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SHORT FORM ORDER

INDEX No. 08-30528
CAL. No. 11-01482OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-17-11 (#001)
MOTION DATE 12-15-11 (#002)
ADJ. DATE 1-24-12
Mot. Seq. # 001 - MD # 002 - MD

REYNA MURRAY and DANIEL MURRAY,

Plaintiff,

- against -

BOARD OF EDUCATION OF CONNETQUOT CENTRAL SCHOOL DISTRICT and SJS CONSTRUCTION COMPANY, INC.,

Defendants.

CIOTTI & DAMM, LLP
Attorney for Plaintiffs
1551 Kellum Place
Mineola, New York 11501

MULHOLLAND, MINION, DUFFY DAVEY, MCNIFF & BEYRER
Attorney for Defendant Connetquot CSD
374 Hillside Avenue
Williston Park, New York 11596

CONNETQUOT CENTRAL SCHOOL DISTRICT s/h/a BOARD OF EDUCATION OF CONNETQUOT CENTRAL SCHOOL DISTRICT,

Third-Party Plaintiff,

- against -

SJS CONSTRUCTION COMPANY, INC.,

Third-Party Defendant.

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C.
Attorney for Defendant SJS Construction
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

SJS CONSTRUCTION COMPANY, INC.,

Second Third-Party Plaintiff,

- against -

BOYD DEVELOPMENT, INC.,

Second Third-Party Defendant.

4-11-12

Upon the following papers numbered 1 to 46 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 40 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 41 - 44 ; Replying Affidavits and supporting papers 45 - 46 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 001) by defendant SJS Construction Company, Inc. for summary judgment dismissing the complaint against it is denied.

ORDERED that the motion (# 002) by defendant Board of Education of Connetquot Central School District for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Reyna Murray ("plaintiff") in the main action on September 7, 2007 at approximately 8:50 a.m. when she tripped and fell on a sidewalk in front of a school building known as "Premm Learning Center" located at 1200 Montauk Highway in Oakdale, New York, owned by defendant in the main action Board of Education of Connetquot Central School District ("Connetquot CSD"). The sidewalk area where the plaintiff allegedly fell was newly installed by defendant in the main action SJS Construction Company, Inc. ("SJS Construction") in 2003. The gravamen of the complaint is that said defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition and failing to warn the plaintiff as to the dangerous condition.

SJS Construction now moves (# 001) for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither owed a duty of care to the plaintiff stemming from its construction contract with Connetquot CSD nor owed a duty to protect or warn against an open and obvious condition which is not inherently dangerous. SJS Construction alleges that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition. In support, SJS Construction submits, *inter alia,* the pleadings, a bill of particulars, the testimony given by plaintiff Reyna Murray at the General Municipal Law § 50-h hearing, and the transcripts of the deposition testimony given by Deniz Gurcan, a representative of SJS Construction, and Robert Hochstein, a representative of Connetquot CSD.

At the General Municipal Law § 50-h hearing, plaintiff Reyna Murray testified to the effect that she was employed as a teacher's aide by Eastern Suffolk BOCES for 17 years. Her job duties included assisting the wheelchair-bound students off the buses and bringing them into the class. On the morning of the accident, she was coming out of the building to pick up students from the buses. She was looking to see where her students were. When her foot hit a raised section of the concrete sidewalk, she fell. After she fell, she realized that a sidewalk flagstone was lifted up about two inches in the area where she fell. Prior to the accident, she noticed that the flagstone was raised in the sidewalk because there were several incidents where the students' wheelchairs got caught. However, she never paid attention, and did not know exactly where the raised portions were. She had been working in the same building for several years prior to the accident, and walked over the same sidewalk area on a regular basis. She did not work during July and August of 2007. The day of the accident was her third day of work after the school opened for the 2007 school year.

At his examination before trial, Deniz Gurcan testified to the effect that he is the owner of SJS Construction. SJS Construction entered into a contract with Connetquot CSD to perform construction

work including walkways in front of the Premm Center in 2003. SJS Construction subcontracted with Boyd Development, Inc. ("Boyd") to install the walkway in front of the Premm Center. The walkway was installed by Boyd in 2005 or 2006. He has never received any complaint regarding the work performed by Boyd. Sometime after the installation of the walkway, an oil tank was removed. The oil tank removal was performed approximately 20 to 30 feet away from the area of the subject accident. Although he did not observe any damage to the walkway as a result of the oil tank removal work, he complained to the architect that "a big piece of equipment sitting up on the concrete walkway" was not "a good idea." After the heavy equipment was removed, he did not inspect the area to check whether any damage was done to the walkway resulting from placement of the heavy equipment. Thereafter, he observed trucks backed up to the front doors to deliver the furniture.

