Rankin. The evidence submitted

established, as a matter of law, that Eastern's employees did not use any type of torching equipment during their work at the premises on the date of the fire (*see, Tower Ins. Co. v Allstate Ins. Co.*, 31 AD3d 630, 817 NYS2d 919 [2d Dept 2006]; *Ray v Brooklyn Union Gas*, 304 AD2d 738, 757 NYS2d 768 [2d Dept 2003]).

The evidence further established, as a matter of law, that Eastern was not responsible for the performance of the plumbing work at the premises. In this regard, the agreements entered into between Eastern and Katz, which provided the complete scope of work to be performed by Eastern at the premises, did not include plumbing work. Furthermore, these agreements expressly stated that Katz was responsible for all the inside work at the premises. In his affidavit, Gary Walsh, the owner of Eastern Construction, avers that he was not hired to provide plumbing, fire protection services, or supervision of subcontractors. During his deposition, Katz admits that he did not hire Eastern to do plumbing work and had no expectation that Eastern would perform the plumbing work. Katz purchased many of the materials for the renovations and intended on doing a lot of the interior work himself. He testified that he was having the work performed piecemeal and admitted that he hired the plumber and electrician directly.

In any event, assuming, arguendo, that Eastern did subcontract Franks to perform the plumbing work at the premises, Eastern would nonetheless be entitled to summary judgment dismissing the complaint because it is not liable for the alleged negligence of an independent contractor (*see, Liberty Mut. Fire Ins. Co. v Akindele*, 65 AD3d 673, 885 NYS2d 302 [2d Dept 2009]; *Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 879 NYS2d 518 [2d Dept 2009]; *Flagship Intl. Corp. v Denelisse Corp.*, 38 AD3d 307, 833 NYS2d 3 [1st Dept 2007]). Generally, "one who engages an independent contractor is not liable for the latter's negligence in performance" (*Pannone v Burke*, 149 AD2d 673, 675, 540 NYS2d 313 [2d Dept 1989]; *see, Alini v Lucent Tech., Inc.*, 59 AD3d 471, 873 NYS2d 204 [2d Dept 2009]; *Gwyn v 575 Fifth Ave. Assocs.*, 12 AD3d 403, 784 NYS2d 579 [2d Dept 2004]; *Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 549 NYS2d 416 [2d Dept 1989]). The numerous exceptions to this rule, which, for the most part, are derived from public policy concerns, "fall roughly" into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is "inherently dangerous"; and where the employer bears a specific, nondelegable duty (*Saini v Tonju Assocs.*, 299 AD2d 244, 750 NYS2d 55 [1st Dept 2002]; *Thomassen v J & K Diner, Inc.*, *supra*). Here, none of the exceptions are applicable.

The evidence submitted fails to set forth any evidentiary facts to substantiate that there was a danger to others inherent in the plumbing work purportedly subcontracted to Franks (*see, Liberty Mut. Fire Ins. Co. v Akindele*, *supra*; *Saini v Tonju Assocs.*, *supra*; *Pannone v Burke*, *supra*; *compare, Beck v Woodward Affiliates*, 226 AD2d 328, 640 NYS2d 205 [2d Dept 1996]).

Likewise, there is no evidence that Eastern had a specific nondelegable duty to either supervise Franks' work or to protect the premises from the risk of fire damage (*see, Kleinberg v City of New York*, 27 AD3d 317, 811 NYS2d 642 [1st Dept 2006]; *compare, Murphy v Columbia Univ.*, 4 AD3d 200, 773 NYS2d 10 [1st Dept 2004]). It is undisputed that no contractual responsibility was imposed upon Eastern to supervise the work of other contractors, to correct dangerous conditions created by other contractors, to supervise and control the safety of the premises, or to protect the premises from the risk of fire damage (*see, Reynolds v John T. Brady & Co.*, 38 AD2d 746, 329 NYS2d 624 [2d Dept 1972]).

In addition, the evidence submitted established, as a matter of law, that Eastern was not negligent in selecting, instructing, or supervising Franks. “To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor’s propensity for the conduct which caused the injury” (*Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 879 NYS2d 518 [2d Dept 2009]). The record is devoid of any evidence that Eastern knew, or should have known upon reasonable inquiry, that Franks was either not qualified to perform the subject plumbing work or had a propensity to engage in the negligent conduct which purportedly caused the fire (*see, Schiffer v Sunrise Removal, Inc., supra; Sanchez v United Rental Equip. Co.*, 246 AD2d 524, 667 NYS2d 410 [2d Dept 1998]). To the contrary, the record indicates that Franks was a licensed master plumber and that Eastern had worked with the company in the past without incident (*see, Liberty Mut. Fire Ins. Co. v Akindede, supra*).

Moreover, the evidence demonstrated that Eastern did not exercise supervision or control over the plumbing work performed by Franks (*see, Corsino v New York City Tr. Auth.*, 9 NY3d 978, 849 NYS2d 18 [2007]; *Saini v Tonju Assocs., supra; Sanchez v United Rental Equip. Co., supra; Pannone v Burke, supra; compare, Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Piazza v Frank L. Ciminelli Constr. Co.*, 12 AD3d 1059, 785 NYS2d 207 [4th Dept 2004]). The owner of Franks, Dennis Franks, performed the plumbing work at the premises with the assistance of a helper, who was also employed by Franks. Franks testified that he supplied his own tools and materials for the work to be done. Although Walsh told him which pipes needed to be moved, Walsh did not ask him how he was going to perform his work and did not give him any instructions on how to move the pipes.

Lastly, Eastern also established its *prima facie* entitlement to dismissal of the plaintiff’s cause of action for breach of a purported verbal agreement whereby Eastern allegedly obligated itself to properly operate, maintain, inspect repair and protect the premises from the risk of fire damage. The evidence submitted establishes that no such verbal agreement was in existence (*see, Reynolds v John T. Brady & Co., supra*).

In opposition to Eastern’s *prima facie* showing of entitlement to summary judgment dismissing the complaint and all cross claims asserted against it, neither the plaintiffs, nor Franks, submitted evidence sufficient to raise a triable issue of fact as to Eastern’s liability (*see, Tower Ins. Co. v Allstate Ins. Co.*, 31 AD3d 630, 817 NYS2d 919 [2d Dept 2006]; *Ray v Brooklyn Union Gas*, 304 AD2d 738, 757 NYS2d 768 [2d Dept 2003]; *see also, United Servs. Auto. Assn. v Wiley*, 73 AD3d 1160, 904 NYS2d 436 [2d Dept 2010]). In opposition to the motion, the plaintiffs relied on, *inter alia*, the affidavit of plaintiff Katz, the permit application for the renovation to the premises, and the affidavit of Raymond E. Miller. Defendant Franks relied on, *inter alia*, the affidavit of Dennis Franks, the affidavit of Salvatore Salvato, and the deposition testimony of John Rankin.

At the outset, the Court rejects Eastern’s contention that the expert affidavits of Raymond E. Miller and Salvatore Salvato should not be considered based on the failure of the plaintiffs and Franks to serve a notice pursuant to CPLR 3101 (d) (1). There is no evidence that the failure to disclose these experts was intentional or willful and there is no showing of prejudice (*see, Hunting Ridge Motor Sports v County of Westchester*, 80 AD3d 567, 914 NYS2d 274 [2d Dept 2011]; *Simpson v Tenore & Guglielmo*, 287 AD2d 613, 731 NYS2d 859 [2d Dept 2001]). Notwithstanding the foregoing, these expert affidavits were insufficient to raise a triable issue of fact as to Eastern’s liability.

The out-of-state affidavit of the plaintiffs' purported expert, Raymond R. Miller, was not submitted in admissible form. For an out-of-state affidavit to be admissible, it must comply with CPLR 2309 (c) which requires that an out-of-state affidavit be accompanied by a certificate of conformity (*see, PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]). In the absence of a certificate of conformity, the affidavit is in effect unsworn (*see, Worldwide Asset Purchasing LLC v Simpson*, 17 Misc3d 1128[A], 851 NYS2d 75 [2007]). In any event, Miller's affidavit is insufficient to raise a triable issue of fact. Miller failed to present evidence that he had any practical experience with, or personal knowledge of, the obligations of a contractor in New York State (*see, Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]; *O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 834 NYS2d 231 [2d Dept 2007]; *but see, Riccio v NHT Owners, LLC*, 79 AD3d 998, 914 NYS2d 238 [2d Dept 2010]). Moreover, Miller's conclusions that Eastern was a general contractor, was responsible to supervise the work of the plumber, and was responsible to ensure that no smoldering conditions exist at the work site were vague, conclusory and unsupported by the record (*see, Kleinberg v City of New York*, 27 AD3d 317, 811 NYS2d 642 [1st Dept 2006]; *Serrell v Connetquot Cent. Sch. Dist.*, 19 AD3d 683, 798 NYS2d 493 [2d Dept 2005]).

The affidavit of Salvatore Salvato, a fire origin and cause investigator, was, likewise, insufficient to raise a triable issue of fact. Salvato's conclusion, that there was clearly detectable evidence of smoke and smoldering in the house at the time Walsh departed, was conclusory, speculative and not based on the facts in the record (*see, Racwel Constr., LLC v Manfredi*, 61 AD3d 731, 878 NYS2d 369 [2d Dept 2009]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]). Salvato's contention that he was unable to eliminate the possibility that the fire was caused by adverse electrical activity occurring during Eastern's removal of the roof, is, similarly, insufficient to raise a triable issue of fact. In this regard, the Court rejects the contention, made by both the plaintiffs and Franks, that there is an issue of fact as to whether Eastern's negligence in performing its work on the date of the accident, caused an electrical fire. Such allegation of negligence on the part of Eastern does not appear in the pleadings. In addition, there is not ample evidence to establish that the cause and origin of the subject fire was electric in nature and caused by Eastern's work (*compare, North Am. Specialty Ins. Co. v Schwanter*, 39 AD3d 511, 833 NYS2d 196 [2d Dept 2007]) and mere speculation that Eastern may have caused the fire is insufficient to allow recovery for the damages (*see, Andrews v New York City Hous. Auth.*, 66 AD3d 619, 887 NYS2d 180 [2d Dept 2009]; *Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433, 834 NYS2d 15 [1st Dept 2007]; *Lau Tung Tsui v New Charlie Tseng Corp.*, 35 AD3d 390, 825 NYS2d 276 [2d Dept 2006]).

Lastly, the conclusory assertion by Katz, in his affidavit, that he hired Eastern as a general contractor is unsupported by the record and in contradiction to his deposition testimony.

Based on the foregoing, the motion by Eastern for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: \_\_\_\_\_

5/6/11

\_\_\_\_\_  
 A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     NON-FINAL DISPOSITION