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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Paul Wooten J.S.C. PART 7

Justice

Index Number : 112787/2006

DAVIES, THOMAS

VS.

FERENTINI, PETER

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is consolidated for disposition with motion sequences 3, 4 and 5 and decided by the attached memorandum decision

FILED
FEB 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/2/10

Paul Wooten J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION K NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 22
Justice

INDEX NO. 112787/06

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

THOMAS DAVIES and LINDA DAVIES,
Plaintiffs,
-against-
PETER FERENTINI, HOME DEPOT U.S.A., INC., RIV CONSTRUCTION GROUP, INC., JOHN MEYER CONSULTING PLANNING, ENGINEERING, LANDSCAPE ARCHITECTURE AND LAND SURVEYING P.C., SBLM ARCHITECTS, P.C., SHAWN'S LAWNS, INC., EASTVIEW HOLDINGS LLC., and YABOO FENCE COMPANY, INC.,
Defendants.

The following papers, numbered 1 to 3 were read on the motions by plaintiff for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ■ Yes ☐ No

Plaintiffs Thomas and Linda Davies commenced this action to recover damages for injuries which Thomas Davies suffered as a result of a motor vehicle accident.

Several of the defendants now move, pursuant to CPLR 3212, for summary judgment. Motion sequence numbers 003, 004, 005 and 006, have been consolidated for disposition. In motion sequence 003, Yaboo Fence Company, Inc. (Yaboo), moves for summary judgment; in sequence 004, Home Depot U.S.A., Inc., RIV Construction Group, Inc. (RIV), and Eastview Holdings LLC (Eastview), move for summary judgment; in sequence 005, Shawn's Lawns, Inc., (Shawn's Lawns) moves for summary judgment; and in motion sequence 006, John Meyer Consulting, Planning, Engineering, Landscape Architecture and Land Surveying, P.C. (JMC), moves for summary

judgment.

In addition to the motions for summary judgment filed by the defendants, plaintiffs cross-move for summary judgement against defendant Peter Ferentini and Shawn's Lawns.

FACTUAL ALLEGATIONS

Thomas Davies (plaintiff) was involved in a motor vehicle accident on May 26, 2006 at 7:00 a.m. on Route 9A, a New York State arterial highway, in Mount Pleasant, New York. The accident took place across from Route 9A's T-section with Dana Road.

Route 9A runs north and south and has two lanes in each direction. Plaintiff was traveling by himself and was heading southbound on Route 9A. Defendant Peter Ferentini (Ferentini) was traveling northbound and stopped at the light at the T-section in order to make a left turn into the Home Depot construction site on the west side of Route 9A, and opposite Dana Road. Ferentini was working at the Home Depot construction site as a teamster foreman.

Plaintiff testified that after his vehicle entered into the intersection with the green light in his favor, Ferentini's vehicle began to turn into his vehicle. Plaintiff attempted to swerve his car to the right in order to avoid getting hit, however his vehicle was struck by Ferentini. Following the impact, plaintiff's vehicle hit a guide rail to his right and flipped over the rail onto its roof. Ferentini testified that he did not see plaintiff's vehicle before the impact and that his vehicle bounced off of the guard rail and spun to the left, but did not flip over.

In addition to the allegations made against Ferentini, plaintiffs allege that the various companies working at the Home Depot site were negligent in the installation of

the guide rail which plaintiff's vehicle flipped over.

The defendants maintain that in order to accommodate construction vehicles at the Home Depot site, a temporary access road had to be built to the west of the southbound lanes of Route 9A, opposite Dana Road. Prior to the construction of the access road, a continuous guide rail abutted the southbound lanes of Route 9A in the vicinity of the accident site. This guide rail was cut by co-defendant Shawn's Lawns, the mass excavator at the site. Following the cutting of the guide rail, the New York State Department of Transportation (the NYSDOT) threatened to pull the highway work permits for the project, unless the guide rail was replaced or proper end assemblies were placed on the end of the rail because of the blunt edges from the cut. Although an attempt was made to obtain curved radius guide rail to fix the ends, the radius guide rails were unavailable and would take about two weeks to deliver. Therefore, it was decided that a different configuration had to be proposed.

