Gambino v Merone

2013 NY Slip Op 31933(U)

August 9, 2013

Sup Ct, Richmond County

Docket Number: 101275/11

Judge: Joseph J. Maltese

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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

ANGELO GAMBINO and EPIFANIA GAMBINO,

Plaintiffs,

against

CHRISTOPHER MERONE, DOROTHY MERONE, and JOHN KLING CUSTOM HOMES OF NY, INC.,

Defendants,

Calendar Nos.: 514-003, 998-004, 1204-005, 1342-006

Index No.: 101275/11

DECISION
HON. JOSEPH J. MALTESE

CHRISTOPHER MERONE and DOROTHY MERONE,

Third-Party Plaintiffs,

against

JOHN KLING CUSTOM HOMES OF NY, INC.,

Third-Party Defendants,

Index No.: A101275/11

CHRISTOPHER MERONE and DOROTHY MERONE,

Second Third-Party Plaintiffs,

against

JAMES J. MANGONE CONSTRUCTION, INC., JAMES J. MANGONE, JAMES J. MANGONE d/b/a JAMES J. MAGONE CONSTRUCTION and MANGONE DEVELOPERS, INC.,

Second Third-Party Defendants,

Index No.: B101275/11

JOHN KLING CUSTOM HOMES s/h/a JOHN KLING CUSTOM HOMES OF NY INC.,

Third Third-Party Plaintiffs,

Index No.: C101275/11

against

JAMES J. MANGONE, JAMES J. MANGONE d/b/a JAMES J. MANGONE CONSTRUCTION, JAMES J. MANGONE CONSTRUCTION, INC. and MANGONE DEVELOPERS, INC.,

Third Third-Party Defendants

The following papers numbered 1 to 16 were fully submitted on the 21st of June, 2013:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant/Third-Party Defendant/Third Third-Party Plaintiff John Kling Custom Homes s/h/a John Kling Custom Homes of NY Inc, with Supporting Papers and Exhibits (dated February 5, 2013)	1
Notice of Cross Motion for Summary Judgment and Indemnification by Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Christopher Merone and Dorothy Merone, with Supporting Papers and Exhibits (dated March 20, 2013)	2
Notice of Cross Motion for Summary Judgment by Second Third-Party Defendants/Third Third-Party Defendants James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction, James J. Mangone Construction Inc., and Mangone Developers, Inc., with Supporting Papers and Exhibits (dated March 28, 2013)	3
Notice of Cross Motion for Summary Judgment by Plaintiffs Angelo Gambino and Epifania Gambino, with Supporting Papers and Exhibits (dated April 16, 2013)	4
Affirmation in Opposition to Motion by Plaintiffs Angelo Gambino and Epifania Gambino, with Supporting Papers and Exhibits (dated May 3, 2013)	5

Affirmation in Opposition to Cross Motion
by Plaintiffs Angelo Gambino and Epifania Gambino,
with Supporting Papers and Exhibits
(dated May 3, 2013)______ 6

Affirmation in Opposition to Cross Motion
by Plaintiffs Angelo Gambino and Epifania Gambino
(dated May 3, 2013)______ 7

Affirmation in Response to (Defendant Merones') Motion for Rule 3212 Relief
by Second Third-Party Defendants/Third Third-Party Defendants
James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction,
James J. Mangone Construction Inc., and Mangone Developers, Inc.,
with Supporting Papers and Exhibits
(dated May 3, 2013)______ 8

Affirmation in Opposition to Plaintiffs' Cross Motion
by Defendant/Third-Party Defendant/Third Third-Party Plaintiff
John Kling Custom Homes s/h/a John Kling Custom Homes of NY Inc,
with Supporting Papers and Exhibits
(dated May 3, 2013)______ 9

Affirmation in Opposition to (Defendant Merones') Cross Motion
by Defendant/Third-Party Defendant/Third Third-Party Plaintiff
John Kling Custom Homes s/h/a John Kling Custom Homes of NY Inc,
with Supporting Papers and Exhibits
(dated May 3, 2013)______ 10

Affirmation in Opposition to (Second/Third Third Party Defendant's) Cross Motion
by Defendant/Third-Party Defendant/Third Third-Party Plaintiff
John Kling Custom Homes s/h/a John Kling Custom Homes of NY Inc,
with Supporting Papers and Exhibits
(dated May 3, 2013)______ 11

