Moreno v County of Nassau
2013 NY Slip Op 33905(U)
April 4, 2013
Supreme Court, Nassau County
Docket Number: 5180/10
Judge: Roy S. Mahon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

FUSTINA MORENO,

Plaintiff(s),

- against -

COUNTY OF NASSAU, NASSAU COUNTY DEPARTMENT OF PUBLIC WORKS, WELSBACH ELECTRIC CORP. OF L.I., LONG ISLAND POWER AUTHORITY, VIVIANA CASIMIR and MARIE C. CASIMIR,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 5180/10

MOTION SEQUENCE NO. 5 & 6 & 7 & 8

MOTION SUBMISSION DATE: February 28, 2013

The following papers read on this motion:

Notice of Motion	XX
Notice of Cross Motion	XX
Affirmation in Opposition	XX
Reply Affirmation	XX
Reply affidavit	X
Memorandum of Law	XX
Reply Memorandum of Law	X

This motion by the defendant County of Nassau for an order pursuant to CPLR 2221(e) granting it leave to renew its motion pursuant to CPLR 3211(a)(7), and 3212 for summary judgment dismissing the complaint and all cross-claims against it is determined as provided herein.

This motion by the defendant Welsbach Electric Corp. of L.I. ("Welsbach") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is determined as provided herein.

This motion by the defendants Viviana Casimir and Marie Casimir for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross-claims against them is determined as provided herein.

This motion by the defendant Long Island Power Authority ("LIPA") for an order pursuant to CPLR 2221(e) granting it leave to renew its motion pursuant to CPLR 3212 for summary judgment dismissing the complaint and any and all cross-claims against it is determined as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries she sustained on December 17, 2008 at approximately 3:00 PM in front of 403 Jerusalem Avenue in Uniondale, when she was allegedly electrocuted via Traffic Signal Box #3836 and/or the Nassau County Department of Public Works' ("N.C.D.P.W.") Traffic Signal Plate on the sidewalk at the intersection of Jerusalem Avenue/ Rutland Road/Florence Avenue and propelled to the ground. At her examination-before-trial, she testified that there was snow on the ground and it was raining and that the traffic signal box was open and someone was working on it. She has also testified about a cable wire in the vicinity and observing a LIPA vehicle nearby. She testified that she was on Jerusalem Avenue heading to Carvel but was only able to identify one of the cross street definitively, Cedar Street. She testified: "I was standing on the sidewalk, at the sidewalk, waiting for the light to change in my favor. When the light changed, I felt – felt something in my entire body, something pull in, like, my entire body. When I walked towards the street, I felt something hit me. . . ." She testified that she went to sit down on the other side of the street after she crossed. She testified that this happened "in front of the box that – it was 3637 – 3638."

The plaintiff seeks to recover of the County, LIPA, Welsbach, which was the contractor alleged to have been under contract to maintain and repair the traffic controls at the intersection and to have done work there, the N.C.D.P.W., and the Casimirs as the owners of 403 Jerusalem Avenue.

In her Bill of Particulars, plaintiff faults LIPA for negligence in their operation, maintenance and control of the subject premises and for creating a dangerous, hazardous and/or defective condition. In her Verified Bill of Particulars responding to Welsbach's demand the plaintiff represents that she was walking in front of 403 Jerusalem Avenue, Uniondale, New York, in a careful and prudent manner, when she stepped her left foot onto the N.C.D.P.W.. Traffic Signals plate and felt an electrical shock and was violently precipitated to the ground. In her Verified Bill of Particulars responding to the Casimirs' demand, the plaintiff alleges that the defective condition was N.C.P.D.W. Traffic Signal's plate on the sidewalk in front of 403 Jerusalem Avenue between Uniondale Avenue and Penninsula Boulevard, Uniondale, New York.

Welsbach was under contract with the County at the time of the plaintiff's accident to maintain the County's traffic control devices. Welsbach's contract with the County required it to, *inter alia:*

> "(1) Maintain all traffic control signals;
> (2) Conduct periodic inspection of all traffic control devices under a 'Routine Maintenance and Inspection Program;
> (3) Repair or replace any defective or worn out traffic control device, electrical, electronic, mechanical or electro- mechanical component, part, unit or equipment;
> (4) Repair and adjust all wiring connections, cables, timing, and "and any other work required for establishing accurate and efficient operation of traffic control equipment."
> (5) Install functionally operating temporary equipment following damage or malfunction to any equipment for traffic control devices, including all necessary temporary electric power, if directed, until the permanent equipment can be restored to normal electric

services;
(7) Initially responded to all **reports** of damaged equipment and secure off the area until such time as repairs commence (emphasis added);
(8) To perform "Routine Maintenance" - Work items that shall be performed regularly to insure that traffic signal equipment will continue to operate efficiently and safely.

Indeed, Brian Tyrie testified at his examination-before-trial that Welsbach was required to do "basically anything that is part of the intersection that needs to be functioning properly in order for public safety." It alone maintained Nassau County's traffic lights. The contract requires Welsbach to indemnify the County for physical injuries and property damage which occurs on account of or in connection with its performance of work as well as for costs and expenses incurred by the County as the result of such claims.

All of the defendants seek summary judgment dismissing the complaint and all cross-claims against them.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman,* 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD2d 601 [2d Dept 2012], *citing Winegrad v New York Univ. Med. Center, supra,* at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]; *Bettineschi v Healy Elec. Contr., Inc.,* 73 AD3d 1109, 1110 [2d Dept 2010]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' " (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], *quoting Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

All of the defendants seek dismissal of the complaint on the ground that the plaintiff cannot specifically identify what caused her injuries.

To establish a *prima facie* case of negligence, a plaintiff must demonstrate by a preponderance of the evidence that defendant owed him or her a duty, that defendant breached that duty and that defendant's breach was a substantial factor in the events that caused the plaintiff's injury (*Derdiarian v Felix Contr. Co.*, 51 NY2d 308, 315 [1980]). " 'Fail[ing] to prove what actually caused a plaintiff to fall in a situation where there could be other causes is fatal to a plaintiff's cause of action' " (*Pipp v Guthrie Clinic, Ltd.*, 80 AD3d 1014, 1015 [3d Dept 2011], quoting *Darp v Larson*, 240 AD2d 918, 919 [3d Dept 1997]). In proving causation, "[p]laintiffs need not positively exclude every other possible cause of the accident. Rather, the proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Gayle v City of New York*, 92 NY2d 936, 937 [1998]). "[A] plaintiff need only prove that it was 'more likely' or 'more

reasonable' that the alleged injury was caused by the defendant's negligence than by some other agency" (*Gayle v City of New York, supra*, at p. 937, quoting *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]; *Wragge v Lizza Asphalt Constr. Co.*, 17 NY2d 313, 321 [1966]).

> "[A] plaintiff may prove the claim that a defendant is responsible for the condition that caused him to slip [or get electrocuted] without direct evidence. Such claims may be substantiated with circumstantial evidence sufficient to create an issue of fact as to whether the defendant created the condition. ' "It is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" ' " (*Healy v ARP Cable,* 299 AD3d 152, 154 [1st Dept 2002], *quoting Schneider v Kings Hwy. Hosp. Ctr.*, supra at p. 744, *quoting Ingersoll v Liberty Bank of Buffalo*, 278 N.Y. 1, 7 [1938]; *see also, Bettineschi v Healy Elect. Contr., Inc., supra*, at p. 1110 [citations omitted]).

Succinctly put, the plaintiff testified at her examination-before-trial that she was shocked either by walking on electrified ground or by coming into contact with a cable.

Contrary to defendants' arguments, the plaintiff has adequately identified where she was injured and the cause (*see Smith v Consolidated Edison Company of New York, Inc.*, __ AD3d __, 2013 WL 828134 [1st Dept 2013]). Any differences between the plaintiff's Bills of Particulars and her testimony at her examination-before-trial presents matters for cross-examination and do not necessitate dismissal of the complaint. Indeed, *res ipsa loquitur* may even apply here (*Smith v Consolidated Edison Company of New York, Inc., supra)* "since a pedestrian is generally not subject to electric shock [when] walking" on the sidewalk or in the street near or over electrical components. The sidewalk cases relied on by the defendants where the complaints were dismissed based on the plaintiffs' inability to identify the cause of their falls are distinguishable. A layman's ability to precisely identify where an electric current originated is far different from identifying a crack, bump or debris.

The County seeks summary judgment on the ground that the plaintiff has not alleged that it had prior written notice of the defective condition that caused her electrocution nor did it receive prior written notice as required as a condition precedent to suit by Section 12-4.0(e) of the Nassau County Administrative Code. In support of its motion, the County has submitted the affidavit of Veronica Cox of the Bureau of Claims and Investigations of the Nassau County Attorney's Office. She attests to having personally searched for and not found any notice(s) of defect or claim(s) with respect to the sidewalk or street relating to electric shock or other defective condition in the area of the traffic signal at Jerusalem Avenue/Rutland Road/ Florence Avenue and/or the traffic signal box #3836 and/or the N.C.D.P.W. Traffic Signal plate on the sidewalk at or near 403 Jerusalem Avenue, Uniondale, for the five-year period preceding the plaintiff's accident.

