Muzia v Mathers
2017 NY Slip Op 30479(U)
March 3, 2017
Supreme Court, Suffolk County
Docket Number: 14-952
Judge: Joseph A. Santorelli

SHORT FORM ORDER

INDEX No. 14-952
CAL. No. 16-00742OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8-1-16 (002)
MOTION DATE 9-1-16 (003, 004)
ADJ. DATE 9-8-16
Mot. Seq. # 002 - MG
003 - MD
004 - MD

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PETER P. MUZIA,

Plaintiff,

- against -

SEAN M. MATHERS, TARA L. MATHERS and LONG ISLAND STONE WORKS, INC.,

Defendants.

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Upon the following papers numbered 1 to 34 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-18 ; Notice of Cross Motion and supporting papers 19-28; Answering Affidavits and supporting papers 29-30 ; Replying Affidavits and supporting papers 31-32, 33-34 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Sean Mathers and Tara Mathers for summary judgment in their favor dismissing the complaint is granted; and it is further

ORDERED that the cross motion by plaintiff Peter Muzia for summary judgment on the issue of liability is denied; and it is further

ORDERED that the cross motion for summary judgment made by plaintiff Michael Friar in the related action assigned index number 1891/2011is denied.

This is a negligence action which seeks to recover damages for personal injuries allegedly sustained by plaintiff Peter Muzia ("Muzia") as a result of an accident that occurred at approximately 7:00 p.m. on August 17, 2013, in the backyard of the premises located at 79 Jefferson Street, East Islip, in the County of Suffolk. It is alleged that plaintiff's injuries occurred when a granite countertop on an outdoor bar fell and struck plaintiff's foot, as a result of the negligence of the property owners, Sean and Tara Mather, and of their contractor, Long Island Stone Works, Inc.

Defendants Sean Mathers and Tara Mathers (the "Mathers") now move for summary judgment dismissing the complaint as against them on the ground that there is no issue of fact regarding the lack of any negligence or liability on their part in causing plaintiff's alleged injuries. In support of their motion they submit, *inter alia*, copies of the pleadings, the verified bill of particulars, and the deposition transcripts of plaintiff, Sean Mathers and Michael Gubista. Plaintiff opposes the motion and cross moves for summary judgment against defendants on the issue of liability. In support of the cross motion plaintiff submits, *inter alia*, copies of the pleadings, the verified bill of particulars, and the deposition transcripts of plaintiff, Sean Mathers and Michael Gubista. Defendant Long Island Stone Works, Inc. has submitted an affirmation in opposition to the motion and cross motion.

Plaintiff testified that on August 17, 2013, he was at the home of defendants Sean and Tara Mathers to meet with other people, and then head to Fire Island for a birthday party. He arrived sometime between 5:00 and 5:30 p.m., intending to go to Fire Island at 7:00 or 8:00 p.m. The plaintiff went into the back yard, where a number of other people were also waiting. He observed a grill and high bar kitchen located on the left side of the back yard, as well as tables and chairs. He went over to the high bar area several times during the night. Plaintiff testified that his accident occurred at approximately 7:00 p.m., near the high bar area. He was at the high bar speaking to an individual named Michael Friar, and was leaning on the bar countertop when it pivoted and slid down onto his foot. According to the plaintiff, the countertop became "unglued", and fell onto his right foot, striking his toes.

Defendant Sean Mathers testified that he and his wife Tara were the owners of the residence located at 79 Jefferson Street. He hired defendant Long Island Stone Works, Inc. ("Stone Works"), which was his cousin Michael Gubista's company, to install a granite countertop on a bar in his back yard. The work was completed approximately 30 hours prior to plaintiff's accident. On August 16, 2013, he was at work during the time the countertop was installed and took no part in the installation work. When he arrived home from work that day, between 5:00 and 6:00 p.m., the installation of the countertop was already completed. According to Sean Mathers no one from Stone Works ever discussed installing brackets to hold up the countertop. Michael Gubista of Stone Works told him that he could remove two temporary support braces, which had been placed under the countertop during installation, after 12 hours. After the accident he telephoned Gubista and asked him if he really thought that the countertop would stay up without braces, and Gubista's response was "yes".

Michael Gubista testified that he is the owner and sole shareholder of Stone Works. He was hired by defendant Sean Mathers to install a granite countertop on a bar in the Mathers' back yard. Gubista spoke to Sean Mathers and asked if supports would be used, and, was told no, because the

brick contractor had told Sean Mathers it would be the granite installer's job. Gubista stated it was not his job, and that it would probably be better if there were supports, but in the meantime he would use temporary supports while the glue dried. He testified that the granite that fell was attached by a cement adhesive and because the granite overhang would be less than 50 percent of the surface area, when the cement dried fully, it would be sufficient to bond the granite. Gubista had installed countertops with an eight to ten inch overhang, affixed with the same cement approximately 20 times over a period of years without any problems. He indicated that depending on the temperature and sunlight, it took anywhere from 12 to 24 hours to dry, and that he used the 12 to 24 hour estimate when speaking to Sean Mathers. Gubista installed the subject countertop on August 16, 2013, the day before plaintiff's accident. He began the installation between 3:00 and 4:00 p.m. It was his judgment that, based upon past experience with prior installations, when the cement fully cured, it would be sufficient to hold up the granite countertop. It was his practice to allow the customer to remove the temporary supports. Gubista told Sean Mathers that if he waited past 5:00 and 7:00 p.m. the next day, everything would be "fine". Gubista opined that there was nothing that Sean Mathers did, should have done, or should not have done that led to the happening of the accident. Gubista claimed that "it was just a freak accident."

