

Scanio v Skanska

2011 NY Slip Op 33057(U)

November 22, 2011

Sup Ct, NY County

Docket Number: 109670/08

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 109670/2008
SCANIO, MICHAEL
vs
KOCH SKANSKA, USA
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/21/11
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for 55
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-3
Answering Affidavits — Exhibits _____ | No(s). 4-6
Replying Affidavits _____ | No(s). 7

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the general memorandum decision and order.
FILED

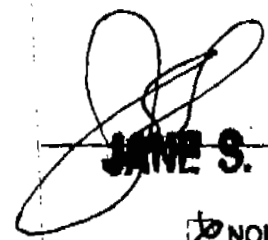
NOV 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

NB - 1-23-12 appearance in Part 55. Watch e counts if there is a change as of the new year, JS

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

Dated: 11/22/11


JANE S. SOLOMON J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X
MICHAEL SCANIO,

Plaintiff,

-against-

KOCH SKANSKA, USA SKANSKA KOCH, INC.,
and WALGREEN EASTERN CO., INC.,

Defendant.

-----X
JANE S. SOLOMON, J.

INDEX NO. 109670/08

DECISION AND ORDER

FILED

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Defendants Koch Skanska, USA and Skanska Koch, Inc. (Skanska) move for summary judgment dismissing ~~complaint~~ complaint in this personal injury lawsuit. The motion is denied.

Plaintiff Michael Scanio (Scanio) was employed by the Port Authority of New York and New Jersey as a maintenance supervisor in the Port Authority Bus Terminal. As he sat at his desk in an office within the bus terminal, a two foot by two foot acoustical tile fell from the ceiling and struck him on the head and shoulder. He describes the fallen debris and wet and heavy. Scanio alleges that his office was located under a roadway, used by taxis and busses, that runs east-west through the building.

Skanska was the general contractor in a project to retrofit the bus terminal to make it less vulnerable to earthquakes. Part of its job involved using jackhammers to remove concrete from around certain steel beams. A beam it worked on projected through the roadway, and it admits that its workers used jackhammers to break through the concrete. However, Skanska

workers were not present on the day of Scanio's accident.

At his June 29, 2009 deposition, Scanio was asked about the location of his office, and his testimony is not entirely clear on this point (Scanio EBT, Notice of Motion, Ex. D). A witness produced by Skanska, named Thomas Kelly, testified to his understanding that the maintenance supervisor's office was located approximately 100 feet away from Skanska's work, and that the space below the work was a woman's employee locker room (Kelly EBT, Notice of Motion, Ex. E).

In April 2011, Skanska produced a schematic drawing of the bus terminal that shows where it worked (Aff. In Opposition of Frank N. Eskesen, Esq., Ex. A). In opposing this motion, Scanio submitted an affidavit indicating the location of his office on the schematic, showing that it was directly below a steel beam identified on the drawing as "Bent 5J". Skanska does not deny that it did work at this location.

Skanska's argument rests on two grounds. First, it argues that it is entitled to judgment as a matter of law because the evidence shows that it did not work above his office, and it was not working on the day of the accident. In support of this argument, it contends that Scanio's affidavit is at odds with his deposition testimony, and should be disregarded as a self-serving statement offered to create an issue of fact to defeat summary judgment. This argument fails because, while it is not obvious from Scanio's EBT testimony where his office was located, he

nevertheless answered the questions as put to him and he cannot be faulted if that did not result in more precise testimony. Moreover, had Skanska produced its drawing and referenced it at the deposition, this problem would have been solved. There is a question of fact as to the location of Scanio's office, and Skanska's motion must be denied in this respect. Moreover, Scanio did not testify that the work was underway at the time of the accident, so the fact that work was not being performed then is not fatal to his case. The theory of his case appears to be that water came through the roadway as a result of Skanska's work, and this seepage was a substantial cause of the damage to his ceiling. It is not necessary for him to prove that Skanska was jackhammering at the time of the accident.

The second ground for Skanska's motion is that it owed no duty to Scanio in this action, citing the Court of Appeals decision in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]). In that case, it was held that a snow removal contractor owed no duty to the injured plaintiff who alleged that she slipped and fell in her employer's parking lot as a result of defendant's failure to properly remove the snow. The court stated that: "Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (98 NY2d at 138, citations omitted). Nevertheless, the Court recognized that under some circumstances, a party who enters into a contract assumes a duty of care to

certain persons outside the contract (*id.*). One such circumstance is "where the contracting party, in failing to exercise reasonable care in the performance of its duties, has launched a force or instrument of harm" (98 NY2d at 140).

This case falls within the latter exception because it is alleged that, by negligently breaking through the roadway without protecting those below from the elements, Skanska launched the instrument of harm to Scanio by permitting water to enter the hole and damage the ceiling below. Unlike *Espinal*, this is not a question of defendant's failure to properly carry out its contractual obligation. Accordingly, Skanska cannot show as a matter of law that it owed no duty to Scanio under these circumstances, and its motion is denied.

It hereby is

ORDERED that defendants' motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on January 23, 2012 at 2 PM.

Dated: November 22, 2011

FILED

NOV 23 2011

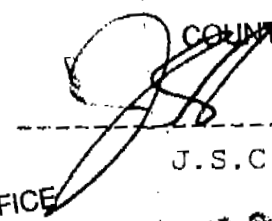
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J.S.C.

JANE S. SOLOMON