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COMMITTEE ON OPINIONS**

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY**

CASE: Chelsea View Condo v Chelsea View Associates et al
DOCKET NO. ATL L 1224-15

**NATURE OF
APPLICATION:** DEFENDANT, METZ PAVING CONTRACTORS, LLC'S,
MOTION FOR SUMMARY JUDGMENT PURSUANT TO R.
4:46-2

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The complaint in this matter was filed on May 26, 2015. The discovery end date is February 28, 2017. There were two previous extensions of discovery in this matter for a total of 610 days of discovery. Currently neither arbitration nor trial is scheduled in this matter. Defendant, Metz Paving Contractors, LLC, now moves for summary judgment pursuant to R. 4:46-2 to dismiss any and all claims against it.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). “Substantial” means “[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real,” or, “having real existence, not imaginary[:] firmly based, a substantial argument.” Ibid., internal citations omitted. Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid., internal citations omitted.

Additionally, R. 4:46-5 provides, in pertinent part, that

when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:42-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the

affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must “engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Id. at 533. This weighing process “requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a ‘genuine’ issue of material fact.” Id. at 533-34. In short, the motion judge must determine “whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Id. at 540.

DEFENDANT, METZ PAVING CONTRACTORS, LLC’S, POSITION

Defendant, Metz Paving Contractors, LLC, now moves for summary judgment to dismiss any and all claims against it without prejudice pursuant to R. 4:46-2.

I. Statement of Undisputed Material Facts

The Complaint asserts claims of negligence against Metz Paving Contractor, LLC. See Exhibit A attached to Defendant's Brief. For instance, paragraph 13 identifies the Chelsea View Condominium Association's improvements to include "street driveways and parking areas" and paragraph 41 identifies Metz as having paved the roadways that were defectively done and caused damage to Plaintiff. See Exhibit A attached to Defendant's Brief.

Metz Paving Contractors, LLC only performed minor work on the site, which consisted of applying the topcoat and striping to one particular parking lot that was located adjacent to Phyllis Avenue. Yet, Metz Paving did not perform any prep work in the lot and simply applied the topcoat over a base coat of asphalt installed by another contractor. Metz Paving did not work on any driveways or streets in the development and did not do any work on Phyllis Avenue as alleged by Plaintiff. See Exhibit B attached to Defendant's Brief. Further, invoices indicate that the work done at Chelsea View on June 19, 2014; June 11, 2014; July 10, 2014; and June 29, 2014, were for parking lot work only. See Exhibit B attached to Defendant's Brief.

II. Defendant contends that it did not perform the work that is the subject matter of the Complaint.

Defendant maintains that the evidence is clear and unequivocal that Metz Paving did not perform the work on Phyllis Avenue as the certification of the principal of Metz Paving as well as the invoices show that Metz Paving performed work in the parking lot area only, yet Plaintiff's Complaint relates to the street work. Defendant submits that the street work is unrelated to the parking lot area.

Therefore, Defendant submits that Plaintiff has failed to assert claims in this matter that are related to the work performed by Metz Paving Contractors, LLC and summary judgment should be granted pursuant to R. 4:46-2 to dismiss the Complaint and any and all crossclaims without prejudice.

OPPOSITION

Plaintiff opposes Defendant's motion for summary judgment and contends that there are genuine issues of material fact as discovery is not yet completed. Specifically, Plaintiff maintains that there are issues as to whether Metz Paving performed work on Phyllis Avenue and whether Phyllis Avenue was included in the scope of work when Metz Paving contracted with the Developer. The contract between Metz Paving and the Developer entered into after the estimates and invoices leads to an inference that there was additional work required as of July 15, 2014.

Moreover, Defendant purports that discovery is ongoing and therefore Defendant's motion is premature as further discovery will supply the facts regarding the dates that Metz Paving was on the construction site as well as their scope of work and whether they did any work on Phyllis Avenue.

Therefore, Plaintiff requests that this Court deny Defendant's motion for summary judgment as there are genuine issues of material fact and discovery is ongoing.

Additionally, Defendants join in Plaintiff's opposition. Wherein Chelsea View Associates, LLC; Renaissance Properties; Renaissance Properties', Inc.; Robert Adinolfi; Tom Mullen; and Anthony Corbisiero, submit that Metz Paving's motion is premature and whether the parties are entitled to contractual or common law indemnification and/or contribution must await final adjudication of all claims. Further, Defendants join in the arguments made by Plaintiff as to discovery, wherein the matter has been pending for less than one (1) year and all parties have only recently served discovery demands.

REPLY

Defendant, Metz Paving Contractors, LLC, maintains that Plaintiff's theory that the contract entered into between Metz Paving and the developer was for future work is contradicted by the Certification of Robert Metzler, who is the sole member of Metz Paving. Mr. Metzler provided the invoices for

the work that was performed by his company and there has been no evidence proffered by any party that contradicts said contention.

Although discovery is ongoing, Defendant contends that it would be prejudicial to remain as a defendant in this multi-party, complex construction defect case when Defendant has proffered credible and undisputed evidence that it was not responsible for the subject matter of Plaintiff's claims.

Thus, if at some point in the future, Chelsea View Associates, LLC, or any other party has proof that Defendant performed other work at the development, then they may make an application to reinstate the claims against the movant.

DISCUSSION

This Court finds that Defendant, Metz Paving Contractors, LLC, is entitled to summary judgment pursuant to R. 4:46-2 to dismiss any and all claims against it without prejudice.

In determining whether a genuine issue of material fact exists, the motion judge must “engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Brill v. Guardian Life Ins. Co. 142 N.J. 520, 533 (1995). This weighing process “requires the court to be guided by the same evidentiary standard of

proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a ‘genuine’ issue of material fact.” Id. at 533-34.

Herein, Plaintiff’s Complaint asserts claims of negligence against Metz Paving Contractors, LLC. See Exhibit A attached to Defendant’s Brief. For instance, paragraph 13 identifies the Chelsea View Condominium Association’s improvements to include “street driveways and parking areas” and paragraph 41 identifies Metz as having paved the roadways that were defectively done and caused damage to Plaintiff. See Exhibit A attached to Defendant’s Brief.

However, Metz Paving only performed minor work on the site, which consisted of applying the topcoat and striping to one particular parking lot that was located adjacent to Phyllis Avenue. Metz Paving did not perform any prep work in the lot; rather it applied the topcoat over a base coat of asphalt installed by another contractor. Metz Paving did not work on any driveways or streets in the development and did not do any work on Phyllis Avenue as alleged by Plaintiff. See Exhibit B attached to Defendant’s Brief. Further, invoices indicate that the work done at Chelsea View on June 19, 2014; June 11, 2014; July 10, 2014; and June 29, 2014, were for parking lot work only. See Exhibit B attached to Defendant’s Brief.

Although Plaintiff asserts that Metz Paving and the Developer entered into a contract after the estimates and invoices, which leads to an inference that there was additional work required, this Court finds that such an inference fails in light of the invoices provided as well as the diagram of the project that shows the entire project including the parking lot that Robert Metzler worked on. See Exhibit B attached to Defendant's Brief. Such an area does not include any roadways nor any area of Phyllis Avenue. See Exhibit B attached to Defendant's Brief. Further, Robert Metzler attests that he did not work on the areas shown in the photo of Phyllis Avenue. See Exhibit C attached to Defendant's Brief. Thus, Plaintiff's alleged inference that additional work was required after the contract was entered into fails to create a genuine issue of material fact as no competent evidence contradicts the invoices submitted; diagram of the project; nor Robert Metzler's attestation.

Accordingly, this Court finds that there are no genuine issues of material fact that Metz Paving Contractors, LLC, proffered credible and undisputed evidence that the work it performed was not the subject matter of Plaintiff's claims. The Certification of Robert Metzler, who is the sole member of Metz Paving Contractors, LLC, provided the invoices for the work that was performed by his company and there has been no evidence proffered by any party that contradicts said contention. Lastly, the dismissal is without

prejudice as discovery is ongoing and an application to reinstate claims against movant can be made if discovery reveals proof to support the same.

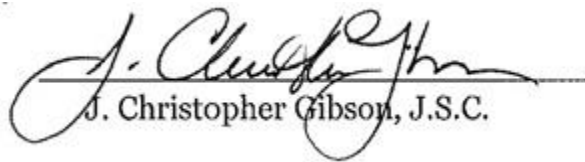
CONCLUSION

The motion is opposed.

Defendant, Metz Paving Contractors, LLC's, motion for summary judgment pursuant to R. 4:46-2 to dismiss any and all claims against it without prejudice is granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

June 21, 2016


J. Christopher Gibson, J.S.C.