

**Smith v Ambrosio**

2020 NY Slip Op 33365(U)

October 13, 2020

Supreme Court, Kings County

Docket Number: 509692/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9

X

IRIS SMITH,

Plaintiff,

-against-

DECISION/ORDER

Index No. 509692/16

Motion Seq. No. 22

Date Submitted: 9/24/2020

GIANNINO AMBROSIO, CYNTHIA AMBROSIO, LITTLE  
J'S TRUCKING, LTD., LITTLE J'S ENTERPRISES, INC.,  
APARO'S LITTLE JOHN, INC., THE HART GRP CON  
LLC, ZUCARO HOUSE LIFTERS INC. and JOHN  
McADAM,

Defendants.

X

THE HART GRP CON LLC,

Third-Party Plaintiff,

-against-

JOHN McADAM,

Third-Party Defendant.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of third party  
defendant's motion for summary judgment dismissing the third party complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmations and Exhibits Annexed.....	<u>346-357</u>
Affirmation in Opposition.....	<u>358-362</u>
Reply Affirmation.....	<u>366</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is a personal injury action arising out of a trip and fall accident on a sidewalk in front of 2522 Sycamore Avenue, Wantagh, in Nassau County. The sidewalk was in front of a house owned by the Ambrosio defendants which was being renovated to repair damage

caused by Superstorm Sandy. Plaintiff claims she was caused to fall by defects in the sidewalk caused/created by the construction work.

The contract between defendant The Hart Grp Con LLC (hereafter "Hart") and the homeowner is at E-File Doc 360. In sum, the contract with the homeowner required Hart, as general contractor, to lift up the house, demolish the foundation, build a new foundation, and put the house back on top of the new foundation. Then, all the utilities needed to be reconnected, some siding replaced, a new porch installed, and so on. Plaintiff claims that at least one of the subcontractors had to have used a vehicle which traversed the sidewalk to reach the house and/or the foundation, to lift the house or to replace it, or to remove the old foundation or pour cement for the new one. Plaintiff claims that one or more of these vehicles caused the sidewalk to become damaged and broken up, which caused her to trip and fall.

Defendant McAdam, a handyman/carpenter, was previously granted summary judgment (MS #11) dismissing the main action against him insofar as he made a prima facie showing that he performed carpentry work and did not do any work with heavy machinery and, thus, his work could not have damaged the sidewalk. No evidence was submitted that disputed the homeowner's testimony and McAdam's affidavit (E-File Doc 141) that he is a carpenter. In E-file Doc 139, at pages 80-81, Ms. Ambrosio testified that McAdam did the front steps, some siding installation, and work to the chimney, and that he did not use any heavy equipment or vehicles to do his work. However, as a result of his attorney's failure to mention the third-party plaintiff's claims against him in his motion papers, the court did not dismiss the third-party complaint against McAdam. The court also noted that while McAdam asked for the cross claims to be dismissed in his notice of motion, he made no mention of

this request for relief in the supporting papers. He did not mention the third-party complaint at all in the original motion (MS #11).

McAdam then moved to reargue the court's decision in MS #18. He contended that to the extent the court found that the plaintiff's claims did not arise from his work, the third-party claims as well as the cross claims against him in the main action should also have been dismissed, as the third-party claims and cross claims would have had to arise out of his work as well.

Third-party plaintiff opposed the motion to reargue, averring that the court properly found that McAdam failed to make a prima facie showing on the original motion as to the third-party claims, and that to the extent the third-party plaintiff is still in the case, its subcontractor McAdam should be as well. The court denied the motion to reargue because McAdam did not demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. The court concluded, in the order dated June 17, 2020, that "[r]eargument is not a vehicle for a party to correct a deficiency in his prior papers or to raise arguments not previously presented."

Third-party defendant McAdam now moves, in MS #22, for summary judgment dismissing third-party plaintiff's complaint/crossclaims, and the other defendants' cross claims, pursuant to CPLR 3212.

The court noted in the prior decision that "it is not too late for McAdam to move for summary judgment dismissing the third-party complaint. He has not previously moved for this relief. Further, there is an upcoming motion to strike the note of issue." The plaintiff's note of issue has in fact been stricken. The new deadline to file the note of issue is not until April of 2021.