Following discussions between the NYSDOT and JMC, the civil engineer of the site, it was decided that a Type II end assembly box beam guide rail (Type II guide rail) should be installed to remedy the problem. JMC maintains that the NYSDOT was responsible for choosing the type of guide rail to be utilized at the site.

The replacement of the guard rail was subcontracted to Yaboo by Shawn's Lawns. After receiving the plans from Shawn's Lawns instructing that a Type II guide rail should be installed, Yaboo ordered the parts and performed the required work in less than one day. On or about January 5, 2006, Bruce Bohlander (Bohlander), JMC's project manager, sent a memo to Brad Schilling (Schilling), NYSDOT's permit engineer, stating that the Type II guard rail was properly installed. JMC also submits an affidavit

from Jose Matos, a professional engineer who concluded that the installation of the Type II guide rail was appropriate and was in accordance with the applicable standard of care for an engineer in JMC's circumstances.

Plaintiffs maintain that a Type I end assembly box beam guide rail should have been affixed to the existing guide rail instead of a Type II. Plaintiffs submit an affidavit from Peter Pomeranz, a professional engineer, who maintains that if a Type I end assembly was installed, plaintiff's vehicle would not have flipped over the guide rail and would have been contained within the road.

DISCUSSION

SEQUENCE 003

In sequence 003, Yaboo, the subcontractor at the site, contends that it cannot be held negligent for plaintiff's injuries because Yaboo did not owe any duty to plaintiff.

The Court of Appeals has recognized three sets of circumstances in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof, thereby subjecting the promisor to tort liability for failing to exercise due care in the execution of the contract. The first exception is where a promisor, while discharging a contractual obligation, creates an unreasonable risk to others, or launches a force or instrument of harm. The second exception is where a plaintiff suffered an injury from detrimentally relying on the continued performance of a contract, and the third exception is where a contract is so comprehensive and exclusive that the contractor entirely displaced the owner's duty to maintain the premises. *See Church v Callanan Indus., Inc.*, 99 NY2d 104, 111-112 (2002); *Espinal v Melville Snow*

Contrs., 98 NY2d 136, 140-141 (2002); *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66-67 (1st Dept 2004).

Plaintiffs fail to identify how Yaboo created an unreasonable risk to plaintiff after it followed the plans which it was provided from Shawn's Lawns. Joseph Gedeiko, the project manager at Yaboo, testified that, after being hired by Shawn's Lawns, Yaboo was provided with a memo from JMC which corresponded with the NYSDOT's standard sheet for box beam installation and Yaboo installed the Type II guide rail pursuant to the plans. Plaintiffs do not indicate that Yaboo's installation of the Type II guide rail was performed in a negligent manner, was improperly installed, or exacerbated a hazardous condition.

The First Department has held that "[i]t is well settled that 'a contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.'" *Diaz v Vasques*, 17 AD3d 134, 134 (1st Dept 2005) (citations omitted). Here, plaintiffs fail to raise a triable issue of fact that Yaboo was aware that anything in the plans for the Type II guide rail might create a dangerous or defective road condition. Also, following Yaboo's half day of work at the site, Yaboo had no further contractual obligations regarding the Home Depot construction project that could form the basis of any duty of care to plaintiffs.

Although plaintiffs argue that a different type of guide rail end assembly may have prevented the accident from occurring, plaintiffs do not submit any evidence which demonstrates that Yaboo was involved with the selection of the Type II guide rail. *See*

Estate of Hamzavi v Dewberry-Goodkind, Inc., 24 AD3d 184, 184 (1st Dept 2005) (the lower court was correct in granting summary judgment to an engineering firm, because there was no substantial basis to conclude that the guide rail in question was designed by this defendant). Therefore, plaintiffs inability to link the selection of the Type II guide rail to Yaboo, renders this argument meritless.