At his deposition, Robert Hochstein testified to the effect that he is the facilities director of Connetquot CSD, and that he is responsible for the maintenance and operation of all the physical buildings and grounds. Connetquot CSD hired SJS Construction as the general contractor for the renovation and expansion of the building. Upon the completion of the construction, the Premm Center was open to the public in 2006. Before the school opened, Mr. Hochstein inspected the sidewalk areas around the Premm Center with the architect and a manager. The punch list did not refer to the sidewalk in front of the Premm Center. On the day of the subject accident, he inspected the area of the accident with the head custodian of the building, Bill Smith, and observed that the area where the plaintiff fell had a "raised corner," and that "the entire flag or concrete section" seemed to have "heaved," which could be caused by many reasons. He stated that "heaving" can be caused by water freezing or debris underneath the area of work which was not removed properly. He also stated that the "heaving" can be caused by using poor material which was "not specified or dirty." He had a contractor repair the condition. Prior to the accident, he had never received a complaint regarding the raised flag on the sidewalk in front of the Premm Center. In addition, he stated that SJS Construction was not responsible for the removal of the oil tank. Prior to the opening of the buildings in the district for the new September school year, he inspected all the school district property on an annual basis. Prior to the opening of the Premm Center for the 2007 school year, he performed a visual inspection but did not notice any defective condition which needed repair.

While, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (*see* ***Williams v SNS Realty of Long Is.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendants, as the movants in this case, are required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). The issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see* ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [4th Dept 1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [2d Dept 1992]). Moreover, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]). Furthermore, while there is no duty to protect or warn against an open and obvious condition, the proof that a dangerous condition is open and

obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*see* ***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 771 NYS2d 527 [2d Dept 2004]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]).

While one who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done (*see* ***Santiago v Spinuzza***, 48 AD3d 1257, 851 NYS2d 322 [4th Dept 2008]; ***Goodwin v Comcast Corp.***, 42 AD3d 322, 840 NYS2d 781 [1st Dept 2007]; ***Dente v Staten Island Univ. Hosp.***, 252 AD2d 534, 675 NYS2d 621 [2d Dept 1998]), the employer is answerable for its own negligence (*see* ***Cassel v City of New York***, 167 AD 831, 153 NYS2d 410 [1st Dept 1915]). Moreover, the employer may also be held liable as a joint wrongdoer if its own misconduct concurred with that of the independent contractor in producing the injury complained of (*see* ***Parson v New York Breweries Co.***, 208 NY 337, 101 NE 879 [1913]).

Here, SJS Construction failed to establish its entitlement to judgment as a matter of law. Mr. Gurcan testified that SJS Construction subcontracted with Boyd to install the walkway in front of the Premm Center, and that he has never received complaint regarding the work performed by Boyd. Mr. Hochstein testified that SJS Construction was hired as the general contractor for the renovation and expansion of the building, and that on the day of the subject accident, he inspected the area of the accident and observed that the area seemed to have "heaved," which could be caused by many reasons, including negligent or improper work in constructing the walkway. There are several questions of fact as to whether SJS Construction's alleged negligence was a proximate cause of the subject accident and as to whether SJS Construction properly installed or inspected the subject walkway area. There are also several questions of fact as to whether SJS Construction exercised reasonable care under the circumstances, and as to whether SJS Construction, as the general contractor, had the authority to control or supervise Boyd's work.

Connetquot CSD moves (# 002) for summary judgment dismissing the complaint and all cross claims against it on the ground that it neither created the allegedly dangerous condition nor had actual or constructive notice of such condition. In support, Connetquot CSD submits, *inter alia*, the affidavit of William Wood, its representative.

In his affidavit, William Wood states that he is the Head Custodian of Eastern Suffolk BOCES, and that his job duty includes cleaning and inspecting the physical buildings and grounds for the Premm Center, including the subject sidewalk. Prior to the accident, he has never observed a "raised" portion of the sidewalk, and that he has never received a complaint regarding the raised sidewalk.

Here, Connetquot CSD failed to establish its entitlement to judgment as a matter of law. There are questions of fact as to whether a dangerous condition existed on the subject sidewalk so as to create liability on the part of Connetquot CSD; whether it had actual or constructive notice of the "raised" condition on the sidewalk (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]); whether it exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]); and whether the plaintiff was comparatively negligent (*see* ***Gogarty v Hay Kit Ho***, 28

AD3d 607, 813 NYS2d 526 [2d Dept 2006]; ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [1st Dept 2003]).

In view of the foregoing, the motion (# 001) by SJS Construction for summary judgment and the motion (# 002) by Connetquot CSD for summary judgment are denied.

Dated: April 10, 2012

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION