

Riveros v Custom Design Homes

2012 NY Slip Op 33135(U)

December 19, 2012

Supreme Court, Queens County

Docket Number: 11754/06

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

JUAN RIVEROS,

Plaintiff,

- against-

Index No. 11754/06

Motion

Date September 18, 2012

CUSTOM DESIGN HOMES, ROOSKA HOME
IMPROVEMENTS CORP., ATLANTIC PLUMBING
& HEATING INC., TOP GUN ELECTRIC, INC.,
CUSTOM DESIGNER HOMES OF LONG ISLAND,
INC., TONY'S STAIRS & RAILING, INC., MIKE
GARCIA SIDING, MIKE GARCIA ENTERPRISES,
INC., GARCIA SIDING, CHARLES GARCIA ROOFING
& SIDING, D&A EXCAVATING, D&A EXCAVATING
CO., LTD., BNB PLUMBING, BNB PLUMBING CORP.,
AA DRYWALL, C. SCOTT, C. SCOTT & SONS, INC.,
and MOON BAY DEVELOPMENT CORP.,

Motion

Cal. No. 24

Motion

Seq. No. 12

Defendants.

ROOSKA HOME IMPROVEMENTS CORP.,

Third-Party Plaintiff,

- against -

BAYVIEW CUSTOM FRAMING, INC.,

Third-Party Defendant.

The following papers numbered 1 to 14 read on this motion by defendants, BNB Plumbing and BNB Plumbing Corp. (BNB Plumbing), for an order granting summary judgment and dismissing the complaint, AA Drywall's cross claims, as well as all other cross-claims.

	<u>Papers Numbered</u>
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Plaintiff, Juan Riveros, alleges that he sustained serious injuries on June 26, 2003, during the course of his employment at a construction site located at the residential home of 6 Kate Court, Southampton, New York, when he stepped onto the stairs leading to the basement, fell through the first step onto the landing, and then onto the basement floor. Plaintiff was employed as a sheet rock installer by Drywall Unlimited. Plaintiff commenced four separate actions for negligence and violations of Labor Law §§ 200, 240 and 241(6). The actions were consolidated under Index No. 11754/2006 pursuant to a stipulation “so-ordered” on September 30, 2009, by Justice Timothy Flaherty.

Prior to the consolidation of the four actions, AA Drywall served an answer to the action commenced under Index No. 14134/2006, and interposed twelve affirmative defenses and two cross-claims against various codefendants, including BNB Plumbing. BNB Plumbing served an answer to the action commenced under Index No. 14134/2006, and interposed nine affirmative defenses, and a cross-claim against various co-defendants.

In an order dated October 6, 2009, Justice Flaherty granted plaintiff’s motion to restore the action to the calendar. Further, he directed that defendants be produced for depositions in the order of the caption of the consolidated action with the first deposition to occur on November 24, 2009, and continuing weekly with depositions on December 1, 2009, December 8, 2009, and December 15, 2009. Although BNB Plumbing appears near the end of those named in the caption, the parties did not adhere to the deposition schedule set forth in that order.

Plaintiff was deposed on November 17, 2009, but was unable to state with certainty whether BNB Plumbing performed work at the site prior to or on the day of his accident. Plaintiff testified that when he first started working at the job site, the plumbers were the other trades at the site, who he identified as “Atlantic and another, BNA or so, BNP” (T.29); that he was asked if the name BNB refreshed his recollection and he responded “BNB” (T.29); that there were other people working in the basement in the days prior to his accident and he thought they were from the plumbing contractor; that when asked if he knew which plumbing contractor, he responded “Not exactly but Atlantic. There was another. Don’t recall.” (T.46); that days prior to the accident he saw a van with Atlantic’s name on it at the site (T.105); and that he did not remember if he saw a vehicle from BNB Plumbing at the site before the accident, but that he saw it (T.100-111). He further stated that he only knew that Atlantic was at the job site from the advertisement on its van; that they [he] performed work at many houses and he had seen BNB Plumbing at other houses. Plaintiff stated that he saw a plumber in the area of the opening of the staircase leading to the basement, and that the plumber was from BNB Plumbing or Atlantic, but he was unable to say with certainty (T.127). He stated that no one from Atlantic or BNB Plumbing told him how to perform his work.

