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SHORT FORM ORDER

INDEX No. 07-13607
CAL. No. 11-01630 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-14-11 (#008)
MOTION DATE 10-13-11 (#009)
MOTION DATE 11-17-11 (#010)
MOTION DATE 12-8-11 (#011)
MOTION DATE 12-29-11 (#012)
MOTION DATE 1-5-12 (#013)
ADJ. DATE: 1-26-12
Mot. Seq. # 008 - MD # 009 - MD # 010 - XMD
# 011 - MD # 012 - MD # 013 - XMD

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MERCHANTS INSURANCE GROUP a/s/o EASTERN SUFFOLK CARDIOLOGY, PC and THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY, a/s/o EASTERN SUFFOLK CARDIOLOGY PC,

Plaintiffs,

- against -

HI-TECH IRRIGATION, INC., P.E.R.T. ANDREASSI DEVELOPMENT CORP., and P.E.R.T. ANDREASSI CONSTRUCTION CORP.,

Defendants.

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HI-TECH IRRIGATION, INC.,

Third-Party Plaintiff,

-against-

SHINNECOCK ELECTRIC CORP., GREENVIEW LANDSCAPING INC., ROANOKE REALTY ENTERPRISES, LLC and SEARLES, STROMSKI ASSOCIATES ARCHITECTS PLANNERS, P.C.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 130 read on these motions and cross motions for summary judgment and for amending the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 32; 33 - 54; 55 - 71; Notice of Cross Motion and supporting papers 72 - 85; 86 - 93; Answering Affidavits and supporting papers 94 - 113; Replying Affidavits and supporting papers 114 - 130; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (# 008) by third-party defendant Searles, Stromski, Associates Architects Planners, P.C. for summary judgment dismissing the third-party complaint and all cross claims against it is denied without prejudice to renew, upon proper papers within thirty (30) days of the entry date of this order; and it is further

***ORDERED*** that the motion (# 009) by third-party defendant Roanoke Realty Enterprises, LLC for summary judgment dismissing the third-party complaint and all cross claims against it is denied; and it is further

***ORDERED*** that the cross motion (# 010) by the plaintiffs for an order pursuant to CPLR 3025 (b) for leave to amend the complaint is denied; and it is further

***ORDERED*** that the motion (# 011) by third-party defendant Greenview Landscaping, Inc. for summary judgment dismissing the third-party complaint and all cross claims against it is denied; and it is further

***ORDERED*** that the motion (# 012) by third-party defendant Shinnecock Electric Corp. for summary judgment dismissing the third-party complaint and all cross claims against it is denied; and it is further

***ORDERED*** that the cross motion (# 013) by defendant P.E.R.T. Construction Corporation, s/h/a P.E.R.T. Andreassi Development Corp. and P.E.R.T. Andreassi Construction Corp., for summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover for property damage allegedly sustained by plaintiffs as a result of an incident that occurred on April 25, 2005 at a commercial property located at 951 Roanoke Avenue, Riverhead, New York, and owned by Roanoke Realty Enterprises, LLC ("Roanoke Realty"). The complaint alleges, *inter alia*, that the defendants' negligence in installing and maintaining a lawn sprinkler system caused an electric transformer to fail, damaging a CAT scan machine, owned by the plaintiffs' subrogee.

Prior to the subject incident, Roanoke Realty entered into a contract with defendant P.E.R.T. Construction Corporation, d/b/a P.E.R.T. Andreassi, s/h/a P.E.R.T. Andreassi Development Corp. and P.E.R.T. Andreassi Construction Corp. ("P.E.R.T. Construction") to construct a building at the subject property. As a construction manager, P.E.R.T. Construction subcontracted with Hi-Tech Irrigation, Inc. ("Hi-Tech") for the installation of an irrigation system. It also subcontracted with Shinnecock Electric Corp. ("Shinnecock Electric") for the electrical work on the project, including the installation of the subject electric transformer. Roanoke Realty hired Greenview Landscaping, Inc. ("Greenview Landscaping") to provide landscaping work and also hired Searles, Stromski, Associates Architects Planners, P.C. ("Searles Architects") to design a one story medical office at the subject premises. Defendant Hi-Tech commenced a third-party action against Shinnecock Electric, Greenview Landscaping, Roanoke Realty and Searles Architects for common law contribution and indemnification.

Third-party defendant Searles Architects moves (# 008) for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it.