The branch of the motion which seeks to dismiss all of the cross claims in the main action against McAdam is unopposed except by Hart, the defendant in the main action (as well as the third-party plaintiff, The Hart Grp Con LLC). Thus, that branch of the motion is granted, and all of the cross claims asserted by the defendants in the main action are dismissed.

Turning to the branch of the motion which seeks to dismiss the third party complaint as against McAdam, the court first must reiterate that the failure of his attorney to even mention, never mind discuss, the third party action in the prior motion (MS #11), after stating in the notice of motion that the motion sought to dismiss both the complaint and the third party complaint, was specifically mentioned by the court in the decisions issued for MS #11 and MS #18, and the court in both instances said that as long as there was no time bar, McAdam could make a motion to dismiss the third party action. This is not a prohibited successive summary judgment motion. A few words in a notice of motion is not a prior motion on the merits.

Movant supports his motion with an affirmation of counsel, the pleadings, and a copy of the contract between McAdam and Hart, along with several prior court orders. The court notes that there is no new affidavit from Mr. McAdam, and that none of the defendants other than the homeowners have yet been deposed, as stated in the affirmation of counsel at E-File Doc 327 in support of the motion to strike the note of issue, which was granted a few weeks ago. However, McAdam did provide an affidavit in connection with MS #11, which is in the court file and to which the court is permitted to refer.

The court finds that McAdam has made a prima facie case to dismiss the third-party complaint, which seeks common law and contractual indemnification. As stated in the

decision dismissing the plaintiff's claims against him, McAdam has established that he was a carpenter and did not do anything with equipment or machinery that could have damaged the sidewalk.

In opposition to the motion, Hart provides an affidavit from Mr. Hart, which annexes the contract with the homeowner and the contract with McAdam, as well as the pleadings, an attorney's affirmation, and prior court documents. The court finds that Hart raises a triable issue of fact which overcomes the motion to dismiss the third-party action against McAdam for indemnification.

The third-party complaint states, at paragraph 10, "wherein JOHN McADAM was a subcontractor retained to perform certain excavation, masonry and carpentry work and provided trucks, equipment and material at the premises in order to perform its scope of work."

Hart's contract with McAdam is provided at E-File Doc 357. It states that Hart would pay McAdam \$18,000 for the work he was to do, while the contract between Hart and the homeowner was for approximately \$100,000. The description of what work McAdam was to do, to analyze whether the indemnification clause applies here—that is, whether plaintiff's accident "arises from the performance of the subcontract Work"<sup>1</sup>—is summarized in the contract as: "The subcontract Work shall consist of the labor and materials of the highlighted

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<sup>1</sup> The indemnification clause provides, in Article 5, as follows:

"To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the contractor, Architect/Engineer, the owner and their agents, consultants and employees (the indemnities) from all claims for bodily injury and property damage that may arise from the performance of the subcontract Work, including reasonable attorneys' fees, Costs and expenses, to the extent caused by the acts or omissions of the subcontractor, the Subcontractor's sub-subcontractors, suppliers, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them maybe liable."

work In the attached ECR and Upgrades Page.” Following the contract is a document called Estimated Cost of Repair, and following that, a supplement (upgrade) to the contract the homeowner signed. However, nothing is highlighted, and the pages of the ECR include all of the items in the entire job. Thus, it is not possible to determine from this document whether McAdam was, in fact, contracted to do work which could have triggered the indemnification clause, thereby requiring McAdam to indemnify Hart, should Hart be found responsible for plaintiff’s accident. To be clear, the court must consider a motion for summary judgment “in the light most favorable to the non-moving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). Here, Hart brought the third-party action against McAdam in 2017 claiming that McAdam was its subcontractor and, as such, is required to indemnify Hart. From the third party complaint and the contract between Hart and McAdam it is not possible to determine whether the indemnity clause applies.

Accordingly, the branch of the motion by McAdam to dismiss the cross claims asserted against him in the main action is granted, and the branch of the motion to dismiss the third-party complaint against him is denied.

This constitutes the decision and order of the court.

Dated: October 13, 2020

ENTER:



Hon. Debra Silber, J.S.C.

HON. DEBRA SILBER  
JSC