

Spano v Sutton

2016 NY Slip Op 30211(U)

February 3, 2016

Supreme Court, Suffolk County

Docket Number: 12-5308

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-8-15

SUBMIT DATE 1-21-16

Mot. Seq. # 05 - MD

-----X
MICHAEL SPANO and DONNA SPANO,

Plaintiffs,

-against-

AM SUTTON, ARCHITECT, P.C., ALFRED
M. SUTTON, RA, ADVANCED
CONSTRUCTION AND MANAGEMENT
CORP., ROBERT MCGRATH, JR., LAURA
MCGRATH, LONG ISLAND MILLWORK
INC., GUANGA MASONRY, INC., MID
ISLAND STEEL CORP.,
J.S. CONTRACTING, INC. and TRECOTT
CONSTRUCTION, INC.,

Defendants.
-----X

ADVANCED CONSTRUCTION AND
MANAGEMENT CORP., ROBERT
MCGRATH, JR., and LAURA MCGRATH,

Third Party Plaintiffs,

-against-

G. SLAUGHTER CONSTRUCTION, INC.,
NOVA CONCRETE CONTRACTORS,
NORTH SHORE INSTALLATIONS, INC.,
DUNN ENGINEERING ASSOCIATES, P.C.,
MQ WINDOWS, KUHN BROTHERS
CONSTRUCTION, R.W. ENGINEERS,
RAYMOND KLINKER & SONS,
NASSAU/SUFFOLK LANDSCAPING, NDC
GUTTERS, INC., DIRECT STONE, NORTH
SHORE WINDOWS AND DOORS,
POLFOAM, LLC, JANCO CONSTRUCTION
GROUP, and HI-TECH IRRIGATION, INC.,

Third Party Defendants.
-----X

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Upon the following papers numbered 1 to 90 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 57; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 58 - 65, 66 - 67, 68 - 72 & 73 - 80; Replying Affidavits and supporting papers 81 - 91; Other ; (and after hearing counsel in support and opposed to the motion) it is,

In this third-party action for indemnification third party defendant, R&W/Engineers, P.C., sued herein as R. W. Engineers, and hereinafter referred to as "R&W", moves for an order pursuant to CPLR 3212 granting summary judgment in favor of R&W and dismissing the third-party complaint in its entirety with prejudice. Defendant/third-party plaintiff, Advanced Construction and Management Corp., hereinafter referred to as "Advanced", opposed this application in all respects and claims that it is premature because discovery has not been completed. Third-party defendants, Kuhn Brothers Construction, Nova Concrete Contractors, Long Island Mill Work, Magnum Masonry, separately filed opposition to this application.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice Sec. 3212.09*)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*,

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22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of motion, third-party defendant R&W has submitted, inter alia, an attorney's affirmation; copies of the summons and verified complaint; copies of eight (8) separate verified answers; copies of the third-party summons and third-party complaint; copies of six (6) separate verified answers to the third-party complaint; copies of a forensic construction report; copies of plaintiffs' response to R&W Engineers' first set of interrogatories; copies of Advanced's response to R&W's interrogatories; an affidavit of Mark T. Kilgore, P.E.; a curriculum vitae for Mark T. Kilgore; an affidavit of Michael L. Williams, P.E.; copies of notes dated November 1, 2013; an affidavit of Larry A. Rubinson, P.E.; copies of a proposal dated April 24, 2006; copies of a drawing titled Spano; copies of computer generated partial site plans for the Spano residence; and a memorandum of law. In opposition to the motion, defendant/third-party plaintiff Advanced has submitted, inter alia, an attorney's affirmation. In opposition to the motion, third-party defendant Kuhn Brothers Construction has submitted, inter alia, an attorney's affirmation. In opposition to the motion, third-party defendant Nova Concrete Contractors has submitted, inter alia, an attorney's affirmation; copies of the verified answer to third-party complaint by Nova Construction Contractors; and copies of demands made by Nova Construction Contractors. In opposition to the motion, defendant Long Island Millwork has submitted, inter alia, an attorney's affirmation; and copies of Long Island Millwork's cross-claims. In opposition to the motion, third-party defendant Magnum Masonry has submitted, inter alia, an attorney's affirmation; copies of Magnum Masonry's verified answer with cross claim and counter claim; and copies of the Town of Islip Subdivision and Land Development Regulations 2004.

Plaintiffs are the owners of property designated as 90 Garner Lane in Bay Shore, New York, hereinafter referred to as "the subject premises". In approximately April of 2005, the plaintiffs hired Advanced to act as construction manager and general manager for a renovation project at the subject premises. Plaintiffs and Advanced entered into a Construction Management Agreement. Ultimately the renovation project evolved into the design and construction of a 14,000 square foot custom home.

Plaintiffs in this action seeking money damages. Plaintiffs commenced this action by filing a summons and verified complaint on March 1, 2012. Issue was joined by defendant/third party plaintiff Advanced serving an answer on April 13, 2012. Thereafter, Advanced filed a third-party summons and verified complaint on December 5, 2013, seeking indemnification. Third-party defendant R&W filed its answer on September 24, 2014.

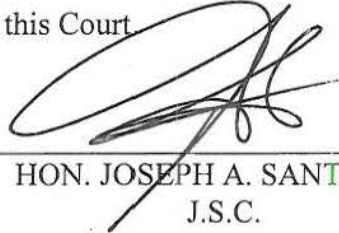
R&W claims that the services it provided at the subject premises were "limited design services... specifically, R&W was requested to design several retaining walls, site grading and drainages for the roof and paved surfaces of the Property." R&W claims it never performed any work on the subject property. Additionally, R&W claims that the plaintiffs contacted them in the fall of 2013 "to provide assistance to Plaintiffs in connection with a lawsuit against them by one of the contractors". R&W was asked to "examine the installed drainage on the property and compare it to that specified in R&W's design." R&W observed that "the drainage system installed was not in accordance with R&W's design." R&W argues that based upon its determination that the drainage installed was not in accordance with its design that summary judgment should be granted.

In opposition multiple parties argue that discovery has not been completed, and that no depositions have been held. Specifically that R&W has not been deposed yet. It was argued that R&W's mere speculation as to whether or not certain aspects of the drainage system were done to R&W's design can not be the grounds for granting summary judgment. R&W did acknowledged that certain aspects by design would not be visible for inspection because they would be under paved areas and driveways. Additionally, multiple parties argued that the information related to the design and work that was done by R&W was solely within R&W's control. Multiple parties argue that there are issues of fact as to exactly what R&W's design included and whether R&W followed the required regulations for grading and drainage which are issues of fact for trial.

Based upon a review of the motion papers the Court concludes that R&W's motion turns on issues of fact, and because CPLR 3212 (f) contemplates a denial of the motion pending discovery of facts within the exclusive knowledge of the moving party, R&W's motion for summary judgment based on CPLR 3212, is denied, without prejudice to renew, upon the completion of discovery (*Evangelista v. Kambanis*, 74 A.D.3d 1278, 903 N.Y.S.2d 243 [2d Dept. 2010] ["[a] party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated"] [citations omitted]; cf. *Fernbach, LLC v. Calleo*, 92 A.D.3d 831, 939 N.Y.S.2d 501 [2d Dept. 2012]).

The foregoing constitutes the decision and Order of this Court.

Dated: February 3, 2016



HON. JOSEPH A. SANTORELLI
J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION

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