The motion by Searles Architects for summary judgment is denied as procedurally defective for failure to submit a complete copy of the pleadings (*see* CPLR 3212 [b]; ***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]). Searles Architects failed to submit the answer of defendant P.E.R.T. Construction, without which it is not possible to determine whether summary judgment is warranted. Thus, Searles Architects' motion (# 008) is denied without prejudice to a new motion for the same relief to be made upon proper papers within thirty (30) days of the entry date of this order.

Third-party defendant Roanoke Realty moves (# 009) for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it. Roanoke Realty contends that it did not negligently hire Hi-Tech or exercise control over the installation of the sprinkler system. In support, Roanoke Realty submits, *inter alia*, the pleadings and an excerpt of the deposition testimony given by Miguel Blanco, a representative of Roanoke Realty, J. Andreassi, a representative of P.E.R.T. Construction, and Robert Lee, a representative of Hi-Tech.

At his examination before trial, Miguel Blanco testified to the effect that he is one of the partners of Roanoke Realty and the only partner who was involved in the construction project at the property located at 951 Roanoke Avenue. Roanoke Realty hired P.E.R.T. Construction for the construction project, and P.E.R.T. Construction hired all the subcontractors on the basis of a bidding process, except Searles Architects, which was already involved in the project before P.E.R.T. Construction. He had no recollection as to who was the landscaper at the time of the subject accident. With regard to the irrigation system, he had no information as to what was to be installed, and did not inspect the system after it was installed.

At his deposition, Joseph Andreassi testified to the effect that he is the sole shareholder of P.E.R.T. Construction, and that P.E.R.T. Construction was hired by Roanoke Realty to perform the construction project at the subject premises. Approximately 10 to 20 subcontractors were utilized on this project. P.E.R.T. Construction recommended most of the contractors, and Roanoke Realty recommended some contractors. Mr. Andreassi had no recollection as to which contractors were recommended by Roanoke Realty. He stated that no one from P.E.R.T. Construction checked "whether there was any water incursion in the electrical transformer upon being advised there was a problem." He also stated that he has no personal knowledge as to what happened to the transformer when it failed, and that it is possible that the sprinkler head may have caused water to enter the housing of the transformer, wetting the interior and causing 'a blowout.'"

At his deposition, Robert Lee testified to the effect that he is the owner of Hi-Tech. On April 12, 2005, Hi-Tech installed the irrigation system at the subject premises. He had no recollection as to whether Roanoke Realty observed the installation of the irrigation system. After completing said installation, he did not review the landscaping plans to see if his installation was different than the plan itself. He stated that he would have just laid the irrigation based upon how the plants were laid out, and thus, a landscaping plan is not relevant after the estimate. He also stated that he made the decision "as to where sprinkler heads should be placed at this location."

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*see* ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

A landowner must act as a reasonable person in maintaining its property in a reasonably safe condition in view of all the circumstances (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Witherspoon v Columbia Univ.***, 7 AD3d 702, 777 NYS2d 507 [2d Dept 2004]). The issue of negligence, whether of the plaintiff or defendant, is usually a question of fact (*see* ***Bruni v City of New York***, 2 NY3d 319, 778 NYS2d 757 [2004]). A property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property, unless the work is inherently dangerous, or the owner interferes with and assumes control over the work (*see* ***Kleeman v Rheingold***, 81 NY2d 270, 598 NYS2d 149 [1993]; ***Fernandez v 707, Inc.***, 85 AD3d 539, 926 NYS2d 408 [1st Dept 2011]; ***Laecca v New York Univ.***, 7 AD3d 415, 777 NYS2d 433 [1st Dept 2004]).

Here, Roanoke Realty failed to establish its entitlement to judgment as a matter of law. There are several questions of fact as to whether Roanoke Realty hired Hi-Tech; whether Hi-Tech properly installed the irrigation system; what caused the subject transformer to malfunction; whether Roanoke Realty exercised control over the installation of the subject sprinkler; and whether Roanoke Realty exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, *supra*). Thus, Roanoke Realty's motion (# 009) is denied.

The plaintiffs seek (# 010) leave to amend their complaint to add third-party defendant Shinnecock Electric as a direct defendant in the main action, and to file and serve their proposed supplemental summons and amended complaint. Counsel for the plaintiffs explains in his affirmation in support of the motion that after the filing of the complaint, the plaintiffs learned that Shinnecock Electric may allegedly be responsible for the failure of the subject transformer. The plaintiffs allege that, when an employee of Shinnecock Electric was attempting to repair the electrical system on the premises, he caused additional damage to the system. In support of the motion, the plaintiffs submit the original summons and complaint and the proposed amended complaint adding Shinnecock Electric as a direct defendant in the main action.

