Martinelli v Spensieri
2013 NY Slip Op 33877(U)
December 23, 2013
Sup Ct, Bronx County
Docket Number: 301264/2011
Judge: Alison Y. Tuitt
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[* 1]
FILED Mar 13 2015 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

JAMES MARTINELLI, INDEX NUMBER: **301264/2011**

Plaintiff,

-against-

Present:
HON. **ALISON Y. TUITT**
Justice

JOSEPH SPENSIERI, ERMELINDA C. SPENSIERI, ARBEN ZHRKU and GJUSHI CONSTRUCTION CO.,

Defendants.

ARBEN ZHRKU, INDEX NUMBER: **83756/2012**

Third-Party Plaintiff,

-against-

Present:
HON. **ALISON Y. TUITT**
Justice

QUALITY WATER & SEWER INC.,

Third-Party Defendants.

The following papers numbered 1 to 4,

Read on this Defendant/Third-Party Plaintiff's Motion for Summary Judgment

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On Calendar of **4/4/14**

Notice of Motion-Exhibits and Affirmation	1
Affirmations in Opposition	2, 3
Reply Affirmation	3

Upon the foregoing papers, defendant/third-party plaintiff Arben Zhrku's (hereinafter "Zhrku") motion for summary judgment is granted for the reasons set forth herein.

The within personal injury action involves a motorcycle accident on August 17, 2000 in front of the property located at 25-61 44th Street, Queens, New York, a two-family home that was owned by Zhrku. Plaintiff alleges that a metal plate in the roadway in front of the subject property caused him to lose control of his motorcycle as he rode over the metal plate in the road. Plaintiff claimed that the steel plates were protruding three to four inches above the roadway. However, plaintiff purportedly gave a different version of how the accident occurred to the police and emergency technician after the accident. Plaintiff claimed that the accident occurred when a truck stopped short in front of him.

Zhrku purchased the two-family home located at the aforementioned address in 2008 and decided to sub-divide the property and build another home. Zhrku hired defendant Gjushi Construction Corp. to build the new home and retained defendant/third-party defendant Quality Water & Sewer, Inc. (hereinafter "Quality") to install a new sewer and water lines in the building and to connect them to the street mains. To perform its work, Quality excavated an 8 by 4 foot trench in the roadway directly outside of the premises. At the end of each day, when Quality finished its work in the trench, it covered the trench with two steel plates, pinned them down and then ramped up the sides of the plates with concrete. The term "ramping up" means putting blacktop at the edges of the plates. The plates were removed and reinstalled approximately six to seven times. In addition to these precautions, Quality states that it placed a warning sign approximately fifty to sixty feet from the plates advising on-comers of the construction site.

Zhrku moves for summary judgment arguing that he is not liable for the work performed by Quality, as all work was under the control of Quality's workers. Zhrku argues that he did not supervise, direct or control the installation of the steel plate by Quality, which was on the public street, not on his premises. Zhrku contends that as a land owner, he is not liable for the negligence of a third-party independent contractor. In opposition, Quality argues that Zhrku had a duty to maintain the street because he made special use of it by hiring a contractor to excavate the street; that he owed a non-delegable duty to ensure that the work was performed properly; and, he failed to show he did not have constructive notice of the alleged dangerous condition. Quality further argues that Zhrku has been in the construction industry for the last 15 years as the owner and president of a marble and tile company and he was on-site approximately twice a week. Quality contends that Zhrku, a long time construction professional, should have inspected the metal plates but he never did.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous or defective condition. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986); Garcia v. Delgado Travel Agency, Inc., 771 N.Y.S.2d 646 (1st Dept. 2004). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Id.

