

**Pietrzyk v Turner Towers**

2014 NY Slip Op 32698(U)

October 6, 2014

Supreme Court, New York County

Docket Number: 152637/2013

Judge: Peter H. Moulton

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. Peter H. Moulton PART 57

*Justice*

PIETRZYK, ANDRZEJ

INDEX NO. 152637/2013

MOTION DATE \_\_\_\_\_

v.

MOTION SEQ. NO. 004

TURNER TOWERS, *et al.* ✓

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

Cross-Motion:  Yes  No

Upon the foregoing papers, this decision addresses the balance of the motion and cross-motion filed under sequence 004. The motion by defendants Turner Towers, Turner Towers Corp. and John B. Lovett & Associates ("Turner") was partially decided by interim decision and order, dated April 16, 2014. In that decision, the court dismissed plaintiff's claims against Turner pursuant to Workers Compensation Law § 11 and held in abeyance the issue of dismissal of the cross-claim asserted by Spiegel Consultants LLC ("Spiegel") against Turner.

Spiegel's opposition to dismissal of cross-claims against Turner

Spiegel opposes dismissal of its cross-claim against Turner Towers Corp. on the basis that it is a third-party beneficiary to a contract between Turner Towers Tenant Corp. and RCI Plumbing Corp, which contains an indemnification provision. A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary . . . and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101 [1st Dept 2001] [internal citations omitted]). Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent (*id.*). Dismissal is appropriate here because Spiegel, who is not a party to that contract, is not mentioned in any manner (*id.* [pleadings did not set

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

forth any basis upon which to construe that plaintiffs were third-party beneficiaries where retention letter did not evince an intention by either signatory that the audit was to be relied on by, or transmitted to, other parties and where the engagement letter made no reference to any third party or the loan).

Instead of articulating a basis for its claim of third-party beneficiary status, Spiegel opposes dismissal as premature, because no depositions have been held. However, Spiegel fails to articulate that facts exist in the exclusive possession of Turner which might alter the finding that its cross claim fails to demonstrate third-party beneficiary status. Therefore, summary judgment in favor of Turner dismissing all cross-claims is proper (*see Herba v Chichester*, 301 AD2d 822 [3d Dept 2003] [third-party beneficiary claim dismissed despite plaintiff's claim that discovery was incomplete and summary judgment was premature because the facts failed to demonstrate that any obligations created by the sales agreement were intended to be for the benefit of plaintiff and where plaintiff made no claim that facts existed in the exclusive knowledge and possession of defendants which would establish his status as an intended third-party beneficiary]).

Spiegel's cross-motion for summary judgment

Spiegel's cross-motion for summary judgment dismissing plaintiff's complaint is denied with leave to renew upon plaintiff's filing a note of issue. Spiegel maintains that it was just a "consultant" to RCI Plumbing Corporation and provided "limited assistance." Spiegel attaches the contract between it and RCI Plumbing Corporation and submits the affidavit of Neevon Spring, its principal. Spring asserts that "per the agreement" Spiegel was not responsible for "any means or method of construction by any party at the site, or the performance of any work by any contractor or vendor at the site." Spring further describes plaintiff's work in moving a bathtub as part of "normal maintenance routine duties." Spring further asserts that no Spiegel employee, contractor, subcontractor, or associate had any involvement with any acts or

omissions which allegedly resulted in a metal pipe being laid in or adjacent to a door over which plaintiff allegedly tripped while exiting the building, carrying the bathtub. Spring asserts Spiegel played “no construction role” and had no notice of the pipe because “No Spiegel employee saw or had reason to look for a metal pipe in that location.”

In opposition, plaintiff states he tripped over a pipe while moving the bathtub in connection with an ongoing construction project involving the replacement of waste, water and gas pipes throughout the building. Plaintiff asserts that he does not need to be engaged in actual construction to be covered by Labor Law § 241[6] *citing Williamson v. Borg Florman Dev. Corp.*, 191 AD2d 335 [1st Dept. 1993]). Plaintiff also points out that general negligence principles do not require that plaintiff be involved in construction. Plaintiff asserts Spiegel has not demonstrated that it did not have employees present or instruct others to place the pipe where it was laid. Plaintiff further cites paragraphs 2.09 - 2.12 of the contract between Spiegel and RCI Plumbing which plaintiff claims raises the issue of whether Spiegel was acting as a general contractor.

Spiegel counters that *Williamson v. Borg Florman Dev. Corp.* (191 AD2d 335 [1st Dept. 1993]) is not good law in light of *Whelan v Warwick Val. Civic & Social Club* (47 NY2d 970 [1979]) and *Agli v Turner Constr. Co.* (246 AD2d 16, 23 [1st Dept 1998]). Moreover, Spiegel contends that it does not fit within any of the exceptions articulated in *Espinal v Melville Snow Contrs.*, 98 NY 2d 136 [2002] which would give rise to a duty of care to plaintiff, based on its failure to perform contractual obligations with due care.

Spiegel’s cross-motion for summary judgment is denied as premature under CPLR 3212 (f), with leave to renew after plaintiff files a note of issue (*see e.g., Grunfeld v City of New Rochelle*, 72 AD3d 1025 [2d Dept 2010] [“Given that no discovery had yet been conducted, the Supreme Court denied the City’s motion as

premature, without prejudice to renewal following the completion of discovery . . . [t]he Supreme Court correctly determined that the plaintiffs and the YMCA should have been afforded an opportunity to conduct discovery prior to the award of summary judgment in favor of any of the parties”). While the construction consultant agreement refers to many tasks that merely involve review of the renovation work, scheduling, coordination and billing and, specifically excludes responsibility “for the management, duration or methods of construction performed by others” it indicates a potential connection to the premises during the relevant time period which plaintiff is entitled to explore in discovery. Although Spring concludes that his company has no involvement with any acts that resulted in the pipe being laid, that statement is conclusory and is not supported by affidavits from Spiegel employees. It is hereby

ORDERED that the balance of the motion by Turner Towers, Turner Towers Corp. and John B. Lovett & Associates is granted and all cross claims against it are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Turner Towers, Turner Towers Corp. and John B. Lovett & Associates dismissing all claims and cross-claims against it upon their service of a copy of this Decision and Order on the Clerk of the Court; and it is further

ORDERED that the cross motion by Spiegel Consultants LLC is denied with leave to renew upon plaintiff’s filing of a note of issue.

This Constitutes the Decision and Order of the Court.

Dated: 10/6/2014



New York, New York

J.S.C.  
PETER H. MOULTON

- 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