Affirmation in Reply to Plaintiff's Affirmation in Opposition to Cross Motion
by Second Third-Party Defendants/Third Third-Party Defendants
James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction,
James J. Mangone Construction Inc., and Mangone Developers, Inc.,
with Supporting Papers and Exhibits
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by Second Third-Party Defendants/Third Third-Party Defendants
James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction,
James J. Mangone Construction Inc., and Mangone Developers, Inc.,
with Supporting Papers and Exhibits
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Reply Affirmation
by Defendant/Third-Party Defendant/Third Third-Party Plaintiff
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by Plaintiffs Angelo Gambino and Epifania Gambino
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Reply Affirmation
by Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs
Christopher Merone and Dorothy Merone
(dated June 7, 2013) 16

Upon the foregoing papers, the motion and cross motions are decided as follows.

This action was commenced by plaintiffs, Angelo and Epifania Gambino, for the recovery of property damage to their home located at 90 St. James Place, Staten Island, New York. Plaintiffs allege, inter alia, that the damage in question was caused by the breakage of a sewage pipe during the construction of a home on the adjacent property owned by defendants Christopher Merone and Dorothy Merone, which is located at 252 Benedict Road on Staten Island. According to the Complaint, the contractor, defendant John Kling Custom Homes s/h/a John Kling Custom Homes of NY Inc (hereinafter "Kling"), negligently "cut and capped" a sewer line running through the Merone property in order to complete the construction of their house (*see* Second Amended Verified Complaint, para 8). It is further alleged that the broken sewer pipe began sending raw sewage into plaintiffs' basement and causing property damage in October of 2008, and that there "was three (3) months of raw sewage backup into Plaintiffs' house before a plumber could finish installing a new sewer line to service the Plaintiffs' home" (id. at 12).

Insofar as it appears, plaintiffs' property and those of three of their neighbors shared a private sewer line that ran under the Merone property before connecting to the City sewer line.

Named with their contractor as party defendants, the Merones subsequently commenced separate third-party actions for indemnification against (1) the general contractor, co-defendant Kling, and (2) a subcontractor, James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction, James J. Mangone Construction Inc., and Mangone Developers, Inc. (collectively, hereinafter "Mangone"), allegedly hired by Kling. Kling thereafter commenced a third third-party action against Mangone for contribution and indemnification.

At his deposition, plaintiff Angelo Gambino (hereinafter "plaintiff") testified that he purchased his home in 2000, and that he was not aware that his sewer line encroached upon the Merones' property prior to the events in question (*see* EBT of Angelo Gambino, pp 6-9). When the sewer back-up first occurred, plaintiff contacted a plumber, who was unable to resolve the problem (id. at 12, 18-20). Thereafter, plaintiff made several attempts to speak with Merone, but was advised by site-workers that the owners of the property were not present (id. at 22, 26-27, 34). During his second attempt to speak Merone, plaintiff was standing at the edge of the construction area when he purportedly saw that "[s]ewerage was coming up from over there, too" (id. at 35), confirming his impression that the sewerage coming into his basement was coming from the Merone property (id.). He was subsequently made aware by his neighbor, Frank Raccuglia, that he, too, was experiencing plumbing problems (id. at 24-25), but it was only after meeting with his neighbors that plaintiff became aware that his and the three other houses were connected to the same sewer line (id. at 36). It was not until Christmas-time that plaintiff was finally able to meet with, e.g., Merone and "the contractor" (id.). According to plaintiff, the sewer line was not replaced until February or March of 2009 (id. at 42).

Defendant Christopher Merone testified at his deposition that he purchased the vacant property in 2007, and that he contracted with Kling to build the house in August of that year (*see* EBT of Christopher Merone, pp 6-8). The witness denied having any involvement in the building process and purportedly left all of the decision-making to Kling (id. at 12, 50). It was Kling which was said to have hired the architect, pulled the required permits and hired the "foundation guy, the sewer guy... electrician, [and] the plumber" (id. at 10, 24, 50). Merone further testified that even after he was made aware of the break in the sewer line, he left it to Kling to address the situation (id. at 16, 18, 48). Purportedly, it was during the winter of 2008, that plaintiffs showed Merone the damage in their basement and he, in turn, informed his contractor of the issue (id. at 18-21). Upon his review of the surveys when he first bought the property, there was no indication of any sewer line running through it (id. at 29, 33). However, these surveys were apparently prepared in 1962 and 2002. According to the witness, had he known that a sewer line running down the middle of his property would have prevented him from building a house, he would never have purchased the lot (id. at 51-52).

