Utica Mut. Ins. Co. v Style Mgt. Assoc. Corp.
2012 NY Slip Op 33868(U)
December 11, 2012
Supreme Court, Nassau County
Docket Number: 4764/10
Judge: Denise L. Sher

[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

UTICA MUTUAL INSURANCE COMPANY a/s/o HARRIS BERENSON and E. TYLER BERENSON,

Plaintiff,

- against -

STYLE MANAGEMENT ASSOCIATES CORP., STYLE MANAGEMENT CORP., YOSI SASON a/k/a YOSEF SASON, ZAK BARUCH, AA FINE HOME BUILDER, INC., SERGEI BROOKLYN (last name fictitious, but representing a floor refinishing employee of defendants) and MOSCO FLOORING COMPANY,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 4764/10
Motion Seq. No.: 02
Motion Date: 08/27/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Style Management Associates Corp., Style Management Corp. and Yosi Sason a/k/a Yosef Sason (collectively the "Style defendants") move, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiff's Complaint in its entirety on the grounds that no question of fact exists; and move, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing one or all individual causes of action in

plaintiff's Complaint as asserted against them on the grounds that no question of fact exists. Plaintiff opposes the motion.

Plaintiff initiated the instant action by filing a Summons and Complaint on or about March 9, 2010. *See* Style Defendants' Affirmation in Support Exhibit A. Issue was joined by the Style defendants on or about May 20, 2010. *See* Style Defendants' Affirmation in Support Exhibit B. The Style defendants' Verified Answer contains cross-claims against defendant Zak Baruch ("Baruch"), defendant AA Fine Home Builder ("AA"), defendant Sergei Brooklyn ("Sergei") and Mosco Flooring Company ("Mosco") for common-law and contractual indemnification and contribution. *See id.*

This is a subrogation action brought by plaintiff for alleged fire damage to the property located at 21 Briarfield Drive, Great Neck, New York. The subject premises is owned by plaintiff's subrogors, Harris Berenson and E. Tyler Berenson (collectively "the Berensons"). Two fires took place in the subject premises - one on June 23, 2009 and the other on June 24, 2009. The subject premises was undergoing renovations at the time of the fires. Plaintiff contends that the fires were the result of, amongst other things, defendants' collective negligence in connection with renovation work being performed by defendant Baruch, defendant AA, the Style defendants and/or purported subcontractors of these defendants. Specifically, plaintiff alleges that the defendants failed to properly store and maintain flooring materials such as stains, polyurethane, rags and sawdust carrying flooring chemicals, so as to prevent the fires. *See* Style Defendants' Affirmation in Support Exhibit D.

The Style defendants submit that "[t]he Berensons hired Mr. Baruch, through one of two companies that Mr. Baruch was involved with at or about the time of the renovations, Mosco

and/or AA, to act as the general contractor. While there is a dispute as to whether Mr. Baruch paid Style to use their license/insurance information to obtain a permit or whether Mr. Baruch hired Style to install moldings, doors and door knobs at the Premises, the testimony clearly establishes that Style was not hired to perform flooring work, and it is undisputed that Style did not perform the flooring work at issue. It is further undisputed that Mr. Baruch, and not Style, was the General Contractor for the renovations at issue, who hired and supervised the subcontractors' work at the Premises."

The Style defendants further argue that "[t]he record establishes that while Style was one of three entities listed on the permit for the subject renovations, Mr. Baruch was 'in fact' the General Contractor for the renovations; Mr. Baruch hired and paid Sergei to install flooring; Mr. Baruch inspected the flooring work; and Style did not perform any of the flooring work at issue in this litigation. No party has identified Style as having performed the actual work; no party observed Style performing any flooring work; and no party has produced any evidence, testimonial or otherwise, to connect Style with any work other than the moldings and doors at the Premises, other than the fact that Style is listed as a contractor on the permit for the work. The record supports that Style has no duty with respect to the flooring work as a matter of law. Consequently, no one has identified any work that Style performed negligently. Accordingly, summary judgment, dismissing the plaintiff's claims against Style, is warranted."

Defendant Yosi Sason a/k/a Yosef Sason ("Sason"), the principal of Style Management Associates Corp., testified at his Examination Before Trial ("EBT") that he was retained by defendant Baruch to install the finishing work at the subject premises, which included moldings, doors and door knobs. This work was performed at the beginning of the renovations. Defendant

Sason's work did not involve painting or staining the moldings that he installed. Defendant Sason did not install flooring or observe the installation of flooring work. *See* Style Defendants' Affirmation in Support Exhibit H. Defendant Sason denied having filed the permit for the subject renovations and denied having seen his name on the permit identifying him as a contractor for the job. *See id.*

The Style defendants contend that "[q]uestions as to whether Style performed no work at the Premises or simply installed the molding and doors, and the fact that Style's name appears on the permit, are not material to the issues at hand and do not alter the undisputed fact that Style did not perform *any* of the flooring work that forms the basis of plaintiff's claim, and that Style did not supervise and control the means and methods of the flooring work that is the subject of plaintiff's claim. Consequently, these questions are immaterial to the Court's analysis of the merits of Style's motion for summary judgment."

The Style defendants argue that plaintiff maintains negligence and *res ipsa loquitur* causes of action against the Style defendants, but that plaintiff cannot maintain these causes of action because the Style defendants were not a party to a contract imposing such duties, nor did the Style defendants perform any flooring work or supervision in connection with the renovation project. The Style defendants maintain that there is no evidence of a contract for any work between the Style defendants and defendant Baruch. The Style defendants therefore claim that "[s]ince Style did not have a contract to perform or supervise the flooring work at the Premises, as a matter of law, Style had no duties with respect to the flooring work to plaintiff or anyone else in connection with the Premises."

The Style defendants further argue that "[i]n addition to the fact that Style never entered into an *agreement* to perform flooring services for the renovation of the Premises, Style simply

did not perform flooring services for the renovation of the Premises, Style simply did not perform or supervise any flooring work at the Premises, and, therefore, Style cannot be said to have created or had notice or any alleged dangerous conditions....A contractor may not be held liable for a dangerous condition if he did not have notice of such condition....There is no evidence that anything Style did caused the Fires....Since the record is wholly devoid of any evidence of Style having a duty in connection with the Fires, any opposition would necessarily have to be based on speculation, which is not permitted as a matter of law."

The Style defendants add that they cannot be held liable solely based upon the fact that they have been identified as a contractor on the permit. They submit that New York courts have held that simply obtaining a construction permit is not enough, by itself, to create a duty to ensure the safety or conditions at a construction site.

In opposition to the motion, plaintiff's counsel submits that, according to the EBT testimony of defendant Baruch, defendant Baruch, on behalf of the Style defendants, entered into an agreement with the Berensons to perform renovation work at their home. Plaintiff's counsel contends that defendant Baruch acted as the "frontman" dealing with customers on behalf of the Style defendants and in furtherance of his own pecuniary interests. He further contends that defendant Baruch, on behalf of the Style defendants, hired workers who performed renovations at the Berensons' home. Plaintiff's counsel states that "Mr. Baruch needed Style and Yosi Sason in order to lawfully perform this work and the two of them formed an agreement/arrangement whereby Baruch would work under the permit obtained and controlled by Style and Yosi Sason. Yosi Sason, as the sole officer and sole employee of Style Management, filed the necessary documents and obtained a permit to perform the construction work at the Berensons home at 21 Briarfield Drive in Great Neck, New York. In exchange, Mr. Baruch paid Style and Mr. Sason a

percentage of the job's value in a dollar amount which was the profit to Style....Mr. Baruch and Mr. Sason had followed the identical process in prior construction projects and Mr. Sason had obtained permits that Baruch was aware of for several other renovation jobs in the past under similar agreements/arrangements....Style and Mr. Baruch carried out their agreement/arrangement. Style and Mr. Sason filed for and obtained a permit for 21 Briarfield Drive in Great Neck, New York from the Village of Lake Success building department. The permit listed Style as the contractor and the plumbing and electric work was delegated to two separate entities. The permit was applied for by Mr. Sason and issued to Style Management and listed Mr. Sason and Style Management's license number, insurance information, and workers compensation information that was filed with the Village of Lake Success under that permit. The permit was then given to Sason by Mr. Baruch so that he could perform the renovation work at the Berensons home for their mutual benefit." *See* Plaintiff's Affirmation in Opposition Exhibit C.

Plaintiff's counsel further submits that, according to the EBT testimony of defendant Baruch, at no point in the project at the subject premises did the Style defendants perform any type of carpentry work at said premises. Instead, "Mr. Baruch testified that after he and Mr. Sason found out about the fire(s) at the Berensons home, Sason told Baruch to lie and testify that Mr. Sason only installed some doors and moldings at the property. Mr. Baruch refused to lie which resulted in an argument between the two of them." *See* Plaintiff's Affirmation in Opposition Exhibit C.

Plaintiff's counsel contends that the documentary evidence and testimony in this matter establish that the Style defendants were the general contractor for the project and that defendant Baruch was the Style defendants' agent. In the documents field with the Village of Lake Success

to obtain a construction permit for work on the subject premises, the license, insurance and workers compensation information relates only to the Style defendants. *See* Plaintiff's Affirmation in Opposition Exhibit J. Defendant Style Management Corp. is listed on the permit as the contractor for the project along with an electric and plumbing company. Neither defendant Baruch, nor any other companies, are listed on the permit as the contractor for the renovation work. It was solely the Style defendants license and insurance coverage that enabled the issuance of the subject permits.

Plaintiff's counsel argues that "Style was clearly a general contractor preparing for his agent to perform a job and receiving his fair share of the profits up front. In the event that a worker had been injured at this job, Style's Workers Compensation insurance would have been called upon to pay the medical and indemnity to the injured worker. Similarly, it is Style's liability carrier and its policy that will be required to pay for the fire damages herein in the event a jury verdict in favor of plaintiff."

Plaintiff's counsel adds that "[w]ithout Sason and Style's company license and insurance information, Mr. Baruch could not agree to perform the Berenson job and neither Baruch nor Sason would have received the compensation that goes along with the job. Style, as general contractor, got the job off the ground and legally filed with the Village of Lake Success, and Baruch, as Style and Sason's agent, hired workers to perform the job through completion. Whether Baruch was an employee of Style, held himself out as an employee of Style, or as an independent contractor to Style does not change the fact that an agent-principal relationship existed through the time of the fire damages to the Berenson home and nothing factually or legally has been offered by movant to change the resulting liability that attaches to Style from that relationship."

Counsel for plaintiff also argues that a contractor's filing of a work permit does raise issues of fact sufficient to defeat a motion for summary judgment. Plaintiff's counsel states, "[t]he permit for the Berenson job stated: 'It is the responsibility of the Owner/Occupant and/or Contractor to comply with all applicable ordinances.' Style Management, along with the plumbing and electric company (which Sason identified himself on the permit application) were provided on the permit listing Style as the contractor for the Berenson job. Neither Zak Baruch nor any of this workers were listed as a contractor. Yosi Sason, as sole officer and sole employee of Style Management was responsible under the permit to ensure that the work performed at the Berensons home was in compliance with all applicable ordinances. Mr. Sason and Style Management's responsibilities under the contract alone create issues of fact regarding their liability for trial and defeat any expectation of obtaining a summary judgment order....Furthermore, Sason filed Style's paperwork with the town as intended in order to receive compensation for the project. There was no claim of error or misunderstanding."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition

transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact **or determine matters of credibility**, but merely to determine whether such issues exist (emphasis added). *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is rarely granted in negligence cases. *See Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st

Dept. 1962); *Johannsdottir v. Kohn*, 90 A.D.2d 842, 456 N.Y.S.2d 86 (2d Dept. 1987).

The Court finds that, based upon a reading of the depositions of defendant Sason and defendant Baruch, there are indeed questions of material fact regarding the role each of them played in the construction at the subject premises. Based upon the evidence presented to the Court, there is an issue of fact as to exactly who was the general contractor for said construction project. There are questions of fact as to the relationship between defendant Sason and defendant Baruch and whether or not it rose to the level of agent-principal and, therefore, encompassed all of the liabilities that come with said relationship. There are questions of fact concerning the compensation each party received for the subject construction project and the basis for said compensation.

The testimony of both defendant Sason and defendant Baruch differ greatly in their recitation of the facts in connection with the instant action, therefore putting the credibility of these individuals at issue. *See* Style Defendants' Affirmation in Support Exhibits H and I. As previously mentioned, the burden on the court in deciding a summary judgment motion is not to determine matters of credibility, but merely to determine whether issues of fact exist. *See Barr v. Albany County*, *supra*; *Daliendo v. Johnson*, *supra*. " A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.'" *Ruiz v. Griffin*, 71 A.D.3d 1112, 898 N.Y.S.2d 590 (2d Dept. 2010) *quoting Scott v. Long Island Power Authority*, 294 A.D.2d 348, 741 N.Y.S.2d 708 (2d Dept. 2002). From the evidence presented in the papers before it, the Court has determined that issues of fact exist.

Accordingly, the Style defendants' motion, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiff's Complaint in its entirety on the

grounds that no question of fact exists and for an order granting them summary judgment and dismissing one or all individual causes of action in plaintiff's Complaint as asserted against them on the grounds that no question of fact exists is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 19, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 11, 2012