The cross motion for summary judgment made by plaintiff Michael Friar in the related action assigned index number 1891/2011 is denied as improperly made in this action. This action and the related action were joined for trial, not consolidated. Whereas, consolidation gives rise to a new action that displaces the actions affected thereby, (***Pigott v Field***, 10 AD2d 99, 101, 197 AD2d 648 [1st Dept 1960]), a joint trial preserves that separate character of each action (*see,* ***Import Alley of Mid-Is. v Mid-Island Shopping Plaza***, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487 [2d Dept 1987]).

The Mathers have established their prima facie entitlement by submitting evidence that they were free from any negligence in this matter. It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Foreman v Town of Oyster Bay***, 140 AD3d 694, 30 NYS3d 895 [2d Dept 2016]; ***MVB Collision, Inc. v Allstate Ins. Co.***, 129 AD3d 1041, 13 NYS3d 137 [2d Dept 2015]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). Generally, liability for a dangerous or defective condition on real property must be predicated upon ownership,

occupancy, control, or special use of that property (*see* ***Chernoguz v Mirrer Yeshiva Cent. Inst.***, 121 AD3d 737, 994 NYS2d 362 [2d Dept 2014]; ***Sanchez v 1710 Broadway, Inc.***, 79 AD3d 845, 915 NYS2d 272 [2d Dept 2010]; ***Gover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). "Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly defective condition" (***Gover v Mastic Beach Prop. Owners Assn.***, *supra,* at 730; *see* ***Reynolds v Avon Grove Props.***, 129 AD3d 932, 12 NYS3d 199 [2d Dept 2015]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]). Liability can be imposed upon a landowner or a lessee who creates a defective condition on the property, or had actual or constructive notice of the allegedly defective condition (*see* ***Scott v 11 W. 19th Assoc., LLC***, 125 AD3d 749, 4 NYS3d 235 [2d Dept 2015]; ***Williams v Yang Qi Nail Salon, Inc.***, 113 AD3d 843, 979 NYS2d 625 [2d Dept 2014]; ***Johnson v City of New York***, 102 A.D.3d 746, 958 NYS2d 423 [2d Dept 2013]). The Mathers have established that they neither created nor had actual or constructive knowledge of the condition that led to plaintiff's alleged injuries. Any action that Sean Mathers took with regard to the bar top was done as per the instructions of the contractor who installed it, and the accident occurred more than 24 hours after the period of which Sean Mathers was told that the countertop would be completely safe. Michael Gubista, testifying for defendant Stone Works, stated that there was nothing that Sean Mathers did, should have done, or should not have done that led to the occurrence of plaintiff's accident (*see* ***Gover v Mastic Beach Prop. Owners Assn.***, *supra*).

Further, any purported negligence by Stone Works cannot be imputed to the Mathers. "The general rule is that a party who retains an independent contractor ... is not liable for the independent contractor's negligent acts" (***Kleeman v Rheingold***, 81 NY2d 270, 273, 598 NYS2d 149 [1993]; *see* ***Rosenberg v Equitable Life Assur. Socy. of U.S.***, 79 NY2d 663, 584 NYS2d 765 [1992]; ***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2012]). The primary justification for this rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (***Kleeman v Rheingold***, *supra*, at 274). This general rule, however, is subject to exceptions, most of which are derived from various public policy concerns (*see* ***Feliberty v Damon***, 72 NY2d 112, 531 NYS2d 778 [1988]; ***Begley v City of New York***, 111 AD3d 5, 972 NYS2d 48 [2d Dept 2013]). These exceptions fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; work that is especially or "inherently" dangerous (*see* ***Rosenberg v Equitable Life Assur. Socy. of U.S.***, *supra*,; ***Raben v Conde Nast Publs.***, 2 AD3d 117, 767 NYS2d 440 [1st Dept 2003]; and, finally, instances in which the employer is under a specific nondelegable duty (*see* ***Pesante v Vertical Indus. Development, Corp.***, 142 AD3d 656, 36 NYS3d 716 [2d Dept 2016]; ***Horowitz v 763 E. Assoc., LLC***, 125 AD3d 808, 5 NYS3d 118 [2d Dept 2015]; ***Backiel v Citibank***, 299 AD2d 504, 751 NYS2d 492 [2d Dept 2001]). There is no evidence that the Mathers were negligent in selecting or instructing Stone Works, which has many years experience of successfully installing this type of bar top. There is no evidence that the work is inherently dangerous. Finally, there is no evidence that the Mathers violated any nondelegable duty, such as one imposed by statute or regulation (*see,* ***Brothers v New York State Elec. & Gas Corp.***, 11 NY3d 251, 869 NYS2d 356 [2008]; ***Backiel v Citibank***, *supra).*

In response, both plaintiff and defendant Stone Works have failed to raise any issue of fact sufficient to deny the Mathers' motion for summary judgment. Conversely, plaintiff's cross motion for summary judgment on the issue of liability with regard to the Mathers must be denied. That branch of plaintiff's cross motion which seeks summary judgment on the issue of liability with regard to defendant Stone Works must also be denied, as plaintiff failed to eliminate all issues of fact as to said defendants' liability.

Accordingly, the motion by defendants Sean Mathers and Tara Mathers for summary judgment in their favor dismissing the complaint is granted. The cross motion by plaintiff Peter Muzia for summary judgment on the issue of liability is denied in all respects.

Dated: MAR 03 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**