

Buglino v Water Works, Ltd.

2011 NY Slip Op 33051(U)

November 17, 2011

Sup Ct, Nassau County

Docket Number: 4760/10

Judge: Ute Wolff Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MD, MD, MD

STEVEN P. BUGLINO and ANN BUGLINO,
Plaintiffs,

Motion Sequence #3, #4, #5
Submitted September 7, 2011

-against-

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WATER WORKS, LTD, WATER WORKS
GROUP INC., GARY RAMIS, personally and as
Chairman or Chief Executive Officer of Water
Works, Ltd., and LAWRENCE S. RAMIS, personally
and as Chairman or Chief Executive Officer
of Water Works Group, Inc.,

Defendants.

WATER WORKS, LTD, WATER WORKS
GROUP INC., GARY RAMIS, personally and as
Chairman or Chief Executive Officer of Water
Works, Ltd., and LAWRENCE S. RAMIS, personally
and as Chairman or Chief Executive Officer
of Water Works Group, Inc.,

Third-Party Plaintiffs,

-against-

DANOY HOME IMPROVEMENTS, INC. and
S & S CONCRETE PUMPING CORPORATION,

Third-Party Defendants.

The following papers were read on these motions:

Notice of Motion and Affs.....1-4
Second Notice of Motion and Affs.....5-7
Notice of Cross-Motion and Affs.....8-10
Affs in Opposition.....11-25
Affs in Reply.....26-29
Memoranda of Law.....30-33

Upon the foregoing, it is ordered that this motion by the third-party defendant Danoy Home Improvements, Inc. (hereinafter "Danoy") for an order pursuant to CPLR 3126 dismissing the plaintiffs' complaint and third-party plaintiffs' complaint or in the alternative, directing the plaintiffs and third-party plaintiffs to respond to discovery is determined as follows:

The defendant/third-party plaintiffs, Water Works, Ltd., is the only party that has responded to Danoy's demands for discovery. It should be noted that it is premature for a discovery motion at this stage of the litigation since no preliminary conference has been scheduled which would enable all of the parties to enter into a preliminary conference order.

Cross-motion by the plaintiffs for an order pursuant to CPLR 3215 directing the entry of a default judgment in favor of the plaintiffs and against defendants Water Works Group Inc., Lawrence S. Ramis and Gary Ramis is denied. The verified answer dated July 28, 2011, by O'Conner Reed, LLP the attorney for defendants/third-party plaintiffs Water Works, Ltd. and Gary Ramis, personally and as Chairman or Chief Executive Officer of Water Works, Ltd., a copy of which is attached to the Affirmation in Opposition to plaintiffs' motion for default judgment dated August 9, 2011 is deemed served.

The motion by the third-party defendant S&S Concrete Pumping Corporation for an order pursuant to CPLR 3211(a)1. and 7. and CPLR 3212 dismissing the third-party plaintiffs' complaint and all cross-claims asserted against the third-party defendant S&S Concrete Pumping Corporation is denied, without prejudice to renewal after the conclusion of all discovery.

Plaintiffs Steven B. Buglino and Ann Buglino claim improper construction and breach of contract to their home located at 1530 Laurel Hollow Road, Syosset, New York. Defendants/third-party plaintiffs commenced a third-party action against S&S Concrete and Danoy for contribution, common law indemnification and breach of contract. The basis for the motion for summary judgment is that S&S Concrete is only in the business of renting out pumps to pour concrete, and it rented a pump that was to be used to pump concrete to the plaintiffs' home. In support of its motion for summary judgment, S&S Concrete submits an affidavit from Husein Muntaz, the president and sole shareholder of S&S Concrete. Mr. Muntaz stated that S&S Concrete is in the business of renting out pumps to pour concrete. S&S Concrete rents out a concrete pump to general contractors who utilize the pump to pour concrete. S&S Concrete does neither any work with the concrete, nor does it alter the concrete mix in anyway. S&S Concrete's sole responsibility is to provide a pump as needed by a contractor. S&S Concrete rented a pump to Danoy that was used to pump concrete to the property located at 1530 Laurel Hollow Road in Syosset, New York, on November 7, 2007. S&S Concrete did not have anything to do with the concrete mixture itself, nor the placement of the mixture at 1530 Laurel Hollow Road. S&S Concrete's sole connection with the work underway at 1530 Laurel Hollow Road was the rental of a pump that was used to pour concrete at this location. S&S Concrete was not

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involved with any construction work at the property located at 1530 Laurel Hollow Road. In further support of its motion, S&S Concrete submitted a copy of an invoice on a Water Works letterhead for concrete work to be performed at the subject premises. S&S Concrete also submitted a copy of an invoice showing that S&S Concrete rented a pump to Danoy to be used to pour the concrete.

On a motion for summary judgment, the Court's function is to decide whether a triable material factual issue exists and not to resolve it. (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (*Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). The third-party defendant S&S Concrete Pumping Corporation has demonstrated a *prima facie* entitlement to summary judgment.

Once a movant has established a *prima facie* right to summary judgment, the burden then shifts to the opposing party to demonstrate that a factual dispute exists requiring a trial. The facts proffered by the opposing party must be presented by proof in admissible form. (*Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient. (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition, the defendant Danoy submits an affidavit by Eric Danoy, the sole principal of Danoy Home Improvements, Inc. in which he states that S&S Concrete performed concrete work, including footings and rebar on the wall and ceilings/garage roof at the subject premises as well as pouring the cement and laying the foundation. Mr. Danoy denies he rented any equipment from S&S Concrete or paid any invoices as alleged by S&S.

Issue identification, rather than issue determination is the key to summary judgment. In addition, the court should refrain from making credibility determinations. The papers should be scrutinized carefully in the light most favorable to the party opposing the motion. (*Andre v Pomeroy*, 35 NY2d 361; *S.J. Capelin Assoc v Globe Mfg. Corp.*, 34 NY2d 338; *In re Cuttitto Family Trust*, 10 AD3d 656). There are issues of fact raised by the conflicting affidavits that preclude the granting of summary judgment. Therefore, defendant S&S's motion for summary judgment is denied as premature without prejudice to renewal after the completion of all discovery.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on the 11th day of January, 2012, at 9:30 AM. This directive, with respect to the date of the conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for all parties.

Dated: **NOV 17 2011**


 UTE WOLFF LALLY, J.S.C.

ENTERED
 NOV 21 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

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