Bartalomy v State University of NY
2013 NY Slip Op 32236(U)
September 9, 2013
Sup Ct, Suffolk County
Docket Number: 11-3311
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 11-3311

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 10-30-12 (#001)
MOTION DATE 12-18-12 (#002)
MOTION DATE 1-8-13 (#003)
ADJ. DATE 5-14-13
Mot. Seq. # 001- MG; CASEDISP
002- XMG
003- XMotD

---X

MARK BARTALOMY,

Plaintiff,

- against -

STATE UNIVERSITY OF NEW YORK, STONY BROOK SCHOOL OF DENTAL MEDICINE AT STATE UNIVERSITY OF NEW YORK, NEW YORK STATE HOUSING FINANCE AGENCY, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and SETAUKET FIRE DISTRICT,

Defendants.

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14, 23-34; Notice of Cross Motion and supporting papers 15-22; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 35-36; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff Mark Bartalomy ("Bartalomy"), CPLR for an order, pursuant to CPLR §1002 and CPLR §3025 granting plaintiff leave to serve a supplemental complaint, adding as a defendant the Setauket Fire Department, Inc. ("Department"), is granted and the complaint is deemed to have been served, and is otherwise denied; and it is further

ORDERED that the motion by defendants Setauket Fire District ("District") and Setauket Fire Department, Inc., for an order, pursuant to CPLR §3211 (a) (7), CPLR §3212 and General Municipal Law §205-b granting it summary judgment, is granted; and it is further

ORDERED that the cross motion by defendant Dormitory Authority of the State of New York ("DASNY"), for an order, pursuant to CPLR §3212 b granting it summary judgment, dismissing the complaint and all cross-claims, is granted.

This is an action to recover damages for personal injuries allegedly suffered by the plaintiff Bartalomy as a result of an alleged fall down a ladder while attempting to descend into an underground vault at the Stony Brook School of Dental Medicine at the State University of New York, Stony Brook campus on June 23, 2010.

Defendant Setauket has now moved for dismissal of the complaint for failure to state a cause of action or for summary judgment dismissing the complaint. In support of the motion defendant Setauket submits, *inter alia*, its attorney's affirmation, copies of the pleadings, plaintiff's verified bill of particulars, the General Municipal Law 50-h hearing transcript of the plaintiff, the deposition transcript of the plaintiff, and the deposition transcript of Chief Brendan Brown, as a witness for the defendant Setauket. In opposition plaintiff submits, *inter alia*, his attorney's affirmation, the pleadings, a copy of the proposed amended complaint, plaintiff's verified bill of particulars, the General Municipal Law 50-h hearing transcript of the plaintiff, the deposition transcript of the plaintiff, and the deposition transcript of Chief Brendan Brown, as a witness for the defendant Setauket.

Defendant DASNY has also moved for summary judgment dismissing the complaint and all cross-claims asserted against it. In support of the motion defendant DASNY submits, *inter alia*, its attorney's affirmation, the sworn affidavit of Paul Louis Rispoli, a copy of the complaint and answer in the matter of ***Mark Bartalomy v the State of New York***, which has been filed in the Court of Claims under Claim No. 119701, and said defendant has incorporated by reference all of the exhibits attached to the motion of the defendant District. Plaintiff discontinued the action against all parties except DASNY and the District. No opposition was submitted with regard to this motion.

Plaintiff testified that on June 23, 2010, while in the employ of Iacono, Inc., he was assigned to repair a vacuum pump at the Stony Brook Dental School, located on the campus of SUNY Stony Brook. In the course of his work, it became necessary for him to access an underground mechanical vault. The mechanical room could only be accessed by means of a fixed metal ladder that was bolted to the side of the room. In the process of descending the ladder, he alleged that his shirt caught on a broken hinge on the vault door and he lost his balance. He lost his footing and fell straight into the mechanical room. In the course of the fall, he managed to grab the side of the ladder to slow his fall. He fell approximately ten 10 to12 feet. In doing so, his left leg became stuck in the second or third rung from the bottom of the ladder. This caused pain in his entire leg, beginning with the knee. He also testified that he had pain in his middle back, upper back, neck, head, right shoulder and right arm. Upon his leg becoming stuck in the rung of the ladder, his upper body swung down and his head, neck and shoulder struck the concrete floor of the room. He lost consciousness for 30 to 45 minutes. When the plaintiff regained consciousness, his leg was still caught in the rung of the ladder and his shoulders, neck, and upper torso,

were in contact with the floor of the room. Plaintiff used his cellular telephone to call Bob Gallagher, his contact on the Stony Brook campus, and informed him as to his situation. Mr. Gallagher informed the plaintiff that assistance would be provided. Units from the Stony Brook University Police and the defendant District responded within 10 to15 minutes. The personnel from these two groups attempted to determine how to extricate the plaintiff. Rescue personnel removed plaintiff's left pant leg, checked his pulse and discovered that the leg had turned blue. A number of members of the response team descended into the vault to begin plaintiff's extraction. As many as six people were in the room with him at any given time. An air bag was placed beneath him in order to elevate his back and a sheet was placed over his face to prevent dirt from the outside of the vault and the rescue workers from falling into his face. In addition to this, a paramedic put a mask (presumably oxygen) over his face and began to monitor his vital signs. An attempt to extricate his leg was unsuccessful. A decision was made to cut the rung of the ladder that held him with an electric bandsaw. Plaintiff testified that he asked if they would put something between his leg and the ladder but no one did. He said he was told that no one was going to cut his leg. He did not know who he spoke with. As someone began to operate the saw he felt an immediate burning sensation which lasted the whole time the machine was operating and then afterward he felt less burning and more pain. After the rung was removed, he was removed from the vault and taken by ambulance to Stony Brook Hospital. Plaintiff's medical records indicate that he had numerous injuries, including an abrasion and bruising on his left ankle which was cleaned and treated with an antibiotic cream. The injury was not stitched. This injury later became infected.

