Gnatsiko v Democracy Now! Prods., Inc.
2015 NY Slip Op 32174(U)
October 22, 2015
Supreme Court, Bronx County
Docket Number: 309266/2012
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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KOKOU GNATSIKO,

Plaintiff,

- against -

DEMOCRACY NOW! PRODUCTIONS, INC., DIANA SANDS, BROOKLYN INTERIORS INC., and BOGDANOW PARTNERS ARCHITECTS, P.C.,

Defendants.

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DEMOCRACY NOW! PRODUCTIONS, INC.,

Third-Party Plaintiff,

- against –

BROOKLYN INTERIORS, INC. and BOGDANOW PARTNERS ARCHITECTS, P.C.,

Third-Party Defendants.

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DECISION AND ORDER

Index No. 309266/2012

Third-Party Index No. 83848/2013

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated June 25, 2015 of defendant Brooklyn Interiors, Inc. and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated September 1, 2015 and the affidavit and exhibits submitted therewith; movant's affirmation in reply dated September 22, 2015 and the exhibit submitted therewith; and due deliberation; the court finds:

Plaintiff alleges that he was in a bathroom reaching for supplies in a cabinet located behind the door to the bathroom, when the bathroom door opened inward and struck the cabinet door, which then struck plaintiff. Movant Brooklyn Interiors, Inc. ("Brooklyn Interiors") was the construction manager when the bathroom was constructed several years prior to the accident.

Brooklyn Interiors moves for summary judgment on the grounds that it owed no duty to the plaintiff, had no notice of the allegedly dangerous condition and did not create or exacerbate any risk of harm to plaintiff.

A contractor ordinarily owes no duty of care to a noncontracting third party. *See Espinal v. Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002). However,

> A duty of care to noncontracting third parties, however, may arise out of a contractual obligation or the performance thereof in three sets of excepted circumstances, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract . . . first, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;" second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation," and third, "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely.'"

Timmins v. Tishman Constr. Corp., 9 A.D.3d 62, 66, 777 N.Y.S.2d 458, 461-62 (1st Dep't 2004) (internal citations omitted), *rearg denied*, 2004 N.Y. App. Div. LEXIS 10845 (1st Dep't Sept. 16, 2004); *see also Ragone v. Spring Scaffolding, Inc.*, 46 A.D.3d 652, 848 N.Y.S.2d 230 (2d Dep't 2007).

Given the respective roles of the parties as depicted here, there can be no question that the third situation does not apply. *See Cahn v. Ward Trucking, Inc.*, 101 A.D.3d 458, 955 N.Y.S.2d 583 (1st Dep't 2012). Nor does the second situation apply, as there is no evidence of plaintiff's reliance on or awareness of movant's limited role with respect to the bathroom. *See Vushaj v. Insignia Residential Group, Inc.*, 50 A.D.3d 393, 855 N.Y.S.2d 117 (1st Dep't 2008).

Movant established *prima facie* that the first situation does not apply because it did not create or exacerbate a risk of harm to plaintiff. The project was designed and all construction work was performed by entities other than movant, and defendant owner inspected and approved

the work. Movant was never made aware of the condition alleged to have caused the accident, and the construction project concluded over two years prior to plaintiff's accident.

In opposition plaintiff claims that defendant negligently designed and constructed the cabinets by placing them directly behind the entrance door. Plaintiff submits the affidavit of an engineer, who opines that defendant violated New York City Building Code § 1008.1.1.2, which states that "There shall not be projections into the required clear width lower than 34 inches (864 mm) above the floor or ground." However, defendant neither designed nor constructed the bathroom and plaintiff presented no evidence demonstrating otherwise. Additionally, plaintiff's expert defined neither "clear width" nor "required clear width."

Furthermore, even considering plaintiff's engineer's gratuitous opinions regarding the interpretation of the contract between defendant owner and movant, which do not constitute evidence, *see Grullon v. City of New York*, 297 A.D.2d 261, 747 N.Y.S.2d 426 (1st Dep't 2002); *see also Cummings v. Fondak*, 122 Misc.2d 913, 474 N.Y.S.2d 356 (App Term 1st Dep't 1983); *Fowler v. Bushby*, 69 Misc. 341, 125 N.Y.S. 890 (App Term 1910), the opinion that movant had any duty to ensure code compliance is a blatant misreading of the contract. Section 2.1.8 actually states, "It is not the Construction Manager's responsibility to ascertain that the Drawings and Specifications are in accordance with applicable laws, statutes, ordinances, building codes, rules and regulations." Movant's only obligation in this regard was to notify the architect and owner if it "recognizes that portions of the Drawings and Specifications are at variance therewith." Plaintiff offers no proof that any such variation was brought to movant's attention. The deposition testimony of movant's president relied upon by plaintiff does not amount to an admission that the bathroom design violated any law, ordinance or rule. The testimony merely suggested that the design was inconvenient or less than optimal. Regardless of how plaintiff

chooses to characterize movant's liability, passive negligence of the type urged by plaintiff will not support a claim premised upon a contractor's launch of an instrument of harm. *See Cahn, supra*; *Wyant v. Professional Furnishing & Equip., Inc.*, 31 A.D.3d 952, 819 N.Y.S.2d 792 (3d Dep't 2006); *Church v. Callanan Indus.*, 99 N.Y.2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002). Plaintiff has thus failed to raise an issue of fact.

Accordingly, it is

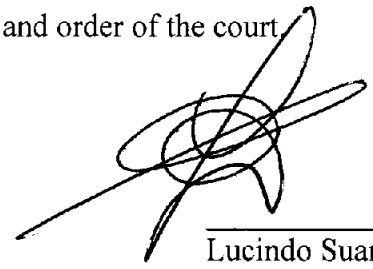
ORDERED, that the motion of defendant Brooklyn Interiors, Inc. for summary judgment is granted; and it is further

ORDERED, that the complaint and all cross-claims against defendant Brooklyn Interiors, Inc. are dismissed; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Brooklyn Interiors, Inc. dismissing the complaint and all cross-claims asserted against it.

This constitutes the decision and order of the court.

Dated: October 22, 2015



Lucindo Suarez, J.S.C.