The County also maintains that the exceptions to this requirement, *i.e.*, that the municipality made a "special use" of the property or created or caused the defective condition, does not apply here. To establish those facts, the County has submitted the affidavit of Shelia M. Dukacz, Nassau County Traffic Engineer II/Signal Management Section Head in which she attests that she searched the complaint forms maintained by the N.C.D.P.W. and found no complaints regarding the location for the five-year period preceding the plaintiff's accident. She attests that the records indicate that defendant Welsbach replaced an eastbound green light bulb at the intersection on December 5, 2008 and that Welsbach performed routine maintenance on the traffic signal four times in 2008 before December 16, 2008, specifically, January 28, 2008, April 4, 2008, July 15, 2008 and September 9, 2008, on which dates Welsbach found the traffic signal to be in good working order. In addition, Dukacz attests that the County inspected the traffic signal on January 14, 2008, March 13, 2008 and July 8, 2008 and at all times found the traffic signal to be in good

working order.

Scott Urban, who runs the N.C.D.P.W.'s Division of Highway and Engineering's permit Department attests that his search of the records revealed that no permits including road opening permits, sidewalk permits, curb cut permits and sewer permits have been issued for the subject location for the five-year period preceding the plaintiff's accident.

Nassau County Administrative Code § 12-4.0(e) provides that no civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk or street being defective, out of repair, unsafe or dangerous unless it has been provided written notice of such defective, unsafe or dangerous condition of such sidewalk or street. "Notice" – but not necessarily written notice – regarding malfunctioning traffic lights has been required (*Frenchman v Lynch*, 97 AD3d 632 [2d Dept 2012]; *Colon v Manhattan & Bronx Surface Tr. Operating Auth.*, 35 AD3d 515 [2d Dept 2006]; *but see Frenchman v Lynch*, 31 Misc 3d 1209(A), p. 4 [Sup Ct Nassau County 2011], *affd as modified* 97 AD3d 632 [2d Dept 2012] ["the County's argument that the notice it has been provided was inadequate because it was not in 'written' form is . . . completely unavailing since . . . there [is] no rule or regulation requiring written notice of a defective traffic signal. . . ."]; *Tyyeb v County of Nassau*, 2002 WL 31415427 [Sup Ct Nassau County 2002] [Nassau County Code's prior written notice requirement does not include a defective traffic signal]).

The County has established that it did not receive prior written notice of the defective condition which is alleged to have caused the plaintiff's electrocution. It has not however established that it did not have any "notice" *(compare, Frenchman v Lynch, supra*; 97 AD3d 632; *Colon v Manhattan & Bronx Surface Tr. Operating Auth., supra*). Prior written notice of defective traffic lights or control equipment is not required (*see Alexander v Eldred*, 63 NY2d 460 [1984] [prior notice laws refer to physical defects such as holes and cracks, not to the failure to maintain or erect traffic signs], citing *Doremuus v Incorporated Vil. of Lynbrook*, 18 NY2d 362 [1966]; *Frenchman v Lynch, supra*, 31 Misc 3d 1209(A); *Tyyeb v County of Nassau, supra*). In any event, assuming, *arguendo,* that written notice was required, the County's use of the street and/or sidewalk for traffic control devices constitutes a "special use" and as such is exempt from the written notice requirement. The County's application for dismissal pursuant to Nassau County Administrative Code § 12-4.0(e) is **denied**.

The County's application is **denied in its entirety**.

"As a general rule, a party such as Welsbach, which enters into a contract to render services, has not assumed a duty of care to third parties outside the contract, such as the injured plaintiff, who allegedly was injured as a result of the negligent performance of such contractual obligation (*Vertsberger v City of New York*, 7 AD3d 697 [2d Dept 2004], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]). "However, in *Espinal v Melville Snow Contrs.*, [*supra*]), the Court of Appeals identified three situations where a party who enters into a contract to render services may be said to have assumed a duty of care and thus be potentially liable in tort to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches an instrument of harm or creates or exacerbates a hazardous condition, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Gushin v Whispering Hills Condominium I*, 96 AD3d 721, 722 [2d Dept 2012], citing *Espinal v Melville Snow Contrs., supra*, at p. 140).

Via the affidavit of Welsbach's traffic signal maintenance foreman project manager Brian Tyrie, Welsbach has established that Welsbach did not receive notice of any problems with the pullbox at the

subject intersection before or after the plaintiff's accident. On December 5, 2008, it received notification that the eastbound green light bulb at 403 Jerusalem Avenue was out and it replacd it. At his examination-before-trial, Tyrie testified that that repair had nothing to do with the pullbox. He also testified that he never in his 24 years at Welsbach received notification that a pullbox had shocked someone. And, he testified that the only way that could happen would be if the pullbox was under water and the person was standing barefoot holding a pole, which the plaintiff was not.

Welsbach has established its entitlement to summary judgment dismissing the complaint against it. It did not have a duty to plaintiff (*DiVona v Wakefeld*, 35 AD3d 527 [2d Dept 2006]; *Ray v Hertz Corp.*, 271 AD3d 374 [1st Dept 2000], *lv denied* 95 NY2d 766 [2000], *lv denied* 95 NY2d 766 [2002], *lv denied* 95 NY2d 766 [2000]) and "there [is] no evidence that Welsbach created or exacerbated a hazardous condition so as to fall within the exception to the general rule (*Vertsberger v City of New York, supra*, at p. 698-699, citing *Espinal v Melville Snow Contrs., supra* at p. 141-142), or that it undertook a comprehensive duty with respect to the traffic control devices thereby displacing the County. The burden therefore shifts to the plaintiff to establish the existence of a material issue of fact. The plaintiff has not established the existence of a material of fact as to whether any of the *Espinal* exceptions apply including whether Welsbach displaced the County with respect to the traffic signals. While its role was extensive, it was not exclusive.

Under the circumstances, in light of the dismissal of plaintiff's claims against Welsbach, the County's claims for indemnification and contribution also fail (*Stone v Williams*, 64 NY2d 639 [1984]; *Lorek v 1133 Fifth Ave. Corp.*, 46 AD3d 766 [2d Dept 2007]; *Moss v McDonald's Corp.*, 34 AD3d 656 [2d Dept 2006]). Welsbach has accordingly also established its entitlement to summary judgment dismissing the County's cross-claim against it, thereby shifting the burden to the County to establish the existence of a material issue of fact. The County has not established the existence of a material issue of fact with respect to its cross-claim against Welsbach. There is simply no evidence that Welsbach failed in any of its duties under the contract or that it played any role in the occurrence. And because there is no evidence that the plaintiff's injuries were caused in whole or part by Welsbach, its contractual indemnification obligation has not been triggered. Welsbach's motion for summary judgment dismissing the complaint and any and all cross-claims against it is **granted**. This action against Welsbach is concluded.

Via their personal affidavits, the Casimir defendants have established that they did not own, operate, maintain or control the N.C.D.P.W. traffic signal cover, the traffic control box or any of the underground electrical facilities connected to it. They have also established that they have never contracted to have work performed on the sidewalk in front of their house nor have they had any work done. They have established their freedom from liability and their entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact. The plaintiff has not interposed any genuine opposition to the Casimirs' motion. While she goes to great length to establish where she was when she got electrocuted and what caused it, she makes no connection to the Casimirs. She has accordingly failed to establish the existence of a material issue of fact with regard to the Casimirs. The Casimirs' motion for summary judgment dismissing the complaint and any and all cross-claims against them is **granted**. This action against the Casimirs is concluded.

Via an affidavit of Nicole Giorlando, a Design Investigator in the Network Strategy Engineering Department of National Grid Electric Services LLC, LIPA has established that LIPA does not own, operate, maintain, or control the traffic signal box or cover at the subject premises nor does it own, operate, maintain or control any facilities located under or within it. Via that affidavit, LIPA has also established that it did not receive any complaints about or do any work in the vicinity of the plaintiff's accident because if that had occurred, there would be a record of such. Furthermore, LIPA has established via Giorlando's affidavit that its crews did not perform any work on traffic signal/box covers, traffic signal cabinets, traffic signal cables

underground or overhead – or any traffic signal facilities in Nassau County. Via Giorlando's affidavit, LIPA has established its entitlement to summary judgment shifting the burden to the plaintiff to establish the existence of a material issue of fact. Merely demonstrating that there was a vehicle with LIPA lettering in the vicinity of her accident when it happened does not meet that burden. The plaintiff has failed to establish the existence of a material issue of fact with respect to LIPA. LIPA's motion for summary judgment dismissing the complaint and any and all cross-claims against it is **granted**. This action against LIPA is concluded.

In conclusion, the defendant Welsbach Electric Corp. of L.I., Viviana and Marie Casimir and Long Island Power Authority's motions for summary judgment dismissing the complaint and any and all cross-claims against them are **granted**.

SO ORDERED.

DATED: 4/4/2013

Ray S. Mallon
J.S.C.

ENTERED
APR 08 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE