

<b>Tower Ins. Co. of N.Y. v Noce Constr. Corp.</b>
2012 NY Slip Op 33525(U)
December 18, 2012
Supreme Court, New York County
Docket Number: 602802/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

TOWER INSURANCE COMPANY

INDEX NO. 602802/2008

-v-

MOTION DATE 12/10/12

NOCE CONSTRUCTION CORP.

MOTION SEQ. NO. 003

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by the defendant Barranco's Piping and Heating Inc. to renew is granted, and upon renewal, its motion for summary judgment dismissing complaint by the plaintiff Tower Insurance Company of New York, a/s/o Kevin McVeigh and Laura McVeigh, as against Barranco's Piping and Heating Inc., is granted; and it is further

ORDERED that the cross-motion by J.F.R. Construction and Joseph Rotunno for summary judgment is denied; and it is further

ORDERED that defendants Barranco's Piping and Heating Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 12/18/12

HON. CAROL EDMEAD, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
TOWER INSURANCE COMPANY OF NEW YORK,  
a/s/o KEVIN MCVEIGH and LAURA MCVEIGH,

Index No. 602802/08

Plaintiffs,

Motion Seq. 003

-against-

NOCE CONSTRUCTION CORP., J.F.R. CONSTRUCTION  
CORP., BARRANCO'S PIPING & HEATING INC.,  
and JOSEPH ROTUNNO,

Defendants.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies paid to Kevin McVeigh ("Mr. McVeigh") and Laura McVeigh ("Mrs. McVeigh") (collectively, "plaintiffs"), the subrogors of plaintiff Tower Insurance Company Of New York ("Tower"), defendant Barranco's Piping & Heating, Inc. ("Barranco") moves to renew its prior motion, and upon renewal, for summary judgment dismissing Tower's complaint as asserted against it. J.F.R. Construction ("JFR") and Joseph Rotunno ("Rotunno") cross move and join in Barranco's motion.

*Factual Background<sup>1</sup>*

Plaintiffs are the owners of a house located at 14 Ivan Court, Staten Island, New York (the "house") which was allegedly constructed by defendants Noce Construction Corp., ("Noce Construction"), J.F.R. Construction Corp., Barranco and Joseph Rotunno ("Rotunno") (collectively, "defendants"). It is alleged that defendants installed a steam shower in the master bathroom of the house on the third floor and ran the pipes through the attic.

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<sup>1</sup> The Factual Background is taken from the moving papers.

On February 19, 2007, a cold water pipe feed in the house froze and burst causing water damage therein in the amount of \$68,533.41. Plaintiffs allege that defendants were negligent for improperly placing the pipe in the unheated attic thereby exposing it to subfreezing outdoor temperatures.

After paying plaintiffs for the damages, Tower was subrogated to the plaintiffs' rights of recovery against defendants, and then commenced this action against defendants to recover the money paid to plaintiffs.

Barranco then moved for summary judgment, which was supported only with an affidavit of Vincent Barranco stating that Barranco did not perform the work which plaintiff alleges was negligently performed. By Decision and Order dated September 14, 2010, the Court held that

“Barranco failed to make a *prima facie* showing of entitlement to judgment as a matter of law. . . . Here, Barranco's partially executed proposal agreement, which shows that Barranco performed all the plumbing and heating work in plaintiffs' house, does not preclude the possibility of any additional plumbing work performed, including the work in connection with the steam shower and the pipe that burst. Furthermore, neither the proposal agreement, nor Barranco's affidavit, stating that he supervised the plumbing work performed at the plaintiff's residence, eliminate the issue of fact as to who installed the steam shower . . . Barranco's denial of the performance of any work on the steam shower, contradicted by Noce's allegation that Barranco[] entered into a side agreement with plaintiffs, creates an issue of fact as to whether a written or oral contract existed between Barranco and plaintiffs with respect to the steam shower. While Barranco's proposal to Noce shows the scope of the 'proposed' plumbing work to be performed in the areas other than the attic, it does not conclusively negate the allegation that Barranco undertook to install the steam shower pursuant to an additional agreement, from which Barranco's negligence, if any, may have arisen . . .

Here, Tower and Noce made a sufficient showing that facts essential to Barranco's alleged involvement in the work on the steam shower exist and are in Barranco's and/or plaintiffs' possession. The testimony of the parties or other witnesses and evidence, including invoices or receipts of payment for the work in question, may shed light as to the side agreement . . . .

Therefore, since an issue of fact exists as to the existence of a side

judgment is denied, at this juncture, without prejudice (Page 8).

Thereafter, the parties completed discovery as follows:

Mr. McVeigh testified that he purchased his home from Noce in late 2006. (Page 8) The master bathroom was designed to have a steam shower. (Page 15) At Noce's suggestion, plaintiffs purchased bathroom fixtures, including a steam generator (Page 22). Plaintiffs paid an initial deposit, and the balance due on the steam generator was paid by Noce Construction. Plaintiffs then "trued it up" at closing, as shown on reconciliation documents, indicating that plaintiffs were given a credit for the steam generator (Page 23). He understood that Barranco was hired to do the plumbing work on the job. He never saw any Barranco workers actually doing work at the site. (Page 16) Mr. McVeigh did not have any documents in writing to show who was actually going to install the steam shower. (Page 24) He did not see the steam shower installed, did not have any actual knowledge as to who installed the steam shower, and did not pay anyone to install the steam shower. (Pages 18, 24-25, 32) He also did not know who installed the pipe that ran through the attic which burst. (Page 31) Mr. McVeigh did not have any evidence that Barranco installed the steam shower. (Page 32) However, the steam shower "was in there" when plaintiffs closed on the house (Pages 32-33), and Mr. McVeigh was unaware of any other plumbers working at the site (Page 33). After the incident, Mr. McVeigh called Noce Construction, and Noce Construction had someone else repair the pipe (Pages 26-27).

Mrs. McVeigh testified that she never heard of Barranco until the case was started, never discussed the steam shower with Joseph Noce ("Mr. Noce"), and did not know where the pipes for the steam shower were to be installed (Pages 14, 20, 26). Although she discussed with Noce Construction's employee Keith Eagle that the steam shower would fit in the master bedroom, she

did not discuss with him who would install the steam shower. (Page 28) She also did not know who the contractor who installed the steam shower was. (Page 31)

Mr. Noce, vice president of Noce Construction, supervised the construction of the plaintiffs' house, which was designed by Calvanico and Associates. (Pages 10, 31) Mr. Noce did not have anyone install a steam shower. (Page 52) The contract between Noce Construction and Barranco did not call for the installation of a steam shower. (Page 52) Mr. Noce did not know how a steam shower got to be in the plaintiffs' residence, and it was possible that another plumber installed the steam shower (Page 53). Other contractors performed work on plaintiffs' home that Noce Construction did not engage, such as landscapers, kitchen installers, and a masonry contractor (Page 25). Mr. Noce assumed Barranco entered into a side agreement with the plaintiffs to install the subject shower because Barranco was the plumber he hired on the job. (Pages 50-51). Mr. Noce had no knowledge of the steam shower until he received the legal complaint at the end of 2008. (Page 84)

Vincent Barranco ("Mr. Barranco") testified that Noce Construction hired Barranco to do the interior plumbing and heating. (Page 6). Mr. Barranco denied installing the steam shower at the house. Mr. Barranco found out about the leak when he received a call and he sent a two-man crew to repair the leak. That was the first time he noticed there was a steam generator. (Page 7) Barranco was not aware of the steam shower until they were called to repair it in February 2007. (Page 17). Mr. Barranco never met with plaintiffs (Page 34) Mr. Barranco knew that additional plumbing work was performed at the house after Barranco completed its work. (Page 35) The attic insulation installed by the owner was not the same as the insulation which was around the pipes going to the steam shower which implied that it was installed at a later date. (Page 38)

The contract proposal between Barranco and Noce Contracting does not indicate the installation of a steam shower.

Barranco now argues that since all parties have been deposed, the Court should grant renewal. The above evidence shows that Barranco did not install the steam shower and the pipes connected thereto, and Tower cannot present any evidence showing that Barranco had any connections with the pipe that burst. Plaintiffs are also unable to show that Barranco was responsible for the installation of the steam shower. Noce Construction indicates that its work was not connected with the steam shower installation, and it was not a part of Barranco's contract with Noce to install the steam shower. Therefore, Tower's complaint against Barranco should be dismissed.

In response, JFR and Rotunno cross move to join in Barranco's motion for summary judgment. JFR and Rotunno argue that there is no evidence of who installed the steam shower, and no evidence that they installed the steam shower.

In opposition, Tower contends that after discussing the construction of the house with Noce Construction, plaintiffs chose fixtures for the bathroom, including a steam generator. Documentation of the billing and deposits made on such items are dated July 2005, indicating that the purchase of the steam generator was selected by plaintiffs over a year before the contract of sale for the house was signed. Mr. McVeigh testified that he agreed with Noce Construction that Noce Construction or one of its subcontractors would install the steam generator. Plaintiffs then closed on and finally purchased the home in January 2007.

The moving defendants failed to eliminate material issues of fact. Evidence that Mr. McVeigh entered into an agreement with Noce Construction for the installation of the steam

hower, Mr. Noce's affidavit that Barranco entered into a side agreement to install the steam shower, and the fact that Noce Construction and Barranco played a role in the repair and chose not to bill anyone for their services, raise issues of fact as to which of the defendants installed the steam shower.

Further, New York City requires a permit for the purpose of assuring that the work performed will be done by a competent, responsible plumber. The purpose of the permit is defeated if a plumber receiving such a permit is permitted to give the permit to another entity without any accountability. Although it is alleged that JFR and Rotunno did not do the work in question, the permit was granted to JFR and Rotunno. Thus, if a jury finds that Barranco negligently performed the plumbing work, Barranco, Rotunno and JFR would all be liable.

In reply, Barranco argues that Tower did not submit any affidavit from Mr. McVeigh in opposition to the previous motion, and that Mr. McVeigh's affidavit (stating that Noce Contracting and/or its subcontractors installed the steam shower), contradicts his earlier deposition testimony and the deposition of his wife (that they had no knowledge of who installed the steam shower). Further, Mr. McVeigh did a significant amount of work unconnected with his contract with Noce Construction, thereby contradicting his assertion that all the work was supervised by Noce Construction. Therefore, such affidavit should not be considered.

There is no evidence linking Barranco, a licensed plumber, to the steam shower. And, Mr. Noce's affidavit, wherein he states that Barranco may have had a side agreement with plaintiffs, is belied by his deposition where he admitted he had no knowledge of any side deal.

Joseph Rotunno's deposition is unnecessary, and he had no role in the actual construction of the home. Therefore, the absence of Rotunno's deposition is inconsequential. It is noted that



if the steam shower was installed outside the building plans and not in accordance with the law, Tower may disclaim coverage under the policy.

*Discussion*

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.”

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d 126, 133, 751 NYS2d 707 [Civil Court, New York City 2002]; D. Siegel *New York Practice* § 254 [3rd ed.1999]). A motion to renew, “is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention.” (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv. dismissed* 71 NY2d 994, 529 NYS2d 277, 524 NE2d 879.)”

Based on the discovery completed after this Court’s previous Decision was issued, renewal is warranted.

On a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material

issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]). Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

To establish a *prima facie* case of negligence, plaintiff must prove that the defendants owed her/him a duty of care, and breached that duty, and that the breach proximately caused her/ his injury (*Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Where a party to a contract fails to comply with the duty imposed by the terms of the contract, a breach results for which an action may be maintained to recover the damages sustained thereby (*Sourer v Federal Signal Corp.*, 79 NY2d 540 [1992], citing *North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171 [1968]; *Trans Carribean Airways, Inc. v Lockheed Aircraft Service International, Inc.*, 14 AD2d 749 [1<sup>st</sup> Dept 1961]). Thus, "a contract may create a duty, [ ], from which negligence may arise, but the negligence arises not because of a breach in the contract, but because of the failure to perform the contractual duty with due care" (*F. W. Woolworth v Southbridge Towers et al.*, 101 AD2d 434 [1<sup>st</sup> Dept 1984]; *Trans Carribean Airways, Inc. v Lockheed Aircraft Service International, Inc.*, 14 AD2d 749 [1<sup>st</sup> Dept 1961]).

Upon renewal, the Court finds that Barranco made a *prima facie* showing of entitlement to judgment as a matter of law.

Here, the deposition testimony of plaintiffs, Barranco, and Noce Construction indicate that Barranco played no role in the installation and/or construction of the steam shower and piping related thereto that gave rise to the damages sought herein. The record does not establish that Barranco performed "all" of plumbing work in plaintiffs' house. The court finds that Barranco's denial of the performance of any work on the steam shower and denial of any side agreement, is supported by the deposition testimonies of the parties, thus far.

And, Noce's speculation that Barranco entered into a side agreement with plaintiffs is inadequate. Barranco's proposal to Noce shows the scope of the "proposed" plumbing work to be performed in the areas other than the attic. Noce's attestation otherwise is based upon "upon information and belief," and insufficient, especially in light of Mr. Noce's deposition testimony that he merely "assumed" Barranco performed the work in question and never saw Barranco performed such work, and in light of Mr. McVeigh's testimony that he did not enter into any side agreement with Barranco. Therefore, upon renewal and based on the newly submitted deposition testimonies, summary judgment dismissing the complaint against Barranco is warranted.

However, JFR and Rotunno failed to make a *prima facie* showing of entitlement to judgment as a matter of law. It is well-settled rule that summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*see Rak v Country Fiar, Inc.*, 38 AD3d 1240, 831 NYS2d 794 [4<sup>th</sup> Dept 2007][denying summary judgment because the defendant failed to establish as a matter of law that it did not perform the work with respect to the condition which allegedly caused plaintiff's injury]). JFR and Rotunno failed to point to anything in the record establishing that they did not perform the plumbing work at issue. The record indicates that they took out a permit from the New York City Department of Buildings to perform

plumbing work, and the deposition testimonies submitted thus do not address JFR and Rotunno's role during the construction of plaintiffs' house. Therefore, since an issue of fact exists as to JFR and Rotunno's liability, the cross-motion for summary judgment is denied.

*Conclusion*

Accordingly, it is hereby

ORDERED that the motion by the defendant Barranco's Piping and Heating Inc. to renew is granted, and upon renewal, its motion for summary judgment dismissing complaint by the plaintiff Tower Insurance Company of New York, a/s/o Kevin McVeigh and Laura McVeigh, as against Barranco's Piping and Heating Inc., is granted; and it is further

ORDERED that the cross-motion by J.F.R. Construction and Joseph Rotunno for summary judgment is denied; and it is further

ORDERED that defendants Barranco's Piping and Heating Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 18, 2012



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**