In conclusion, because plaintiffs have failed to raise a triable issue of fact that Yaboo was negligent in its installation of the Type II guide rail, Yaboo's motion for summary judgment is granted.

SEQUENCE 004

In sequence 004, the Home Depot; RIV, the general contractor at the site; and Eastview, the owner of the land where the Home Depot was being constructed (hereinafter "the Home Depot defendants"), move jointly for summary judgment. Plaintiffs allege that The Home Depot defendants were negligent in the installation of the Type II guide rail, that RIV must be held negligent under respondeat superior for Ferentini's accident, and that the accident took place on land owned by Eastview.

The Home Depot defendants contend that any arguments concerning vicarious liability must fail because Ferentini's accident took place before his work day had commenced. The Court of Appeals has held that "an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his employment . . .. [a]s a general rule, an employee driving to and from work is not acting in the scope of his employment. Although such activity is work motivated, the element of control is lacking." *Lundberg v State of New York*, 25 NY2d 467, 470-471 (1969) (citations omitted).

Here, Ferentini, who was employed by RIV, testified that prior to beginning work, he would sometimes visit the construction trailers to have coffee, while at other times, he would go to the front of Dana Road (Ferentini EBT, at 20). Ferentini testified:

Q. Before the accident, had you been to the construction site at all or were on your way there?

A. No, I was in the back where the construction trailers were. I don't understand.

MR. RINGLE: The question is before the accident occurred that morning, did you go to the site before the accident.

A. No.

Q. You were on your way to work at the time the accident happened; is that correct?

MR. BLUTH: Objection to form.

A. Yes.

(Ferentini EBT, at 61-62).

Although plaintiffs contend that the intersection where the accident took place was part of the construction area and that Ferentini may have already been on the job site before the accident, Ferentini testified that he was traveling to the site when the accident took place. Despite the allegations presented by counsel for Ferentini, there is no evidence that Ferentini began to perform his job, was performing a work-related task at the time of the accident, or was under his employer's control from the time he left his home in the morning. *See Lundberg v State of New York,* 25 NY2d at 471. There is

also no support for the allegation raised by counsel for Ferentini that he was, at the time of the accident, working, because he was observing traffic conditions. Ferentini specifically testified that, prior to the accident, he was just waiting for cars to pass before making the left turn.

Plaintiffs also maintain that there is an issue of fact as to who owned the land where the accident took place. The Home Depot defendants contend that they did not individually or jointly own the property, but that the State of New York owned the property. Schilling, a civil and permit engineer at the NYSDOT; Schiraldi, a resident engineer at the NYSDOT; and Bohlander, JMC's project manager, each testified that the end sections were located on property which belonged to New York State (Schilling EBT, at 91; Schiraldi EBT, at 101-102; Bohlander EBT, at 6-7). Plaintiffs fail to submit any evidence which suggests otherwise.

Although plaintiffs maintain that Home Depot and RIV received memos regarding the cutting of the guide rail, these parties were copied on the letters and communications and plaintiffs do not submit any evidence that the Home Depot defendants made any suggestions or decisions which led to the installation of the Type II guardrail. *See Estate of Hamzavi v Dewberry-Goodkind, Inc.*, 24 AD3d at 184.

Therefore, because plaintiffs fail to raise a triable issue of fact regarding the Home Depot defendants, the Home Depot defendants' motion for summary judgment is granted.

SEQUENCE 005

In sequence 005, Shawn's Lawns contends that Ferentini was not one of its employees and was not acting within the scope of his employment at the time of the

accident.

The testimony of Sean Wendell (Wendell), the president of Shawn's Lawns, Ferentini, and William Kouroupas, the supervisor of construction for RIV, is that Ferentini was employed by RIV, but was placed on Shawn's Lawns' payroll. Because RIV was required to have a teamster on site and it did not have a contract with a union, it could not hire Ferentini directly. Therefore, an arrangement was made whereby Shawn's Lawns would pay Ferentini, and RIV would reimburse Shawn's Lawns for that amount. However, regardless of who Ferentini worked for, as discussed above, plaintiffs have failed to raise a triable issue of fact that Ferentini was acting within the scope of his employment at the time of his accident, because he was commuting to his work site.