The stipulation dated March 16, 2010, “so-ordered” by Justice Flaherty directed that Rooska be deposed on April 14, 2010; that Atlantic be deposed on April 21, 2010; that BNB Plumbing be deposed on April 28, 2010 and AA Drywall be deposed on May 5, 2010. The parties, however, did not adhere to this deposition schedule either.

Robert Hlinko, President of Atlantic, was deposed on October 18, 2010, and testified that Atlantic entered into a contract with the builder, Custom Design Homes, to perform all the plumbing and heating work at the premises, including the basement; that Atlantic was at the job site for 11 non-consecutive days; that he did not know of BNB Plumbing; and did not see anyone from BNB Plumbing at the job site.

By order dated August 31, 2010, Justice Flaherty granted a motion by BNB Plumbing to reargue a portion of the order dated October 6, 2009, and upon reargument, the court denied BNB Plumbing's request for an order discontinuing the action against them. The court adhered to its prior determination that plaintiff had not, in a prior stipulation, agreed to discontinue the action against certain defendants, including BNB Plumbing, but had merely agreed to withdraw certain allegations made against BNB Plumbing in a prior motion for default judgment. Counsel for BNB Plumbing, in an affirmation submitted in support of the motion to reargue, stated that upon the issuance of the order dated October 6, 2009, he attempted to contact his client; that BNB Plumbing's telephone number had been disconnected; and that he had conducted an internet and telephone directory search, but was unable to locate BNB Plumbing's current telephone and address.

After the submission of the motion to reargue, BNB Plumbing's counsel located Brian J. Blatt, the president and sole shareholder of BNB Plumbing. Mr. Blatt, in the affidavit notarized on October 4, 2010, stated that BNB Plumbing was a domestic corporation which acted strictly as a plumbing subcontractor on construction projects; that it ceased doing business in March 2008; that BNB Plumbing never performed any work or services at 6 Kate Court, Southampton, New York; and that it was never approached about performing work and never entered into an agreement to perform work at the premises. Mr. Blatt further stated that BNB Plumbing had no knowledge of Mr. Riveros or the alleged accident until the commencement of this action.

On October 6, 2010, counsel for BNB Plumbing sent a copy of Mr. Blatt's affidavit to plaintiff's counsel, via facsimile, along with an explanatory letter and stipulation of discontinuance, requesting that said stipulation be executed. On October 19, 2010, following Mr. Hlinko's deposition, counsel for BNB Plumbing sent a second letter and stipulation of discontinuance to plaintiff's counsel, via facsimile, requesting that said stipulation be executed.

On February 1, 2011, the parties entered into a stipulation, whereby the plaintiff's motion to strike defendants' answer and Rooska's cross motion to compel were withdrawn and resolved, and provided, in pertinent part, that EBT's for "BNB Plumbing, to be held on March 21, 2011, at 10:00 a.m. location TBA." Said stipulation was filed with the court on April 12, 2011. The parties did not adhere to that schedule.

Upon review of the file, this court, in an order dated April 7, 2011, granted Atlantic's unopposed motion to dismiss the complaint, noting that plaintiff was granted six adjournments

to submit opposition papers between June 24, 2010 and February 8, 2011, and failed to do so.

On July 27, 2011, counsel for BNB Plumbing, via facsimile, informed plaintiff's counsel that Mr. Blatt was available for deposition on August 12, 2011, at 11:00 a.m. at defense counsel's office. Counsel for BNB Plumbing, in a letter to plaintiff's counsel dated August 10, 2011, sent via facsimile, stated that he had not received any response or confirmation of the deposition date, despite having left telephone messages on August 2, 2011, and August 9, 2011, requesting counsel to contact him. Counsel for BNB Plumbing, in his reply affidavit, states that plaintiff's counsel, thereafter, requested additional time in which to conduct discovery of some of the other defendants; that the attorney handling the matter for plaintiff left the law firm; and that on January 5, 2012, he had a discussion with the attorney currently handling plaintiff's case regarding the scheduling of BNB Plumbing's deposition.

