

Borrok v John Barman, Inc.

2013 NY Slip Op 33435(U)

December 13, 2013

Supreme Court, New York County

Docket Number: 114120/10

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SHLOMO HAGLER
J.S.C.
Justice

PART 17

Index Number : 114120/2010
BORROK, CHARLES R.
vs
JOHN BARMAN, INC.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ || No(s) 1

Answering Affidavits — Exhibits and cross motion _____ || No(s) 2-3

Replying Affidavits _____ || No(s) 4, 5, 6

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached order.

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

FILED

DEC 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/13/13

SHLOMO HAGLER, 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: CROSS-MOTION IS: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

CHARLES R. BORROK,

Plaintiff,

Index No. 114120/10

-against-

JOHN BARMAN, INC., and STARK WALL
COVERING,

Defendants.

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DEC 24 2013

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JOHN BARMAN, INC.,

COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Plaintiff,

Index No. 590034/11

-against-

EVAN LONG ISLAND PAINTING CORP.,

DECISION/ORDER

Third-Party Defendant.

-----X

Shlomo S. Hagler, J.:

In this action to recover for damage to property,
defendant/third-party plaintiff John Barman, Inc. ("Barman")
moves, pursuant to CPLR 3212, for summary judgment dismissing the
complaint and all cross-claims against it. Plaintiff Charles R.
Borrok ("plaintiff" or "Borrok") opposes the motion and cross-
moves, pursuant to CPLR 3212, for summary judgment on the issue
of liability against Barman, and for sanctions against Barman,
pursuant to 22 NYCRR 130-1.1, in the form of legal fees and

costs, for bringing what plaintiff maintains is a frivolous motion.

I. Background

Plaintiff resides in apartment 28G at 1930 Broadway, New York, New York. According to the complaint, plaintiff hired Barman "to perform all work associated with a complete decoration and design ... of Borrok's apartment, ... including procuring, furnishing and installing special wallpaper from Stark ... in portions of the apartment." Complaint, ¶ 1. The wallpaper in question was highly priced gold leaf, and was made by defendant Stark Wallcovering ("Stark").

Plaintiff claims that the wallpaper acquired spotting and staining a few years after its installation, which he attributes to the allegedly negligent manner it was installed by third-party defendant Evan Long Island Painting Corp. ("Evan"). Plaintiff has not sued Evan and was not even aware that the wallpaper installation was being subcontracted out to Evan. Plaintiff claims that Barman was personally responsible for installing the wallpaper, and failed to do so when it chose to subcontract the job to Evan (whose personnel were, allegedly, inexperienced in hanging this particular type of wallpaper), and did not properly supervise Evan in the installation of the wallpaper.

Stark previously made a motion to dismiss the complaint as to it, which was granted by this court on the record, because

plaintiff did not appear to have any valid claim that the wallpaper itself was defective. Instead, plaintiff claims that Evan installed the wallpaper without using a paper liner that would have absorbed the moisture from the glue used in the installation, which eventually caused spots to appear on the surface of the wallpaper. According to plaintiff, Stark's explicit instructions required the use of paper liners.

Plaintiff brings three causes of action against Barman: for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty and negligence. Barman brings Evan in as a third-party defendant, claiming that, if there was any negligence in the installation of the wallpaper, it was attributable to Evan.

Barman's defense is that its sole responsibility on the project was as an interior decorator, hired to "select items that would look nice in the apartment" (Aff. in Support of Motion, at 4), and to "present[] decorating schemes to [plaintiff] to improve the appearance of his apartment" (*id.* at 6), which included helping plaintiff pick out appropriate wall coverings. Barman also claims that it "purchased carpeting, wall treatments and fabric" from Stark for the job, including the wallpaper in question. Barman contends that it had used Evan's services on previous occasions, but that, it was not itself responsible for installing the wallpaper; did not tell Evan how to install the

wallpaper; had no personal knowledge about how to install the wallpaper; and was not a guarantor for the proper installation of the wallpaper by the Evan.

Barman moves for summary judgment on the ground that it had no duty in contract or otherwise to see to the proper installation of the wallpaper. Plaintiff cross-moves for summary judgment on the ground that Barman failed in its duties (fiduciary as well as contractual) to see that the wall paper was properly installed. Evan has appeared to oppose plaintiff's cross motion against Barman.

II. Discussion

It is often stated that summary judgment is a "drastic remedy." *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 (2012). "[T]he '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 issues of fact from the case.'" *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v*

Rozbruch, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

Both Barman's and plaintiff's motions must be denied, as there are questions of fact as to the scope of the duty Barman owed to plaintiff with regard to the installation of the wallpaper. Barman claims that, as an interior decorator, his only function was to help plaintiff select carpets and wallcovering and fabric, and had no obligation to install these items. However, it appears that Barman may have undertaken the duty to oversee that the wallpaper was actually installed. In fact, Barman may have entered into a direct agreement with plaintiff for the "preparation of walls and wallpapering apartment except for kitchen." (See, Exhibit "C" to the cross-motion, Proposal 004 dated January 14, 2008). Barman then allegedly sub-contracted the said work to Evan. Such an agreement may imply an obligation to see that the job was properly done by whomever Barman found to install the wallpaper. Therefore, the scope of Barman's obligations under its arrangement with plaintiff must be explored by the trier of fact, and neither movant is entitled to summary judgment.

Plaintiff's cross-motion must also be denied because there are questions of fact as to whether Evan was negligent in installing the wallpaper. On the instructions that came with the wallpaper, Stark appended the following language: "[w]e recommend the use of highly experienced paper hangers experienced in the installation of fine wallcoverings who are members of the National Guild of Professional Paperhangers ("Guild"). We recommend that a quality paper liner be used under our wallcoverings. Please consult with your paper hanger prior to installation." Plaintiff claims that Evan's personnel were not formally trained in the installation of gold foil wallpapers, Evan was not a member of the Guild, and Evan failed to follow the recommendation to use quality paper liners.

On the other hand, Evan's president Evans Papagoulias ("Papagoulias"), avers that he has been hanging wallpaper for 30 years, starting as an apprentice in Italy, and has experience with the kind of wallpaper used in plaintiff's apartment. Papagoulias claims that, despite the recommendations on Stark's instructions, paper liners were not indicated for the job because paper liners are only used when the surface of the wall is rough, and needs to be smoothed over before applying the gold foil. Plaintiff's walls were apparently not rough and, therefore, Evan denies that paper liners were necessary. Evan also argues that the spotting was not the result of faulty installation of the

wallpaper, but came from humid conditions allegedly prevalent in plaintiff's apartment.

III. Conclusion

As a result of these opposing theories, summary judgment is properly denied to both movants, except that the court dismisses the third cause of action for breach of fiduciary duty. Interior decorators do not owe a fiduciary duty to their customers. See *Frank v Sobel*, 38 AD3d 229 (1st Dept 2007).

Further, plaintiff has not made any showing that it is entitled to sanctions pursuant to 22 NYCRR 130-1.1, as Barman's motion is not frivolous.

Accordingly, it is

ORDERED that the motion brought by defendant/third-party plaintiff John Barman, Inc. for summary judgment dismissing the complaint and all cross-claims against it is denied, except that the third cause of action for breach of fiduciary duty is dismissed; and it is further

ORDERED that the cross-motion brought by plaintiff Charles R. Borrok, for summary judgment on the complaint, and for sanctions against John Barman, Inc., is denied.

Dated: December 13, 2013

FILED

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DEC 24 2013

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