

Singh v Trice Contr. Inc.
2013 NY Slip Op 30701(U)
April 2, 2013
Sup Ct, New York County
Docket Number: 109163/2008
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

PRAKASH SINGH,

Plaintiff,

- v -

TRICE CONTRACTING INC., HUANG'S HOLDING.
CORP., 180 7TH AVENUE SOUTH CORP., RANDEE-ELAINE LTD.,
RANDEE ELAINE SALON, AND JODI KAUFMAN

Defendants.

TRICE CONTRACTING, INC.,

Third-Party Plaintiff,

-v-

HARJINDER SINGH, AMAN CONSTRUCTION NY CORP., AND
AMAN CONSTRUCTION CORP.,

Third-Party Defendants.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion for/to

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answer — Affidavits — Exhibits _____	<u>2, 3, 4, 5, 6, 7</u>
Replying Affidavits _____	<u>8</u>

Prakash Singh ("Plaintiff") brings this action to recover for personal injuries he sustained at 180 7th Avenue, New York, NY 10014 on July 10, 2007. Defendant/Third-Party Plaintiff Trice Contracting, Inc. ("Trice"), now moves for summary judgment pursuant to CPLR §3212.

Huang's Holding Corp. ("Huang Holding") is the owner of the premises known as 180 7th Avenue South. Trice was a contractor retained by Huang

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Holding, to perform brick facade work and roof work on the building. Trice hired Harjinder Singh, a subcontractor, to perform brick work on the exterior of the building. Randee-Elaine Salon is a beauty salon located on the first and second floors of the premises. The owner of the salon is Jodi Kaufman.

Plaintiff was getting a manicure on the second floor of the Randee-Elaine Salon, on July 10, 2007, when he was hit in the head by a wood beam that fell from the ceiling, resulting in serious injuries. The complaint asserts negligence on the part of defendants, their agents, servants and/or employees.

Trice now moves for summary judgment pursuant to CPLR §3212. Plaintiff, Huang Holding, Randee-Elaine Salon and Jodi Kaufman oppose the motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

A contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. (*See, Espinal v. Melville Snow Constrs.*, 98 NY2d 136, 773 NE2d 485, 746 NYS2d 120 [2002]). However, one exception is where the contractor “launches a force or instrument of harm”, thereby creating an unreasonable risk of harm to others, or exacerbating that risk. (*Espinal v. Melville Snow Constrs.*, 98 NY2d 136, 773 NE2d 485, 746 NYS2d 120 [2002]); *Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Here, the parties claim that Trice is liable on the basis that Trice caused or created the condition alleged to have caused the injury. Specifically, the parties contend the falling wood that struck Plaintiff on July 10, 2007 was caused by the

work done by Trice in May 2007 or even earlier, in December 2006 or January 2007.

According to the deposition testimony of Mr. Rafiq, the President of Trice, Trice was hired in March of 2006 to replace the exterior brick facade of the building known as 140 Seventh Avenue South. In May of 2006, Mr. Rafiq made an oral agreement with Harjinder Singh, a subcontractor, to replace the exterior part of the facade on the building. Mr. Rafiq alleges that Mr. Singh began working on the exterior of the building but never completed the job. In September of 2006, Huang and Trice enter into a second contract whereby Trice would reconstruct the parapet wall. In December of 2006, or early January of 2007, Trice and Harjinder Singh completed work on the building's facade.

Terry Huang, the owner of Huang Holding testifies that it was in early April 2007, he noticed a leak coming from the ceiling above the window on the second floor of the premises. A transformer that had been connected to a neon sign, fell from the ceiling over a window on the second floor. The salon owner, Jodi Kaufman, took the neon sign down after the transformer fell. Mr. Huang testified that he believed the leak caused the transformer to fall through the ceiling.

In late April 2007, Mr. Huang contacted Mr. Rafiq, informing him that there was a leak coming from the wall above the window, where a transformer had fallen. Mr. Rafiq went to the premises to repair the leak. He indicates that he noticed that there was sheetrock that had fallen from the ceiling, and he pulled it off. Mr. Rafiq returned to the building two weeks later, in May 2007, and put up plastic to cover the hole where the sheetrock had fallen.

At that time, and up until the time of the Plaintiff's accident, Mr. Rafiq admits that the leak still existed, and he was working to rectify it.

Plaintiff's incident occurred about two months later, on July 10, 2007, when he was getting a manicure on the second floor of the Randee-Elaine Salon with his co-worker, Mr. Edwards. Plaintiff alleges that he had been seated at a manicure table next to a window facing the Seventh Avenue side of the building, when "something came down" and hit him on the head. Mr. Edwards recalled hearing a rumbling sound coming from the ceiling, and then noticing a wood beam and some drywall fall and strike Plaintiff. Neither plaintiff nor Mr. Edwards had

noticed the ceiling before the incident occurred and did not know where the wood came from or what caused the wood to fall.

Mr. Rafiq received a call from Mr. Huang about Plaintiff's accident. Immediately after receiving the call, Mr. Rafiq went to the building to see what happened. He states that he observed a wooden plank that had allegedly hit the Plaintiff.

Mr. Huang's deposition testimony described the wooden plank that had fallen on Plaintiff:

Q: I believe you are about to tell us what your opinion was what caused the accident as you explained it to Rafiq? Is that correct?

A: Yes, that is correct.

Q: Please tell us. Tell us what that was.

A: Based on my opinion I saw, the fact that the edge of that beam was somehow rotten, was wet. It was kind of part of it is a dark color due to water damage.

Q: Did you say wet or red?

A: Wet. It was rotten. So my own evaluation was that it has to be the result of the water damage caused by the leaks. That was it.

Q: You told him that?

A: I did. Yes, I did.

Trice submits the affidavit of Timothy Galarynk, an expert in construction risk management and forensics, which states that he had visited the site on April 29, 2009 and examined the area where Plaintiff's accident allegedly occurred. He states that the wood that allegedly fell onto Plaintiff "was likely wedged between the building steel beam and the interior concrete wall" and that it "had no relationship to the brick wall or the roof that had been repaired by Trice

Contracting, Inc., and the work performed by Trice Contracting did not cause the dimensional piece of lumber to fall.” The parties state that Mr. Galarynk’s expert report is not proper, as Trice never identified him as an expert prior to Trice’s instant summary judgment motion.

Based on the submissions, Trice is not entitled to summary judgment. Here, both Mr. Rafiq and Mr. Huang’s deposition testimony raise triable issues of fact as to whether Trice’s efforts created or exacerbated a dangerous condition. (*See, Moch Co v. Rensselaer Water Co.*, 247 NY 160, 159 NE 896 [1928]). A contractor who “creates or exacerbates” a harmful condition may generally be said to have “launched” it. (*McCord v. Olympia & York Maiden Lane Co.*, 8 AD3d 634, 779 NYS2d 542 [2004]). Questions of fact arise as to whether Trice created or exacerbated the ceiling condition by negligently removing sheetrock which may have held the wooden beam inside the ceiling, by failing to properly inspect the ceiling hole after he removed the sheetrock, and by failing to repair the hole in a timely manner.

Wherefore, it is hereby,

ORDERED that Trice Construction Company’s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 4/2/13


HON EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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