It is well settled that leave to amend pleadings should be freely given (*see* CPLR 3025 [b]) provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Sheila Props. Inc. v A Real Good Plumber***, 59 AD3d 424, 874 NYS2d 145 [2d Dept 2009]). The relation-back doctrine, codified at CPLR 203 (b), allows a claim asserted against a defendant in an amended pleading to relate back to claims previously asserted against a co-defendant for statute of limitations purposes (*see* ***Buran v Coupal***, 87 NY2d 173, 638 NYS2d 405 [1995]; ***Ito v Marvin Windows of New York***, 54 AD3d

1002, 865 NYS2d 119 [2d Dept 2008]). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well (*see* ***Buran v Coupal***, *supra*; ***Nani v Gould***, 39 AD3d 508, 833 NYS2d 198 [2d Dept 2007]).

Parties are united in interest when their interests in the subject matter causes them to stand or fall together with respect to the plaintiff's claim (*see* ***Xavier v RY Mgt. Co., Inc.***, 45 AD3d 677, 846 NYS2d 227 [2d Dept 2007]). Generally, unity of interest will be found where one of the parties is vicariously liable for the conduct of the other (*see* ***Mondello v New York Blood Ctr.-Greater N.Y. Blood Program***, 80 NY2d 219, 225, 590 NYS2d 19 [1992]; ***Quiroz v Beitia***, 68 AD3d 957, 694, 893 NYS2d 70 [2d Dept 2009]).

Here, plaintiffs failed to satisfy their burden of establishing the applicability of the relation-back doctrine as there is nothing in the submissions indicating that Shinnecock Electric was united in interest with any of the original defendants, since it has manifestly different defenses to the plaintiffs' claims and would not stand or fall together (*see* ***Aresell v Mass One LLC***, 73 AD3d 668, 900 NYS2d 380 [2d Dept 2010]). In addition, inasmuch as the third-party action was commenced after the expiration of the statute of limitations for the underlying tort, plaintiffs have failed to establish requisite notice on the part of Shinnecock Electric. Thus, third-party defendant Shinnecock Electric is not united in interest with the other defendants, plaintiffs' claims against it do not relate back to the time of commencement of the action against the direct defendants, and plaintiffs' proposed amendment is time-barred (*see id.*). Accordingly, plaintiffs' cross motion (# 010) is denied.

Third-party defendant Greenview Landscaping moves (# 011) for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it. To the extent that Greenview Landscaping seeks the same relief as it sought in its prior motion for summary judgment (# 003), the motion dismissing the third-party complaint and all cross claims against it is denied as redundant.

Third-party defendant Shinnecock Electric moves (# 012) for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against it. Shinnecock Electric alleges that it is not responsible for the failure of the electric transformer or for causing the CAT scan machine to malfunction. In support, Shinnecock Electric submits, *inter alia*, the pleadings and the deposition testimony given by Gregg Grothmann, a representative of Eastern Suffolk Cardiology, P.C., and Joseph Fratello, representatives of Shinnecock Electric.

At his examination before trial, Gregg Grothmann testified to the effect that he is employed by Eastern Suffolk Cardiology. On the day of the incident, while he was operating the subject CAT scan machine, an electrical failure in the transformer caused the malfunction of the machine. He attempted to reset the power supply and reinitialize the circuit breaker which is in the same room with the machine, but "it did not re-energize at that time." Having found that there was no power coming into the building, he called General Electric and Shinnecock Electric. A General Electric technician responded to the site. After

he retraced the steps Mr. Grothmann performed initially, he determined that there was no electricity coming into the power supply. Then, Joe from Shinnecock Electric came. When he checked the main breaker from the transformer, it was "blown." He then checked the transformer itself. Approximately three weeks to a month prior to the incident, the machine was installed by General Electric. In the interim, Mr. Grothmann had not experienced any problem with the machine. He stated that "Shinnecock Electric was responsible for bringing the electric into the building, and then G.E. was responsible from inside the building to the machine."

At his deposition, Joseph Fratello testified to the effect that he has been employed as an electrician by Shinnecock Electric since 2004, and that he was involved in a construction project at the subject premises. He stated that he worked on the installation of the CAT scan machine on the northern part of the building, and that the machine required a step-up transformer which converts a lower voltage to a higher voltage. The transformer was supplied by Shinnecock Electric. He installed it outside. He explained how the electrical power reached the CAT scan machine. The electricity runs from the power lines to the electrical distribution panel in the mechanical room inside the building. There is a disconnect, which is known as a circuit breaker, at the distribution panel. From the breaker, the power goes to the step-up transformer outside the building. The electricity runs to another circuit breaker associated with the CAT scan machine, and to the machine (hereinafter the first breaker in the mechanical room referred to as "transformer breaker" and the second breaker referred to as "CAT breaker"). On the day of the accident, when he received a phone call stating that the CAT scan machine was down, he went to the subject premises and noticed that the transformer breaker "was tripped in the off position." The transformer breaker was supplied by Shinnecock Electric. Thereafter, he went to check the CAT breaker which was provided by General Electric. After observing that the CAT breaker was not tripped, he went back to the transformer breaker. When he "attempted to turn it back into the on position," he "heard a loud boom and that was an [electrical] arc from inside the step-up transformer." At that time, the CAT breaker was "off." Then, he removed the face plate of the transformer, and observed that there was a black flash inside the cabinet, caused by a "large arc inside," and that it was wet inside. He stated that he did not check the transformer before he heard the boom sound. He indicated that two electrical surges occurred to the transformer. The first surge occurred before he came to the premises on the day of the accident, and the second surge occurred when he attempted to turn the transformer breaker back on. He stated that the black markings inside the transformer "could have been [from] either the first or second" surge. He also stated that, due to "so many factors," "things happen to trip especially with equipment like this [CAT scan machine] that has a large inrush current."

Here, Shinnecock Electric failed to establish its entitlement to judgment as a matter of law. There are several questions of fact as to what happened to the subject transformer; what caused an electrical arc inside the transformer; whether Shinnecock Electric properly repaired the transformer; whether Shinnecock Electric's alleged negligence was a proximate cause of the damage to the CAT scan machine; and whether Shinnecock Electric exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, *supra*; ***Basso v Miller***, *supra*). Thus, Shinnecock Electric's motion (# 012) is denied.

Defendant P.E.R.T. Construction cross-moves (# 013) for summary judgment dismissing the complaint in the main action and all cross claims insofar as asserted against it. P.E.R.T. Construction alleges that it is not responsible for the independent negligent acts of the subcontractor on the job site, and that it

did not play any role at the site other than coordinating trades and payments for subcontractors on behalf of Roanoke Realty. In support, P.E.R.T. Construction submits, *inter alia*, the pleadings and the incomplete copy of the deposition testimony given by Robert Lee, a representative of Hi-Tech.

While one who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done (*see* ***Santiago v Spinuzza***, 48 AD3d 1257, 851 NYS2d 322 [4th Dept 2008]; ***Goodwin v Comcast Corp.***, 42 AD3d 322, 840 NYS2d 781 [1st Dept 2007]; ***Dente v Staten Island Univ. Hosp.***, 252 AD2d 534, 675 NYS2d 621 [2d Dept 1998]), the employer is answerable for its own negligence (*see* ***Cassel v City of New York***, 167 AD 831, 153 NYS2d 410 [1st Dept 1915]). Moreover, the employer may also be held liable as a joint wrongdoer if its own misconduct concurred with that of the independent contractor in producing the damage complained of (*see* ***Parson v New York Breweries Co.***, 208 NY 337, 101 NE 879 [1913]).

Here, P.E.R.T. Construction failed to establish its entitlement to judgment as a matter of law. As discussed above, there are several questions of fact as to what happened to the transformer; what caused the CAT scan machine to malfunction; whether P.E.R.T. Construction properly checked the transformer upon being advised there was a problem; whether P.E.R.T. Construction's alleged negligence was a proximate cause of the damage to the CAT scan machine; and whether P.E.R.T. Construction exercised reasonable care under the circumstances. Thus, P.E.R.T. Construction's cross motion (# 012) is denied.

In view of the foregoing, the motion (# 008) by third-party defendant Searles, Stromski, Associates Architects Planners, P.C. for summary judgment is denied without prejudice to renew, upon proper papers within thirty (30) days of the entry date of this order. The motion (# 009) by third-party defendant Roanoke Realty Enterprises, LLC for summary judgment is denied. The cross motion (# 010) by the plaintiffs for an order for leave to amend the complaint is denied. The motion (# 011) by third-party defendant Greenview Landscaping, Inc. for summary judgment is denied. The motion (# 012) by third-party defendant Shinnecock Electric Corp. for summary judgment it is denied. The cross motion (# 013) by defendant P.E.R.T. Construction Corporation for summary judgment is denied.

Dated: May 10, 2012

J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**