

**Spano v AM Sutton, Architect, P.C.**

2018 NY Slip Op 30301(U)

February 14, 2018

Supreme Court, Suffolk County

Docket Number: 12-5308

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme Court

MOTION DATE 6-6-17  
SUBMIT DATE 2-1-18  
Mot. Seq. # 08 - MD

-----X  
MICHAEL SPANO and DONNA SPANO,

Plaintiffs,

-against-

AM SUTTON, ARCHITECT, P.C., ALFRED M. SUTTON, RA, ADVANCED CONSTRUCTION AND MANAGEMENT CORP., ROBERT MCGRATH, JR., LAURA MCGRATH, LONG ISLAND MILLWORK INC., GUANGA MASONRY, INC., MID ISLAND STEEL CORP., J.S. CONTRACTING, INC. and TRECOTT CONSTRUCTION, INC.,

Defendants.

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ADVANCED CONSTRUCTION AND MANAGEMENT CORP., ROBERT MCGRATH, JR., and LAURA MCGRATH,

Third Party Plaintiffs,

-against-

G. SLAUGHTER CONSTRUCTION, INC., NOVA CONCRETE CONTRACTORS, NORTH SHORE INSTALLATIONS, INC., DUNN ENGINEERING ASSOCIATES, P.C., MQ WINDOWS, KUHN BROTHERS CONSTRUCTION, R.W. ENGINEERS, RAYMOND KLINKER & SONS, NASSAU/SUFFOLK LANDSCAPING, NDC GUTTERS, INC., DIRECT STONE, NORTH SHORE WINDOWS AND DOORS, POLFOAM, LLC, JANCO CONSTRUCTION GROUP, and HI-TECH IRRIGATION, INC.,

Third Party Defendants.

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Upon the following papers numbered 1 to 52 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 24 - 30, 31 - 42, & 43 - 46; Replying Affidavits and supporting papers 47 - 52; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

In this third-party action for indemnification third party defendant, Hi-Tech Irrigation, Inc., hereinafter referred to as “Hi-Tech”, moves for an order pursuant to CPLR 3212 granting summary judgment in favor of Hi-Tech and dismissing the third-party complaint and all cross claims against it. Defendant/third-party plaintiff, Advanced Construction and Management Corp., hereinafter referred to as “Advanced”, opposed this application in all respects. Third-party defendants, G. Slaughter Construction, Inc., and Long Island Mill Work, separately filed opposition to this application.

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1<sup>st</sup> Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2<sup>nd</sup> Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

The 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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *aff'd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Plaintiffs are the owners of property designated as 90 Garner Lane in Bay Shore, New York, hereinafter referred to as "the subject premises". In approximately April of 2005, the plaintiffs hired Advanced to act as construction manager and general manager for a renovation project at the subject premises. Plaintiffs and Advanced entered into a Construction Management Agreement. Ultimately the renovation project evolved into the design and construction of a 14,000 square foot custom home.

Plaintiffs in this action seek money damages. Plaintiffs commenced this action by filing a summons and verified complaint on March 1, 2012. Issue was joined by defendant/third party plaintiff Advanced serving an answer on April 13, 2012. Thereafter, Advanced filed a third-party summons and verified complaint on December 5, 2013, seeking contribution and indemnification. Third-party defendant Hi-Tech filed its answer on March 10, 2014. Thereafter third-party defendant Hi-Tech filed an Amended Answer with Affirmative Defenses, Counterclaims and Cross-Claims on December 29, 2015.

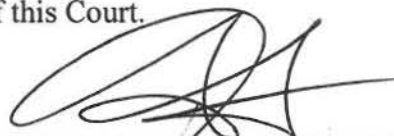
Hi-Tech claims that its only work on the subject premises was the installation of a lawn sprinkler system. Hi-Tech claims that "No party asserts that Hi-Tech's work was defective, or that it contributed to or caused any of the alleged damage at the Premises." Hi-Tech further claims that the plaintiffs have not asserted any claims related to the sprinkler system and therefore there can be no action for contribution or indemnification against it. Hi-Tech does not dispute the fact that it completed phase 2 and phase 3 at the same time, prior to the scheduled completion date.

In opposition multiple parties argue that Hi-Tech caused the plaintiffs to incur additional expenses because of its early installation of phase 3. Advanced argues that by Hi-Tech combining phase 2 and phase 3 of the contract, it causing phase 3 to be completed prematurely and for the sprinkler system to be damaged by other contractors who were still completing their work in those zones. Advanced, and the other third-party defendants, rely upon the deposition testimony of Michael Spano wherein he states that "I know one of the big problems was that it was suppose to be done in phases", "all the phases were implemented and all the sprinkler system was installed, which subsequently I had to replace the sprinkler system because it all got damaged by trucks", "Hi-Tech came back a few times... and every time they repaired something, maybe not every time, but I would get a bill for the repair" and that he knew that Hi-Tech and Advanced had a separate lawsuit related to this construction. Multiple parties argue that there are issues of fact as to the financial damages caused by Hi-Tech to the plaintiff due to its premature completion of phase 3 of the installation contract.

Based upon a review of the motion papers the Court concludes that third party defendant Hi-Tech has failed to establish entitlement to judgment as a matter of law. There are material and triable issues of fact presented as to whether the premature completion of phase 3 caused financial damages to the plaintiff for which Advanced is seeking contribution and/or indemnification. Thus the motion for summary judgment must be denied.

The foregoing constitutes the decision and Order of this Court.

Dated: February 14, 2018



HON. JOSEPH A. SANTORELLI  
J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION

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