

**Hornick v All City Expediting, Inc.**

2012 NY Slip Op 32044(U)

July 25, 2012

Supreme Court, New York County

Docket Number: 106573/11

Judge: Joan A. Madden

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

**HON. JOAN A. MADDEN**

PRESENT: \_\_\_\_\_  
**J.S.C.**  
*Justice*

PART 11

Index Number : 106573/2011  
HORNICK, PETER  
VS.  
ALL CITY EXPEDITING, INC.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

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

## FILED

AUG 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 25, 2011

\_\_\_\_\_  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

PETER HORNICK,

Plaintiff,

-against-

ALL CITY EXPEDITING, INC. A TO Z BUILDING  
CONSULTING, INC., CW CONSULTING SERVICES,  
LLC, PAL GENERAL CONSTRUCTION CORP.,  
PARIHAR ENGINEERING PC, and 177 WEST  
83 STREET HDPC,

Defendants.

INDEX NO. 106573/11

**FILED**

**AUG 03 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

JOAN A. MADDEN, J.:

Defendant CW Consulting Services, LLC (CW) moves and defendant Parihar Engineering PC (Parihar) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them. Plaintiff opposes defendants' motion and cross-motion, and cross-moves for an order pursuant to CPLR 3215 granting a default judgment against defendant PAL General Construction Corp. (PAL), based on said defendant's failure to appear and answer.

Plaintiff is the proprietary lessee of cooperative apartment 5N/S in the building located at 177 West 83rd Street in Manhattan, which is on the top floor of the building. The complaint<sup>1</sup> alleges that "on or about Fall 2009 the Contractor Defendants [collectively, defendants All City Expediting, Inc., A to Z Building Consulting, Inc., CW Consulting Services, LLC, PAL General Construction Corp., and Parihar Engineering PC] undertook to do certain work in connection with repairs to the cornice of the building," and that "on or about April 2010" defendants

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<sup>1</sup>The court relies on the complaint submitted with CW's motion papers, which is identical to the complaint filed with the court. It is unclear why plaintiff submits a different version of the complaint with his motion papers.

commenced work to remove the old roof and replace it with a new roof.” The complaint alleges that “[d]uring such work the plaintiff was able to hear broken pieces of the old roofing materials falling through the old wooden roof boards and onto the ceiling of plaintiff’s apartment.” The complaint further alleges that during the “demolition work on the roof . . . it was discovered by the NYC Department of Environmental Protection that asbestos was present in the roofing materials” being removed, some of which had “fallen between the roof boards and down onto the ceiling of plaintiff’s apartment,” and “as a result of said work, asbestos was caused to fall into the apartment and also onto the ceiling of the apartment.” The complaint also alleges that “[w]hile the roof was open and before resealing the roof with a permanent membrane there was extensive water damages from rains entering the building,” and that such “water damage degraded the ceiling [of plaintiff’s apartment] so that a part of it collapsed, allowing black water and black debris to fall directly onto the floor of the apartment.”

Defendants CW and Parihar are each moving for summary judgment, asserting that they were neither responsible for nor involved in the construction work performed on the roof of plaintiff’s building.

Defendant CW submits an affidavit from its principal, Christopher Wesolowski, a licensed architect, stating that plaintiff “wrongly believes” CW designed the project, and “[i]n fact, CW was superseded on the Project by a different design professional, and new plans, replacing the designs previously prepared by CW, were filed by that replacement design professional prior to the commencement of construction.” According to Wesolowski, CW was retained to “design a new cornice and parapet for the roof in question, and a new outermost roofing membrane,” with the portion of the roof “possibly containing asbestos . . . not to be disturbed.” He states that “my drawings were not used for the construction work on this project” and that “[n]ew drawings were filed by the superseding engineer of record, a defendant herein – Surjit Parihar of Parihar Engineering PC.”

Defendant Parihar submits an affidavit from its President, Surjit Parihar, stating that “Parihar was retained by PAL General Construction Corp. in February 2011, approximately ten months after the subject roof project, to prepare plans for the design and construction of a parapet wall at the premises,” and that it “was never requested, nor did it provide, any input with respect to the design or installation of the roof.” He further states that “Parihar was not involved in any way with the roof replacement project, as it was completed approximately ten months before Parihar was retained to perform any services at the Premises.”

Neither CW nor Parihar is entitled to summary judgment as the foregoing affidavits take conflicting positions as to whether they were involved with the construction project at plaintiff’s building when work was being performed on the roof. “It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits.” Brunetti v. Musallam, 11 AD3d 280 (1<sup>st</sup> Dept 2004) (citing Millerton Agway Co-op, Inc. v. Briarcliff Farms, Inc., 17 NY2d 57 [1966]); accord Talansky v. Schulman, 2 AD3d 355 (1<sup>st</sup> Dept 2003); Mason v. Dupont Direct Financial Holdings, Inc., 302 AD2d 260 (1<sup>st</sup> Dept 2003).

While Mr. Wesolowski states that CW was superseded by Parihar before the roof work began and that his plans were not used in connection with the roof work, Mr. Parihar asserts that the roof work was completed at the time Parihar took over the project from CW. Furthermore, the documentary evidence alone, including documents from the Department of Buildings, does not conclusively resolve the issues raised by the conflicting affidavits. Thus, summary judgment is denied as both CW and Parihar. “On a motion for summary judgment, the court may not resolve an issue of fact by weighing one affiant’s credibility against another’s.” Estate of Spitz v. Pokoik, 83 AD3d 505 (1<sup>st</sup> Dept 2011).

The court’s conclusion is without regard to the insufficiency of plaintiff’s opposition papers, which do not include an affidavit. As the proponents of motions for summary judgment, defendants bear the initial burden to make a prima facie showing of entitlement to judgment as a

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matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. See JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

In addition to the foregoing, the court agrees with plaintiff that defendants' motions must be denied in any event, as premature, since the evidence needed to oppose the motions is in defendants' exclusive possession, and discovery has not yet commenced. See CPLR 3212(f); Global Minerals & Metals Corp v. Holme, 35 AD3d 93, 102-103 (1<sup>st</sup> Dept 2006), lv app den, 8 NY3d 804 (2007). However, once discovery is complete, defendants may renew their motions for summary judgment if the evidence warrants such relief. See Harvey v. Nealis, 61 AD3d 935 (2<sup>nd</sup> Dept 2009).

Plaintiff's cross-motion for a default judgment against defendant PAL General Construction Corp. is denied, as plaintiff's motion papers do not include proof of service of the summons and complaint on such defendant as required by CPLR 3215(f). Moreover, as noted above, the copy of the verified complaint submitted with plaintiff's motion papers is different from the complaint plaintiff filed with the court when this action was commenced. The denial of plaintiff's cross-motion is without prejudice to renewal on papers in compliance with CPLR 3215.

Accordingly, it is hereby

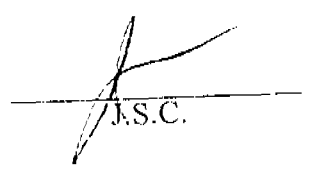
ORDERED that the motion by defendant CW Consulting Services, LLC for summary judgment is denied without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that the cross motion by defendant Parihar Engineering P.C. for summary judgment is denied without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that plaintiff's cross-motion for a default judgment against defendant PAL General Construction Corp. is denied without prejudice to renewal on papers in compliance with CPLR 3215.

Dated: July 25, 2012

ENTER:

  
J.S.C.

**FILED**  
AUG 03 2012  
NEW YORK  
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