Zhrku's motion for summary judgment is granted. The accident did not occur on his premises. It occurred on a public street. Zhrku did not perform the work on the street. He retained Quality to perform the work. There is no evidence that Zhrku directed, controlled or supervised the work that Quality performed. Quality's own witness, Charlie Brahimi, testified that Zhrku never supervised or controlled Quality's work. The fact that Zhrku himself was a contractor or that he was involved in the construction business is irrelevant since he did not direct any of the work that caused the alleged dangerous condition. Constructive notice is also irrelevant as the work was performed by an independent contractor. The contract between Zhrku and Quality established that the Quality was responsible for opening the street and protecting the street while the work was ongoing. Zhrku had no obligation whatsoever with respect to the plates, had no obligation to inspect the plates and, therefore, he has no burden to show that he did not have constructive notice of the condition.

A property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property, unless the work is inherently dangerous, or the owner interferes with and assumes control over the work. Fernandez v. 707, Inc., 926 N.Y.S.2d 408 (1st Dept. 2011). See, also Laecca v. New York University, 777 N.Y.S.2d 433 (1st Dept. 2004)(Party who employs an independent contractor for particular task on premises is generally not liable for the negligent acts of that contractor, absent a showing of a specifically imposed duty or knowledge by principal of an inherent danger; such knowledge can be imputed where owner or principal created the hazardous condition or otherwise had actual or constructive notice of it, or where he exercised supervisory control over contractor's operation). The mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal. Goodwin v. Comcast Corp., 840 N.Y.S.2d 781 (1st Dept. 2007). In the instant matter, Quality has failed to show that any of the exceptions to the "independent contractor rule" apply.

With respect to Quality's contention that Zhrku derived a special benefit from the excavation in the street, this argument also fails. Section 7-210 of Administrative Code of City of New York imposes a non-delegable duty on the owner of the abutting premises to maintain the sidewalk (or street) in a reasonably safe condition. A landowner is not liable to a person injured by a defect in a public sidewalk abutting the landowner's property unless the landowner caused the defective condition through negligent construction or repair, or as a result of some special use, or if a statute imposes the obligation to maintain the sidewalk on the abutting property owner. Vucetovic v. Epsom Downs, Inc., 10 NY3d 517, 519 (2008); Grossman v. Amalgamated

Housing Corp., 750 N.Y.S.2d 1 (1st Dept. 2002). "The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." Noia v. Masselli, 846 N.Y.S.2d 326 (2d Dept. 2007)(citations omitted). See also, Petty v. Dumont, 910 N.Y.S.2d 46 (1st Dept. 2010)(Under the special use doctrine, a private landowner bears a duty to repair and maintain the special structure erected on public land or instrumentality creating the benefit, provided that the landowner has express or implied access to, and control of the instrumentality giving rise to the duty, regardless of whether the private landowner installed the structure)

The special use doctrine does not apply to these facts. The owner of the premises here derived what can be described as a one time benefit from the excavation of the street - the installation of sewer and water lines for his new house. However, the spirit of the special use doctrine really applies where the owner of a premises derives a continuous or ongoing special benefit from the use of a public sidewalk or street.

Accordingly, the motion for summary judgment is granted and defendant Zhrku is dismissed from case. Since Zhrku is no longer a defendant in the action, the third-party action is also dismissed.

This constitutes the decision and order of this Court.

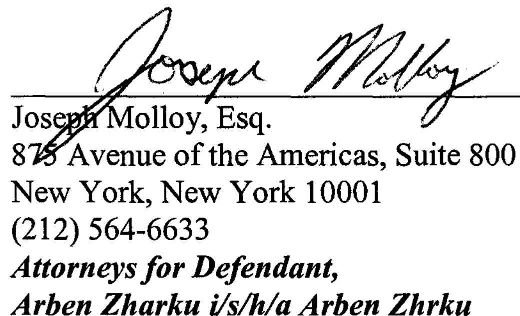
Dated: 3/5/15

Hon. Alison Y. Tuitt

Dated: New York, New York
December 23, 2013

Yours, etc.

WHITE & McSPEDON, P.C.

By: 

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