John Kling, the president and owner of defendant Kling, testified on its behalf that it was hired by Merone to build a house on the vacant piece of property in 2007 (*see* January 24, 2012 EBT of John Kling, pp 6-7). Kling "got all the permits" and building department approvals; hired the architect; and hired a surveyor, who "put stakes on [the] property" (id. at 6-7, 11). Kling also

subcontracted with Mangone to perform all the excavation necessary to install the foundation (id. at 12). At the time of the "break", there were allegedly no other subcontractors working at the site, and the only machinery present belonged to Mangone (id. at 13-15). It was allegedly during the digging process that an unidentified pipe was discovered about 10 feet from the foundation boundary (id. at 17). Kling stated that he "had no idea what the pipe was" and "thought the pipe was... [from] an old building on [the] property." He further stated that "when we excavated the property, we backfilled whatever pipe that was broken... We [just] backfilled it" (id. at 18). By "we", the witness was referring to himself and "James Mangone" (id. at 21). It was not until plaintiff complained about the sewage back-up that Kling realized that the unidentified pipe ran to the Gambinos' residence (id. at 23-24, 36, 40). When construction first began, Kling purportedly reviewed the surveys with Merone and noted that there were "no lines or nothing showing on the property" (id. at 49). Moreover, he maintained that if a pipe is not located on the survey, there are no measures taken to ascertain its purpose (id. at 33-34). Nevertheless, he claimed that prior to digging, "One Call" was contacted by Mangone.[1] "One Call" is the City agency which "comes out and sprays orange marks everywhere to know where pipes are, where things are... anything that is underground [and] going through the property" (id. at 34-35). According to the witness, it was only after discussing the matter with plaintiff that he learned that a few of the neighboring houses were sharing a sewer pipe that passed under the Merone property before connecting into the main sewer line (id. at 26). It was Kling's understanding that Merone subsequently granted an easement allowing these neighbors, including plaintiffs, to hire a sewer contractor who "re-ran [the] pipe" (id. at 30, 43).

James Mangone testified at his deposition that he was first contacted by Kling to do work at the Merone property in August of 2007 (*see* EBT of James Mangone, p 37). In preparation for the excavation work, he reviewed the architectural drawings and visited the site (id. at 45). According to the witness, surveyors "would come out... and do a foundation stake out where they would put stakes on every corner of the [intended] building" (id. at 46). He allegedly began excavating on August 27, 2007, and completed the job on September 14, 2007 (id. at 48, 57). During the course of the excavation, Mangone (1) denied ever coming into contact with anything other than simple dirt (id. at 54, 90, 94) and (2) claimed that he was never contacted by anyone regarding claims of a broken pipe (id. at 66, 71, 101). According to Mangone, "if you are excavating new construction, there's nothing on the site. Even if there was a demo there, all the utilities are cut ahead of time. Water,

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[1] However, at his November 28, 2012 deposition, Kling testified that it was his responsibility to contact One Call prior to constructing new houses. He did not recall who actually contacted One Call in this instance, but claimed that he did not ask Mangone to do so (*see* November 28, 2012 EBT of John Kling, pp 86-88).

sewer, gas, [are] cut in the street. So when you are coming on to a vacant piece of property, there's no One Call, there's no markings. It's just survey stakes and you excavate" (id. at 73). When asked if he ever had any discussions with the Merones, the witness stated that they only exchanged "hello and goodbye" (id. at 83).

Non-party witness Frank Raccuglia testified that he was one of the neighbors who shared the sewer line with plaintiff, and that he experienced a sewage back-up at approximately the same time as plaintiffs (*see* EBT of Frank Raccuglia, p 17). He further testified that at some point he confronted Merone and showed him the "hole expos[ing]... the sewer line" that had been capped (id. at 26). According to the witness, a sewer builder by the name of Andy Grecco had cut and capped the line in question (id. at 26-27), and he believed that Grecco had been hired by Kling (id. at 45). Prior to the commencement of construction on the Merone property, the witness denied ever experiencing a sewage back-up (id. at 89-90).

Following the subject incident, five of the neighbors, including plaintiffs and the Merones entered into an Easement Indenture dated May 5, 2010 (*see* Klings' Exhibit "F"). The Indenture stated that the property of each "and a predecessor in title to the property of Merone were serviced by an unmapped private sanitary sewer line which extended through... to connect to the sanitary sewer line in Benedict Road, hereinafter called [the] Old Sewer Line", and acknowledged that the latter had been "disrupted by construction on Merone's property" (id.). To the extent relevant, the Easement Indenture also provided for the relocation of the "Old Sewer Line" through the property of a nonparty neighbor (id.). Plaintiffs maintain that after the new sewer line was connected to the City's main line, the sewage back-up in their basement ceased (*see* Affidavit of Angelo Gambino, para 29).

In moving for summary judgment, Kling argues that it is blameless for plaintiffs' loss since, inter alia, the surveys concerning the subject property did not reveal the presence of a sewer line at or near the construction site. Alternatively, Kling seeks common-law indemnification and/or contribution from Mangone, the party claimed to have broken the pipe. In a similar vein, Mangone has cross-moved for summary judgment dismissing the claims for indemnification on the ground that the work which it performed was completed in September of 2007, i.e., well prior to the subject incident (*see* Mangone's Exhibit "B"). Moreover, it is alleged that there was no privity of contract between itself and either Kling or Merone.

For their part, the Merones are cross moving for summary judgment and dismissal of the complaint against them on the grounds that they had no prior knowledge of the private sewer pipe, and that they did not supervise, direct or control the work being done on their property by either Kling or Mangone. Alternatively, the Merones seek contractual indemnification from Kling, and/or common-law indemnification from both Kling and Mangone, including the costs of attorney's fees. In support of their contractual claims, the Merones rely on their contract with Kling, which calls for the latter to "personally supervise and direct the construction and erection of the house" (*see* Merones' Exhibit "E", para 1), and further provides that Kling will "save, hold and keep harmless and indemnify the Owners from and for all claims and liability for the losses to persons or to any adjacent lands and property which may have been caused by the Contractor or Contractor's workmen, agents, employees, invitees, or licensees" (id. at para 10).

The familiar elements of a cause of action for negligence are (1) the existence of a duty of care owed to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach proximately caused plaintiff's injury (*see Mitchell v. Icolari*, __AD3d__, 2013 NY Slip Op 5192 [2nd Dept]). Where realty is concerned, liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or a special use (id.). Accordingly, where none of these factors is present, a party will not be held liable for injuries caused by an allegedly defective condition (id.). Moreover, liability will not be imposed upon a landowner or a lessee who neither creates a defective condition on the property, or lacks actual or constructive notice of an alleged hazardous condition (*see Johnson v. City of New York*, 102 AD3d 746, 748 [2nd Dept 2013]).

Here, the Merone defendants demonstrated their prima facie entitlement to a judgment of dismissal as a matter of law by presenting evidence that they did not create or have actual or constructive notice of the presence of the sewer pipe which broke and caused plaintiffs' damages (id. at 748; *see generally Silvercrest v. St. Christopher-Ottile*, 194 AD2d 720 [2nd Dept 1993]; *cf. Mougiannis v. Dermody*, 87 AD3d 993, 994 [2nd Dept 2011]). Neither did they own, occupy, control or make a special use of the sewer pipe in question.

In addition, it is well established that a property owner ordinarily will not be held responsible for the negligence of an independent contractor retained to work upon its property, unless the work in question is inherently dangerous, or the owner interferes with and assumes control over the work (*see Fernandez v. 707, Inc.*, 85 AD3d 539, 540 [1st Dept 2011]). The rationale for this principle is simply stated, i.e., someone who engages an independent contractor to perform a task which is not inherently dangerous retains no right to control the manner or means by which the work is

accomplished and thus, the risk of any loss caused thereby is more sensibly placed on the party making the decisions, i.e., the contractor (*see Calandrino v. Town of Babylon*, 95 AD3d 1054, 1055 [2nd Dept 2012]). The case at bar is a fitting example, as the Merones have demonstrated prima facie that they hired Kling to construct a home for them on a vacant lot and ceded all of the decision-making to the latter (id.; *see also Soussi v. Gobin*, 87 AD3d 580, 581 [2nd Dept 2011]). Clearly, the construction of a house on a vacant lot is not inherently dangerous, and there has been no proof sufficient to raise a triable issue as to any of the recognized exceptions to the independent contractor rule (*see Sanchez v. 1710 Broadway, Inc.,* 79 AD3d 845, 846-847 [2nd Dept 2010]; *Fernandez v. 707, Inc*., 85 AD3d at 540).

Turning to the opposing motions for summary judgment on plaintiffs' cause of action for common-law negligence against defendant Kling, it has generally been held that the breach of the obligation to exercise due care in the performance of a contract is not sufficient in and of itself to impose tort liability upon the promisor to noncontracting parties (*see Johnson v. City of New York*, 102 AD3d at 748). Nevertheless, a party who enters into a contract for the rendition of services may be deemed to have assumed both a duty of care and potential liability in tort to third persons if its failure to exercise reasonable care in the performance of said contract launches an instrument of harm or creates or exacerbates a hazardous condition (id. at 748-749). Here, although Kling has demonstrated prima facie that plaintiff was not a party to its contract with the Merones, the Court opines that plaintiffs have presented sufficient evidence to raise a triable issue of fact as to whether Kling negligently failed to take sufficient precautions to detect the presence of, e.g., underground conduits on the Merone property, and/or whether once detected, acted reasonably to ascertain their purpose before severing and capping same, thereby creating the alleged hazardous condition which was a proximate cause of plaintiffs' damage (id. at 749; *cf. Gurmendi v. Perry St Dev Corp,* 93 AD3d 635, 638 [2nd Dept 2012]). Accordingly, neither is entitled to summary judgment.

Finally, the cross motions for summary judgment (1) by Kling on its cause of action for common-law indemnification and/or contribution against Mangone and (2) by Mangone for dismissal of the third third-party complaint must be denied, as questions of fact plainly exist as to whether, e.g., either or both caused or contributed to plaintiffs' property damage (*cf. 492 Kings Realty, LLC v. 506 Kings, LLC*, 105 AD3d 991, 994-995 [2nd Dept 2013]; *Aragundi v. Tishman Realty & Constr Co, Inc.*, 68 AD3d 1027, 1029-1030 [2nd Dept 2009]). To be entitled to common-law indemnification, a movant is required to show that it was not negligent, and that negligence of the party from which indemnification is sought was a proximate cause of plaintiffs' damages, or in the alternative, that it is subject to vicarious liability for the negligence of those parties whose work it had the authority to

direct, supervise, and control (*see Kielty v. AJS Constr of LI, Inc*, 83 AD3d 1004, 1005 [2nd Dept 2011]). All of this has yet to be determined. Moreover, further issues of fact exist as to whether either of these entities failed to comply with various statutory obligations including the duty to contact the One-Call notification system prior to commencing excavation work (*see* General Business Law §764; 16 NYCRR subpart 753-3; *see generally Level 3 Communications, LLC v. Petrillo Contr, Inc*., 73 AD3d 865, 867 [2nd Dept 2010]).

In view of the dismissal of the complaint as against the Merone defendants, so much of their cross motions as are for summary judgment on their third-party and second third-party causes for indemnification have been rendered academic.

Accordingly, it is hereby:

ORDERED that the motion and cross motions for summary judgment by plaintiffs (Seq. No. 006), defendant/third third-party plaintiff John Kling Custom Homes s/h/a John Kling Custom Homes of NY, Inc (Seq. No. 003), and second/third third-party defendant James J. Mangone, James J. Mangone d/b/a James J. Mangone Construction, James J. Mangone Construction Inc., and Mangone Developers, Inc. (Seq. No. 005) are denied; and it is further

ORDERED that cross motion for summary judgment by defendant Christopher Merone and Dorothy Merone (Seq. No. 004) is granted and the complaint as against said defendants is severed and dismissed; and it is further

ORDERED that the actions shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

The remaining parties shall appear in DCM Part 3 for a status conference on **September 16, 2013 at 9:30 a.m.**

ENTER,

DATED: August 9, 2013

____
Joseph J. Maltese
Justice of the Supreme Court