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SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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INGRID METCALF,

Plaintiff,

-against-

HARRIET RUEHMAN, THE GARDEN CITY COMMUNITY CHURCH, BFI CONSTRUCTION CORP., ESSENTIAL ELECTRIC CORP., and ADJO CONTRACTING CORP.,

Defendants.

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TRIAL PART: 32

NASSAU COUNTY

INDEX NO: 1545/2003

MOTION DATE: 10-31-03
MOTION SEQ. NO: 005 + 004

The following papers having been read on this motion:

Notice of Motion, dated 9-22-03	1
Affirmation in Opposition, dated 10-23-03.............................	2
Reply Affirmation, dated 10-30-03..	3
Notice of Cross-Motion, dated 10-16-03	4
Affirmation, dated 11-5-03	5
Reply Affirmation, dated 11-12-03	6
Notice of Cross-Motion, dated 11-17-03	7

Motions and cross-motions have been made by several of the parties, for orders for summary judgment, pursuant to CRLR § 3212, dismissing the complaints against them. Stipulations of Settlement have been submitted, discontinuing the actions against several of the defendants. The plaintiff, Ingrid Metcalf, (hereinafter "Metcalf") has discontinued her action against BFI Construction Corp., (hereinafter "BFI") and the Garden City Community Church, (hereinafter, "GCCC" or "church"). GCCC has entered into a stipulation of

settlement with and discontinued its actions and cross-claims against its co-defendant, BFI. Additionally, Metcalf has discontinued its action against co-defendant, ADJO Contracting Corp., (hereinafter "ADJO"). The only parties remaining in this action by the plaintiff are the defendants, Reuhman and Essential Electrical Corp., (hereinafter "EEC")

The sole motion still remaining to be decided is the cross-motion made by co-defendant, EEC, for an order granting it summary judgment, dismissing the plaintiff's complaint and all cross-claims against it on the ground that they lack merit as a matter of law and for a further order awarding it sanctions against the plaintiff and/or her attorney for bringing and continuing a frivolous action against it.

The action which forms the basis of the above motions arose from a motor vehicle accident which occurred on the evening of December 17, 2002, on the grounds of the GCCC.

It is alleged that the car driven by defendant, Ruehman hit the defendant on a walkway as she approached a side entrance to the church. At the time of the incident the church was undergoing renovations. BFI was hired by GCCC as the general contractor. BFI in turn, engaged several sub-contractors, including EEC, to perform the work required by the church. EEC was retained to perform the electrical work, both inside and outside the church.

On the date of the incident, the outside street lamps nearest to the site of the accident, the Whitehall Blvd. side, were not functioning. It is claimed in the plaintiff's opposition to EEC's motion for summary judgment that the non-functioning of those lights was a

proximate cause of Ruehman's vehicle striking the plaintiff. EEC denies that the inadequacy of the lighting conditions was a proximate cause of the accident. Additionally, EEC's motion claims that as a matter of law, it, as a subcontractor had no legal obligation to the plaintiff.

Summary judgment is considered to be a drastic remedy which should not be granted unless there is doubt as to the existence of a triable issue of fact (*Rotuba Extruders v. Ceppos*, 46 NY2d 223[1978]). A motion for summary judgment should not be granted unless it clearly appears that there are no material or arguable questions of fact, which would be properly presented to and resolved by the trier of fact. (*Glick v. Dolleck, Inc., v. Tri-Pac Export Corp.*, 22 NY2d 439 (1968). It is the burden of the moving party to demonstrate that no triable issues of fact exist by establishing, through the submission of proof in acceptable form, that the Court is warranted, as a matter of law, to direct judgment in its favor. (CPLR 3212 (b); *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v. NYU Medical Center*, 64 NY2d 851(1985). This burden can essentially be met only through the tender of evidentiary proof in admissible form (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979); *Spearmon v. T.S.S. Corp.*, 96 AD2d 552).

A party, in opposing a motion for summary judgment, must present proof of evidentiary facts showing the existence of a genuine issue. (*Alvarez v. Prospect Hospital, supra*; *Federal Deposit Insurance Corp., v. Hyer*, 66 AD2d 521). The party opposing the motion must not only rebut the movant's prima facie showing, but must also demonstrate the existence of a triable issue of ultimate fact, by presenting proof in evidentiary form

(*Bethlehem Steel Corp., v. Solow*, 51 NY2d 870; *Gibbons v. Hantman*, 58 AD2d 108).

The Court's ultimate function on a motion for summary judgment is issue finding, not issue determination (*Sillman v. 20th Century Fox Film Corp.*, 3 NY2d 395). It is the existence of an issue, not its relative strength that is the critical and controlling consideration (*Barrett v. Jacobs*, 255 NY 520; *Cross v. Cross*, 112 AD2d 62).