Shawn's Lawns also argues that it does not owe any independent duty to the plaintiff as a result of its work at the construction site. Shawn's Lawns contends that it was working at the Home Depot project pursuant to a written contract with RIV. Wendell testified that Shawn's Lawns cut the guard rail pursuant to sketches provided by the NYSDOT and that the NYSDOT chose the guard rail. Plaintiffs do not submit evidence which demonstrates that Shawn's Lawns had any role in selecting the Type II guide rail or that Shawn's Lawns' installation of the Type II guide rail deviated from the NYSDOT's specifications. Therefore, based upon the record, there is no triable issue of fact that Shawn's Lawns created an unreasonable risk to plaintiff.

Even if the court was to find that Shawn's Lawns owed a duty to plaintiff, Shawn's Lawns was not the proximate cause of plaintiff's injuries. The underlying cause of the accident was Ferentini's initial impact with plaintiff's vehicle. *See Tomassi*

v Town of Union, 46 NY2d 91, 98 (1978) (although there were alleged claims of negligence concerning the design, construction, and maintenance of a street, the drivers of the vehicles were held to be the proximate cause of the accident).

Therefore, because plaintiffs have failed to meet their burden and demonstrate that an issue of fact exists or that Shawn's Lawns owed a duty to plaintiff, Shawn's Lawns motion for summary judgment is granted.

SEQUENCE 006

In sequence 006, JMC contends that the NYSDOT was the party that directed and approved the installation of the Type II guard rail. Plaintiffs contend that JMC should be held negligent, because it was the party whom decided that the Type II guide rail should be utilized at the site. However, the testimony of the various witnesses was that the selection of the Type II guide rail was made by the NYSDOT.

Bohlander testified that the state provided JMC with the specifics of the location, the layout, the length, and the type of guide rail to install, specifically the Type II end section (Bohlander EBT, at 13). Schilling also testified that the NYSDOT recommended that a Type II end rail be installed (Schilling EBT, at 36). Attached to the reply affirmation of Thomas M. Flemming II, counsel for JMC, is a copy of a December 27, 2005 e-mail from Schiraldi to Kenneth Franco (Franco), a NYSDOT permit inspector, and Schilling. This e-mail states that, after Bohlander notified Schiraldi that he could not get the radius guard rail, "I [Schiraldi] suggested they install two Type II end sections" (Flemming Reply Affirm., ex. A). Although Schiraldi and Franco, at first, testified that they believed JMC proposed the Type II guide rail due to the proposed sketches submitted by JMC, Schiraldi later testified that, based upon a review of this e-

mail, it was he who suggested a Type II guide rail be utilized (Schiraldi EBT, at 100).

Therefore, based upon the testimony of the various witnesses, plaintiffs have failed to raise a triable issue of fact that JMC was the party responsible for selecting the Type II guard rail.

There is also no evidence presented by plaintiffs that JMC did not follow the plans or specifications of the NYSDOT when installing the guide rail or that the work was defective. The design for the Type II guide rail was based upon the NYSDOT's specification sheet from the NYSDOT's web site, and there is no evidence that JMC was put on notice that the utilization of a Type II guide rail would be harmful to motorists. Although plaintiffs submit an expert report from Peter Pomeranz, a professional engineer, which states that the installation of a Type I guard rail may have prevented the vehicle from flipping over, the report fails to raise an issue of fact that JMC was negligent in rendering engineering services or that JMC deviated from the good and accepted standards of practice in the profession. *See Tower Bldg Restoration, Inc. v 20 East 9th Street Apt. Corp.*, 7 AD3d 407 (1st Dept 2004).

Even if the court was to find that the decision to use the Type II guide rail was made by JMC, there is no evidence that JMC's work at the site, which was not disapproved or criticized by the NYSDOT, was the proximate cause in bringing about plaintiff's accident with Ferentini. *See Tomassi v Town of Union*, 46 NY2d at 98.

