

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 4/15/03
ADJ. DATE 7/15/03
Mot. Seq. # 002 - MD

BUON ACCORD, LTD., Plaintiff, - against - FEMI-9 CONTRACTING CORP., Defendant.
GANNETT KALLMANN ANTIN & ROBINSON Attorneys for Plaintiff
MICHAEL F.X. MANNING LAW OFFICES Attorneys for Defendant

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers, Answering Affidavits and supporting papers 7-9; Replying Affidavits and supporting papers 10-16; Other 17 (plaintiff's memorandum of law); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#002) by the defendant for an order granting it summary judgment dismissing the plaintiff's complaint is denied.

This is an action to recover for property damages sustained by plaintiff, allegedly resulting from road work performed by defendant in the vicinity of plaintiff's restaurant, Ladikins, located at 714 Montauk Highway, Moriches, New York, on August 24, 1999. Plaintiff alleges that defendant was negligent in the performance of that road work. Specifically, plaintiff contends that the work, consisting of the removal of one-quarter of an inch of pavement from the roadway in front of Ladikins, resulted in the concentration of cement dust in the vicinity of the restaurant and concomitant necessity for an extensive interior and exterior cleaning. Further, plaintiff maintains that the severe pounding on the roadbed caused cracks to form in the roof of the restaurant, forcing costly remedial measures, and also cracks to the restaurant's chimney, which allegedly led to a fire at the premises in October 1999.

Defendant was awarded the contract for performing the work by the Suffolk County Department of Public Works, pursuant to a letting and subsequent bidding by defendant. The project called for the removal of 15,000 square yards of pavement on Montauk Highway in the vicinity of Barnes Road. This was a one-day project.

Defendant now moves for summary judgment on the ground that it was not negligent in any way

in the performance of the contract and was simply following the directives of the Suffolk County Department of Public Works. Defendant submits, *inter alia*, a copy of the pleadings and the deposition transcripts of Vincent Buoniello, the owner of the subject premises and Ladikins, and Susan Levy, the president of defendant company.

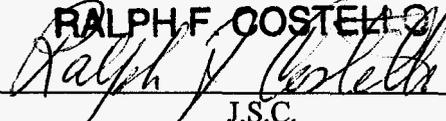
Plaintiff opposes the motion on the ground that there exist issues of fact as to whether defendant was negligent in the performance of the contract. Plaintiff submits, *inter alia*, a portion of the deposition testimony from one Mr. Laporte, a neighbor of the subject premises, and an affidavit from its expert, Mi-Vincent Ettari, P.E..

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment **as** a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied (*see, Romano v St. Vincent's Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1984]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (*see, Schulz v Esposito*, 210 AD2d 307, 619 NYS2d 774 [1994]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt **as** to the existence of a triable issue of fact, or where the material issue of fact is "arguable," summary judgment must be denied (*see, Salino v IPT Trucking*, 203 AD2d 352, 610 NYS2d 77 [1994]).

Defendant **has** failed to meet its initial burden. A builder or contractor is justified in relying upon the **plans** and specifications which he has contracted to follow unless they are *so* apparently defective that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury (*Gee v City of New York*, 758 NYS2d 157, 2003 App.Div. LEXIS 3983 [2003]; citing *Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 145 NE 321 [1924]). Here, defendant has failed to submit any evidence of the specifications or plans that were relied on for this project. Furthermore, the only testimony of alleged control over the project site was from Susan Levy, who was at the site for only a short time and only to have her picture taken as part of a newspaper story. She testified that a representative from the **Suffolk** County Department of Public **Works**, one Peter Raggone, was at the project site. However, there is no evidence that **Mr.** Raggone exercised any control over said site. He may have been there in only an advisory capacity. Inasmuch as Suffolk County has a duty to maintain its roadways in a reasonably safe condition for use by the traveling public, **Mr.** Raggone's presence at the site could have been attributed to this duty, or he could have been there to check up on defendant. Glaringly absent from the record before the court is any testimony from defendant's on-site supervisor, William Levy as to job specifications and instructions. In short, defendant has failed to submit sufficient evidence which would prove that it followed plans or specifications established by the Department of Public Works, which would tend to establish its freedom for negligence.

Accordingly, the defendant's motion for summary judgment, pursuant to CPLR 3212, is denied.

Dated: Aug 26, 2003

RALPH F. COSTELLO


J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION