

**P&R Universal Constr. Corp. v Andrea Lane Assoc.
Corp.**

2015 NY Slip Op 30767(U)

May 13, 2015

Supreme Court, Putnam County

Docket Number: 409/12

Judge: Lewis J. Lubell

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.

PLC 6/22/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X
P&R UNIVERSAL CONSTRUCTION CORP.,

Plaintiff,

-against -

ANDREA LANE ASSOCIATES CORP., WN
WEAVER STREET LLC, GE QUALITY
CONSTRUCTION, INC. and EVEN FLOW
PLUMBING & HEATING, INC.,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 409/12

Sequence No. 2-6
Motion Date 2/17/15

The following papers were considered in connection with **Motion Sequence #2** by plaintiff P&R Universal Construction Corp. ("P&R") for an Order, pursuant to CPLR 3212, granting summary judgment and dismissing the counterclaim of defendants, Andrea Lane Associates Corp. ("Andrea Lane") and WN Weaver Street LLC ("Weaver"), against plaintiff; **Motion Sequence #3** by defendants Weaver and Andrea Lake for an Order pursuant to CPLR 3212, granting summary judgment to defendants, dismissing the complaint, and severing defendants' counterclaims down for trial; **Motion Sequence #4** by defendant GE Quality Construction, Inc. ("GE") for an Order, pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint and any cross-claims; **Motion Sequence #5** by defendant Even Flow Plumbing & Heating, Inc. ("Even Flow") for an Order pursuant to CPLR 3212, granting summary judgment to defendant, dismissing the Complaint; and **Motion Sequence #6** by plaintiff for an Order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff against defendants WN Weaver Street, LLC and GE Quality Construction and for such other and further relief as this Court may deem just and proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-K	1
MEMORANDUM OF LAW	2
NOTICE OF CROSS MOTION/AFFIDAVIT/EXHIBITS A-E	3
MEMORANDUM OF LAW	4
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-K	5
NOTICE OF CROSS MOTION/AFFIDAVIT/AFFIRMATION/ EXHIBITS A-D	6
NOTICE OF CROSS MOTION/AFFIRMATION/AFFIDAVIT EXHIBITS A-L	7
AFFIRMATION IN OPPOSITION AND REPLY/EXHIBIT A	8
AFFIRMATION IN REPLY AND IN OPPOSITION	9

Defendant WN Weaver Street. LLC ("Weaver") is the developer of The Greens at Cherry Lawn (the "Greens"), New Rochelle, New York, a luxury development consisting of twenty six residential homes. Defendant Andrea Lane Associates Corp. ("Andrea Lane") is the general contractor hired by Weaver to build the Greens. Plaintiff, P&R Universal Construction Corp. ("P&R"), is a subcontractor hired by Andrea Lane to perform finishing work at some of the residences. In turn, P&R retained GE Quality Construction, Inc. ("GE") to install wainscoting. Defendant Even Flow Plumbing and Heating, Inc. ("Even Flow") was retained to perform plumbing work.

There is no dispute that, during the installation of wainscoting by GE, a nail fired from a nail gun pierced a water pipe concealed behind previously installed sheetrock. Sometime after the purchase of the residence by a non-party homeowner, the pipe leaked causing damage to the home.

P&R initiated this action against the various defendants seeking \$111,059.50 in damages representing monies for alleged unpaid labor and material.

As its first and second causes of action against defendant Andrea Lane, P&R sues for breach of contract and unjust enrichment, respectively. Weaver is sued by way of P&R's third and fourth causes of action for breach of contract and unjust enrichment, as well. P&R's fifth and sixth causes of action allege negligence and breach of contract, respectively, against GE. Finally, a negligence claim is asserted against Even Flow. There are no written contracts between any of the parties.

To the extent relevant to these motions, Andrea Lane and Weaver have filed counter-claims against P&R to recover monetary damages they allegedly sustained as a result of the flood. Andrea Lane and Weaver allege that plaintiff "impermissibly" retained a subcontractor, GE, and failed to supervise or monitor GE in

connection with its work.

These various motions follow.

(Seq 2) Motion by P&R dismissing the Counter-Claims by Andrea Lane and Weaver

- and -

(Seq 3) Cross-Motion by Andrea Lane and Weaver dismissing Complaint as against them and Severing Counter-Claims

- and -

(Seq 6) Cross-Motion by P&R against Andrea Lane, Weaver and GE

The thrust of P&R's motion for summary judgment against Andrea Lane and Weaver is that P&R neither performed nor supervised the work performed by GE and, in any event, GE asked Andrea Lane to mark the sheetrock to identify the location of pipes and wires and it failed to do that. In any event, P&R asserts that it was never advised not to hire a subcontractor and, even if GE is responsible, P&R is not because it cannot be liable for the acts of an independent contractor.

The Court finds that there are material questions precluding summary judgment as to any of the movants in the aforementioned motions. The questions of fact include, but are not limited to: whether the use of an independent contractor was prohibited by Andrea Lane; whether GE was an independent contractor in the first place and, even if so, whether Emil Filicko, the person operating the nail gun, was performing finishing work on behalf of GE or as an employee of P&R. In addition, if it can be said that GE was performing the work as an independent contractor, was P&R negligent in its instruction to and supervision of GE.

The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts (see, Rosenberg v Equitable Life Assur. Socy., 79 NY2d 663, 668; Gravelle v Norman, 75 NY2d 779, 782; Besner v Central Trust Co., 230 NY 357, 362; Prosser and Keeton, Torts § 71 *274 [5th ed]; see also, Restatement [Second]

of Torts § 409 [1965] . . .

. . . [T]he general rule "is now primarily important as a preamble to the catalog of its exceptions" (Pacific Fire Ins. Co. v Kenny Boiler & Mfg. Co., 201 Minn 500, 503, 277 NW 226, 228; accord, La Count v Hensel Phelps Constr. Co., 79 Cal App 3d 754, 145 Cal Rptr 244 [general rule of nonliability applies only where no good reason can be found for departing from it]; Restatement, op. cit., § 409, comment b, at 370 [same]). These exceptions, most of which are derived from various public policy concerns (see, Feliberty v Damon, supra, at 118), fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or "inherently" dangerous (see, Wright v Tudor City Twelfth Unit, 276 NY 303, 307; see also, Rosenberg v Equitable Life Assur. Socy., supra); and, finally, instances in which the employer is under a specific nondelegable duty (see generally, Restatement, op. cit., § 409, comment b, at 371). [Footnotes omitted].

(Kleeman v Rheingold, 81 NY2d 270, 273-74 [1993]).

P&R's motion for summary judgment against Andrea Lane, Weaver and GE for re-calculated monies (\$103,559.50 plus interest) allegedly due and owing for paint and trim work is denied.

To the extent that Andrea Lane and Weaver rely upon section 771 of the General Obligations Law as a grounds for dismissal of P&R's first and third causes of action against them, same is denied. Section 771 is not applicable since, among other things, section 771 does not apply to "the sale or construction of a new home . . ." (GBL §770[3][a]; see also Westchester County Code §§863.313, 863.324).

That aspect of Andrea Lane's and Weaver's motion seeking to dismiss P&R's second and fourth causes of action against them on the grounds that all sums sought have been paid or were admittedly double billed is denied. Notwithstanding movants' submission on their motion, the Court cannot state, as a matter of law, that movants have come forward in the first instance with sufficient proof in admissible form establishing that all monies allegedly due

and payable to P&R by movants have been paid such that these causes of action should be dismissed.

**(Seq 4) Motion by GE dismissing the complaint
and cross-claims**

That aspect of GE's motion to dismiss plaintiff's fifth cause of action wherein plaintiff advances a negligence claim against GE is granted. Said claim is barred by the economic loss doctrine. "The harm alleged here does not rise to the level required to transform it from contractual to tortious in nature" (Verizon New York, Inc. v Optical Communications Group, Inc., 91 AD3d 176, 182 [1st Dept 2011]; see Sommer v Fed. Signal Corp., 79 NY2d 540, 542 [1992]). The claims sought by plaintiff against this defendant in its negligence and breach of contract claim are identical and, under the circumstances, are relegated to a breach of contract cause of action.

In that movant has failed to come forward in the first instance with an adequate showing of its entitlement to judgment in its favor as a matter of law on the breach of contract claim, its motion for summary judgment in that regard is denied.

**(Seq 5) Motion by Even Flow dismissing the
Complaint**

There being no opposition to Even Flow's motion to dismiss the complaint as against it and for the reasons therein advanced, the motion is granted.

Based upon the foregoing, and there being no merit to any other aspects of the instant applications, it is hereby

ORDERED, that the motions and cross-motions are denied except to the extent that the Court hereby grants GE's motion to dismiss the negligence cause of action against it and Even Flow's motion to dismiss the complaint as against it; and, it is further

ORDERED, that, all parties, except Even Flow, are directed to appear before the Court for a Pretrial Conference at 9:30 A.M. on June 22, 2015.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
May 13, 2015

S/

HON. LEWIS J. LUBELL, J.S.C.

Kelly & Meenagh, LLP
Attorneys for Plaintiff
135 North Water Street
Poughkeepsie, NY 12601

Law Office of Allison M. Furman, PC
Attorneys for Defs. Andrea Lane and Weaver
260 Madison Avenue, 15th Floor
New York, New York 10016

Ahmuty Demers & McManus, Esqs.
By: Nicholas M. Cardascia, Esq.
Attorneys for Def. GE Quality Construction
200 I.U. Willets Road
Albertson, NY 11507

Christopher T. Bonante, Esq.
Attorney for Def. Even Flow Plumbing & Heating
14 Mamaroneck Avenue, 2nd Floor
White Plains, New York 10601

Cascone & Kluepfel, LLP
By: Howard B. Altman, Esq.
Attorney for Plaintiff on the Counterclaim
1399 Franklin Avenue, Suite 302
Garden City, NY 11530