Based upon the testimony of the various witnesses, plaintiffs fail to raise a triable issue of fact that JMC created an unreasonable risk to plaintiff which caused the accident and thus, JMC's motion for summary judgment is granted.

CROSS MOTION

Plaintiffs cross-move for summary judgment against Ferentini as well as Shawn's Lawns.

Ferentini contends that plaintiffs' motion is procedurally defective because it seeks relief from a non-moving party. The cross motion was served on Ferentini on January 15, 2009 and counsel for Ferentini filed an affirmation in opposition on February 24, 2009. Counsel for plaintiffs acknowledges that the motion was mislabeled, but argues that there is no prejudice to Ferentini.

Although "a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party . . . [s]uch a technical defect may be disregarded where, as here, there is no prejudice, and [the opposing party] had ample opportunity to be heard on the merits of the relief sought." *Kleeberg v City of New York*, 305 AD2d 549, 550 (2d Dept 2003) (citations omitted). Since there has been no showing of any prejudice to Ferentini, the cross motion will be considered.

Counsel for Ferentini also argues that the cross motion was not properly organized. At the oral argument, the court instructed counsel for plaintiffs to provide the parties with a complete set of exhibits to the motion and allowed Ferentini's counsel 30 additional days to amend his affirmation in opposition to the cross motion after receiving the newly-organized exhibits. The court has not received an amended affirmation in opposition from Ferentini, and will only consider the affirmation in opposition which is dated February 24, 2009.

Plaintiffs maintain that Ferentini must be held negligent per se, for violating the Vehicle and Traffic Law and turning into plaintiff's vehicle. Plaintiff testified that he was

traveling about 30 miles per hour at the time of the accident, that the road was flat in both directions, and that prior to reaching the intersection, he had watched the light change from red to green. Plaintiff testified that Ferentini's vehicle "came out of nowhere" (Davies EBT, at 33).

Ferentini testified that, before making his left turn into the construction site, his view of the intersection was unobstructed and he waited three to four minutes to let cars pass. Although Ferentini testified that he did not see plaintiff's vehicle before the impact, there is no testimony that plaintiff was speeding. Ferentini's counsel attempts to raise an issue of fact by plaintiff's testimony that he passed a car waiting in the southbound left lane, which was stopped to make a left turn onto Dana Road. However, Ferentini testified that there was nothing blocking his view and regardless of the existence of this vehicle, plaintiff maintained the right of way to proceed straight through the intersection.

Section 1141 of the Vehicle and Traffic Law (VTL) provides that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

It is clear from the testimony that Ferentini's vehicle violated section 1141 of the VTL, when he attempted to make a left turn directly into the path of oncoming traffic. Ferentini has not provided any explanation for failing to see plaintiff's vehicle and plaintiff was entitled to anticipate that Ferentini would observe the VTL and not cross into the intersection when he had the right of way. *See Griffin v Pennoyer,* 49 AD3d

341 (1st Dept 2008). Therefore, because Ferentini fails to present any evidence that he did not violate section 1141 of the VTL or offer a non-negligent explanation for the accident, plaintiffs' cross motion for summary judgment on liability must be granted.

Although plaintiffs also maintain that Shawn's Lawns should also be held liable pursuant to respondeat superior, this aspect of the cross motion is moot.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the summary judgment motions of Yaboo Fence Company, Inc. (Sequence 003); Home Depot U.S.A., Inc., RIV Construction Group, Inc., and Eastview Holdings, LLC, (Sequence 004); Shawn's Lawns (Sequence 005); and John Meyer Consulting, Planning, Engineering, Landscape Architecture and Land Surveying, P.C. (Sequence 006), are granted, and the complaint is dismissed as to these defendants with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the plaintiffs' cross motion as against defendant Peter Ferentini on the issue of liability is granted, and the motion is denied in all other respects; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 2, 2010

Paul Wooten **J.S.C.**

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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