In considering a motion for summary judgment, the court is obligated to accept as true the opposing party's evidence, as well as, any evidence of the moving party that favors the opposition (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept., 1964]). If the affidavits submitted by the opposition are straight-forward and direct, any conflicts between them and the proof submitted by the movant, regarding a material issue, will require that the motion be denied. (See, CPLR Practice Commentaries C3212:17)

EEC has met its initial burden. Metcalf is now obligated to establish, as outlined above, that there do exist material issues of fact which would require that EEC's motion be denied. Initially, it must be noted that Metcalf's opposition papers were submitted in the form of an attorney's affidavit. Generally, an attorney's affidavit, unless the attorney happens to have personal knowledge of the facts, has no probative value (*Farragut Gardens No. 5 Inc. v Milrot*, 23 Ad2d 889 [2nd Dept., 1965]). The plaintiff has not shown that its attorney had such personal knowledge.

Even disregarding the form of her opposition papers, Metcalf has failed to prove to the Court that material, triable issues of fact exist. Regarding the issue of proximate cause,

nowhere does the defendant Ruehman state that her ability to see Metcalf in the church walkway was affected by the surrounding lighting conditions. Ruehman, in her deposition testified that the lighting was sufficient for her to discern shapes and structures. Moreover, Metcalf, herself, testified that she "could see kind of okay"and that there were lights on inside the windows of the church adjacent to the entrance and that there was another light on in the vestibule, near the entrance steps. It must be concluded, therefore, that the plaintiff, in opposing the motion for summary judgment, has produced no proof that lighting conditions contributed to Ruehman hitting the plaintiff with her car. Mere conclusory or unsubstantiated allegations or conjectures are insufficient to defeat a motion for summary judgment (*McGagee v Kennedy*, 48 NY2d 832 [1979]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

This same principle can be applied to the plaintiff's suggestion that EEC in some way damaged or severed the wiring serving the non-functioning lampposts. The plaintiff has failed to demonstrate that EEC was actually responsible for such damage, if any. The party opposing a motion for summary judgment must show by evidentiary facts that its defense is real and that it can be established at trial. (*Indig v Finkelstein*, 23 NY2d 728 [1968]; *Speller v Ryder Truck Rental, Inc.*, 47 AD2d 608 [1st Dept., 1975]). This clearly has not been accomplished.

Additionally, EEC's motion should be granted based upon the applicable law. Under New York decisional law, a contractual obligation, in and of itself, generally will not give

rise to tort liability in favor of a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]. Put in the context of the instant case, a subcontractor, with some specific exceptions, owes no legal duty to a plaintiff (*Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]). The exceptions wherein a party to a contract to render services may be held to have assumed a duty of care and may be liable to a third person are: (1) where a defendant who undertakes to render a service negligently creates or worsens a dangerous condition; (2) where the plaintiff has suffered injury based on reasonable reliance upon the defendant's continuing performance of a contractual obligation and (3) where the contracting party has totally displaced the other party's obligation to maintain the premises safely. (*Citations omitted*)

None of these exceptions are applicable here. The documentary evidence presented by the plaintiff included a contract in which BFI, the general contractor, engaged EEC solely to perform the electrical work for the church project. The evidence also contained bills sent by EEC for repair of circuits and underground lines for the outside lights of the GCCC. The last bill for work repairing the lights is dated December 5, 2002, the day immediately after a meeting between BFI and GCCC, during which it was indicated that the lights in question were not working. There is no proof of any further communication to EEC, until after the accident occurred. No evidence was submitted to show that the prior work had not been completed or that any party was dissatisfied with EEC's performance of that work. Furthermore, the deposition of Stanley Winnick on behalf of BFI indicated that concrete

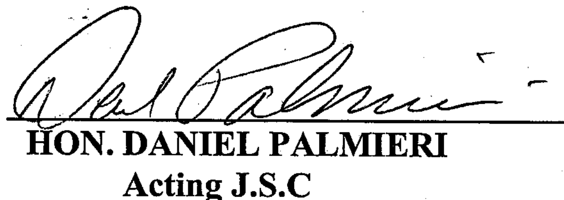
work being performed by a different subcontractor on the church project, may have subsequently severed the electrical lines, thereby causing the lights in the lampposts not to function. Mere speculation by the party opposing a motion for summary judgment, without any factual proof is insufficient to defeat such a motion.

Consequently, the Court must conclude that plaintiff has failed to rebut EEC's prima facie showing, and was unsuccessful in demonstrating the existence of triable issues of ultimate fact. Based on the above, the motion of co-defendant, EEC, for an order granting it summary judgment and dismissing the plaintiff's complaint and all cross-complaints against it is granted. The Court finds EEC's motion for sanctions against the plaintiff and/or her attorney is unwarranted and is therefore denied.

This constitutes the Decision and Order of this Court.

ENTER

DATED: February 11, 2004



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FEB 17 2004
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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