In a so-ordered stipulation dated January 3, 2012, this court stated in pertinent part, that plaintiff's motion to strike defendants' answer and Rooska's cross motion to compel were "...withdrawn and resolved" and an EBT for defendant "BNB Plumbing to be held on 1/10/12 [sic]...failure to comply will result in a preclusion order and/or an order striking defendant's [sic] who fail to comply upon affidavit in support".

On January 6, 2012, counsel for BNB Plumbing sent plaintiff's counsel, via facsimile and two emails, a copy of Mr. Blatt's October 4, 2010 affidavit, relevant portions of Mr. Hlinko's deposition, and stipulation of discontinuance and requested once again that said stipulation be executed. Counsel for BNB Plumbing, in a letter dated January 9, 2012, sent via facsimile to plaintiff's counsel, stated that he received a call from counsel's office on January 9, 2012, confirming that AA Drywall would be deposed on January 10, 2012, and requested that he be contacted so that BNB Plumbing could comply with the order of January 3, 2012. BNB Plumbing was not deposed on January 10, 2012.

Contrary to the allegations of plaintiff's counsel, the so-ordered stipulation of January 3, 2012, was not self-executing, BNB Plumbing's answer has not been stricken nor has it been precluded from being offered into evidence at trial. The order of January 3, 2012, clearly contemplated that plaintiff must move by motion in order to obtain an order of preclusion and/or an order striking defendants' answer. Plaintiff has not so moved, and the court will not deem the affidavit submitted in opposition to the within motion to be an application for such order.

The court further finds that Mr. Blatt's October 4, 2010 affidavit is not "suspect" and plaintiff's counsel had been aware of, and in possession of the affidavit since 2010, and that copies of the affidavit were repeatedly furnished to plaintiff's counsel in 2011 and 2012. Furthermore, BNB Plumbing's counsel, in his reply affirmation and accompanying exhibits, has provided ample evidence of his efforts in April, May, June and July 2012, via facsimile, email, and telephone, to obtain a status update from plaintiff's counsel with respect to a representation made by plaintiff's counsel to discontinue the action against BNB Plumbing. BNB Plumbing's

counsel avers that plaintiff's counsel did not respond to these requests. There is no evidence that plaintiff's counsel scheduled a deposition of Mr. Blatt or moved for an order of preclusion.

Plaintiff's counsel has not established that Mr. Blatt purposely failed to appear for the court-ordered depositions. The court notes that counsel for the parties did not enter into a written agreement to waive the deposition of Mr. Blatt (*Carney v New York Tel. Co.*, 158 AD2d 443 [2d Dept 1990]). However, it is apparent that plaintiff's counsel, despite multiple orders directing a deposition, chartered his own course with respect to BNB Plumbing, and failed to depose Mr. Blatt when he was available for a deposition in August 2011 and in January 2012.

The evidence presented sufficiently established that BNB Plumbing did not perform any work at the subject premises and neither controlled nor supervised plaintiff's work. There is no evidence that BNB Plumbing was ever solicited to perform any work at the subject premises, or that it was engaged as a contractor or subcontractor, or actually performed any work at the subject premises. Rather, the evidence presented established that all of the plumbing work performed at the subject premises was performed by Atlantic. Plaintiff has not presented any evidence to the contrary. Since there is no evidence that BNB Plumbing was at the job site, plaintiff cannot establish liability for common-law negligence or for violations of Labor Law §§ 200, 240 and 241(6) (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Kelarakos v Massapequa Water District*, 38 AD3d 717 [2d Dept 2007]).

Accordingly, that branch of BNB Plumbing's motion, which seeks an order granting summary judgment and dismissing plaintiff's complaint, is granted.

That branch of BNB Plumbing's motion which seeks to dismiss AA Drywall's cross-claims is denied as moot, as the cross-claims asserted by BNB Plumbing against AA Drywall, and the cross-claims asserted by AA Drywall against BNB Plumbing were discontinued pursuant to a stipulation dated September 18, 2012.

That branch of BNB Plumbing's motion which seeks to dismiss all other cross-claims is granted, and the request for sanctions and attorney's fees, requested in the reply papers, is denied.

Dated: December 19, 2012

DARRELL L. GAVRIN, J.S.C.