Brendan Brown testified as a witness for the District. At the time of the accident, he was chief of the Setauket Fire Department. He responded to a call made for the plaintiff' rescue and oversaw the rescue operation. Other members also responded to the scene, as well as Stony Brook fire marshals and police. The removal of the plaintiff was described as a confined space rescue. He observed the plaintiff in the vault. A tripod was set up over the hole, so that a Stokes basket (a device to remove a patient with a spinal injury or potential spinal injury) could be lowered to remove the plaintiff. At that time he did not know who operated the band saw to allow the removal of plaintiff's injured leg. There was a protocol when using a band saw to use some sort of barrier. The actual extrication of the plaintiff was carried out by the Department and state fire marshals. The emergency medical technician in the vault was from the Department. Plaintiff was extricated using the tripod and the Stokes basket, and placed in an ambulance to be taken to the hospital. State police and fire marshals were also inside the vault.

It was later learned that the Department member who operated the bandsaw was Joseph DiBernardo, Jr.. Mr. DiBernardo was a volunteer fire fighter with the Department and was a Lieutenant in the New York City Fire Department, who died in the line of duty on September 22, 2011. As a result, neither party was able to conduct his deposition.

Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875

NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]). Plaintiff's motion to amend is granted, without opposition.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). 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, 427 NYS2d 595 [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, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The District moves for summary judgment. An agency of government is not liable for negligent performance of a governmental function unless there existed a special duty to the injured person (***McLean v City of New York***, 12 NY3d 194, 878 NYS2d 238 [2009]; ***Clarke v City of New York***, 18 AD3d 796, 796 NYS2d 689 [2d Dept 2005]; ***Apostolakis v Centereach Fire District***, 300 AD2d 516, 752 NYS2d 691 [2002]). The four elements that are required to establish a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*see* ***McLean v City of New York,*** *supra*; ***Pelaez v Seide***, 2 NY3d 186, 778 NYS2d 111 [2004]; ***Kovit v Estate of Hallums***, 4 NY3d 499, 797 NYS2d 20 [2005]). To sustain liability, the duty breached must be more than that owed to the public generally (***Lauer v City of New York***, 95 NY2d 95, 100, 711 NYS2d 112 [2000]). The burden of proof of establishing a special relationship is on the plaintiff (***Valdez v City of New York***, 18 NY3d 69, 936 NYS2d 587 [2011]; ***Lauer v City of New York***, *supra*). In order to invoke the special duty rule, plaintiff must establish that, through affirmative acts, the municipality has lulled him or her of foregoing other avenues of protection or that it has voluntarily assumed a duty separate from that owed to the public at large. (***Bishop v Bostick***, 141 AD2d 487, 529 NYS2d 116 [2d Dept 1988]). It is the plaintiff's burden to show that the defendants conduct actually lulled him into a false sense of security, induced him to relax his own vigilance or forego other avenues of protection and thereby placed him in a worse position than if the defendants never assumed the duty (***Davis v Village of Spring Valley***, 50 AD3d 943, 856 NYS2d 243 [2d Dept 2008]; ***Conde v City of New York***, 24 AD3d 595, 808 NYS2d 347 [2d Dept 2005]). For the purposes of this motion, the request that the Department be deemed to join in the motion is granted. The District has submitted evidence sufficient to entitle it to summary judgement. The district established that there was an emergency situation, where the plaintiff's leg had turned blue and immediate action was necessary to prevent further injury to the plaintiff; that not only employees of

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the District were in the underground vault; but, also Stony Brook fire marshals and police; that plaintiff could not identify the person who he allegedly conversed within regard to cutting, and cannot establish that it was an employee of the District and, thus, cannot establish all the elements necessary to establish a special duty on the part of the District. The defendant District has also shown that the plaintiff failed to plead the alleged special duty in either the original or the amended complaint.

In response, the plaintiff has failed to meet his burden of establishing that the District or Department owed a special duty to him. The plaintiff has not provided proof that the person with whom he spoke was a member of the Fire District. In any event the alleged statements were inadmissable hearsay and plaintiff has made no showing the statements are admissible under any exception to the hearsay rule. There is no evidence that plaintiff actually lulled him into a false sense of security, induced him to relax his own vigilance or forego other avenues of protection and there is no evidence that plaintiff was placed in a worse position than if the defendants never assumed the duty. In light of this the motion for summary judgment, dismissing the complaint against both the District and Department is granted.

Turning to the motion for summary judgment by DASNY, 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]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Forbes v Aaron***, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Defendant DASNY has established its entitlement to summary judgment herein. The answer of the State of New York in the related Court of Claims action contains an admission that the State maintains the area where the plaintiff alleges he was injured. The affidavit of Louis Rispoli, a vice president of the State University of the State of New York, states the defendant DASNY does not own, operate, maintain, manage, supervise or control or have any interest in the site of the plaintiff's alleged injuries. No opposition has been submitted. In light of these uncontested facts, the motion by the defendant DASNY for summary judgment is granted in all respects.

Dated: September 9, 2013

W. Gerard Asher
J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION