

Marrero v 343 E. 195 LLC
2016 NY Slip Op 30241(U)
January 8, 2016
Supreme Court, Bronx County
Docket Number: 302495/13
Judge: Elizabeth A. Taylor
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JAN 13 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
ADOLFO MARRERO,

Plaintiff,

Index No. 302495/13

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

343 EAST 195 LLC, MARINE BOILER & WELDING
INC. and SKAGGS-WALSH INC.,

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
	Answering Affidavit and Exhibits-----	_____
	Replying Affidavit and Exhibits-----	_____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212, for an order dismissing the complaint and any and all cross claims against defendant Marine Boiler & Welding, Inc. (Marine), is granted on default.

Plaintiff commenced this action to recover monetary damages for injuries allegedly sustained from scalding hot water emitted from a showerhead inside a premises owned by defendant 343 East 195 LLC (343 East), on January 12, 2013. In his bill of particulars, plaintiff alleges, among other things, that defendants failed to maintain the premises' domestic hot water system.

In moving for summary judgment, Marine contends that it did not owe plaintiff a duty of care as (1) its business dealings with 343 East consisted of "non-contractual

repair calls,” and (2) Marine never installed, service or repaired the subject boiler.

It is axiomatic that in negligence actions “it is for the courts first to determine whether any duty exists” (*Darby v Compagnie Nat’l Air France*, 96 NY2d 343, 347 [2001]). Courts have determined that contractual obligations, standing alone, generally do not give rise to a duty of care to third parties, as imputing this duty would render the contracting parties liable in tort to an indefinite number of potential beneficiaries (*H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). However, in certain instances, contracting parties can nonetheless be liable to third parties (see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). For a defendant contractor to establish freedom from liability, it must establish that (1) it did not fail to exercise reasonable care in performing its duties, thus avoiding “launch[ing] a force or instrument of harm;” (2) the contract did not displace the other contracting party’s duty to maintain the premises in question; and (3) plaintiff did not detrimentally rely on the its continued performance of its contractual duties (*Id.* at 140; *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]).

In support of its motion, Marine submits, among other things, the (1) deposition testimony of plaintiff; (2) the deposition testimony of Vincent Maldonado, owner and president of 343 East; and (3) the deposition testimony of William Falco, owner of Marine.

Mr. Maldonado testified that his limited liability company, 343 East, was the record owner of the premises in which plaintiff lived and was purportedly injured. He

further testified that since he purchased the subject premises, he has had only two boilers, and that he purchased the second boiler in 2012. He testified that he “always used to use [Marine]” for welding repairs, but only did so “three or four times” within a fifteen-year span. He further testified that he recalls last employing Marine in 2011, and that Marine had “nothing to do” with the new boiler that was installed in 2012.

Mr. Falco testified that he was the owner of Marine, and his company performed general maintenance on boilers. He further testified that he recalled last working with Mr. Maldonado more than ten years before the deposition date, and that “seventy-five percent of the dealing [with him] were oral.”

The record reflects that Marine and 343 East executed oral contracts for the welding and inspection of the first boiler. Despite these oral contracts, there is no evidence that makes Marine, as an independent contractor, liable for plaintiff’s alleged injuries. There is no evidence to show that Marine created or exacerbated a problem with regards to the old boiler by performing welding work so as to have “launched a force or instrument of harm” (*cf. Ocampo v Boiler*, 33 AD3d 332 [1st Dept 2006]; *Castlepoint Ins. Co. v Moore*, 109 AD3d 718 [1st Dept 2013]). Neither did Marine’s welding work on the old boiler “entirely absorb” 343 East’s duty to maintain safe conditions on the subject premises, as Marine was only required to perform welding work on the old boiler and nothing in the record demonstrates an express agreement by Marine to maintain the premises (*see Bracco v Puntillo Ltd. Partnership*, 19 AD3d 624 [2d Dept 2005] [where court held that defendant’s limited maintenance agreement with co-defendant was insufficient to have entirely displaced co-defendant’s duty to maintain


the premises]; see also *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316 [4th Dept 2012] [where court held that the oral plumbing repair contract in issue was not so comprehensive and exclusive so as to displace the owner's responsibility to maintain the premises]). Lastly, plaintiff could not have detrimentally relied on the oral contract between Marine and 343 East as Marine completed its inspections and welding repairs of the older boiler prior to the installation of the second boiler, and there is no evidence that plaintiff had knowledge of 343 East's oral contract with Marine (see *Neil v City of New York*, 227 AD2d 260 [1st Dept 1996] [where court held that plaintiff could not have detrimentally relied on the performance of defendant's contract as its performance was completed prior to plaintiff's injury]; *Aiello v Burns Intern. Sec. Services Corp.*, 110 AD3d 234 [1st Dept 2013] [where the court held that this *Espinal* exception requires that the non-contracting party have actual knowledge of the contract between the contracting parties]).

In light of the proffered evidence, this court finds that Marine has met its prima facie burden establishing that it did not owe plaintiff a duty of care.

The Clerk is directed to dismiss the complaint and the cross-claim against defendant Marine Boiler & Welding, Inc. and amend the caption, accordingly.

The foregoing shall constitute the decision and order of this court.

Dated: JAN 08 2016



A.J.S.C.
Elizabeth A. Taylor