Soler v County of Suffolk
2013 NY Slip Op 32242(U)
August 30, 2013
Sup Ct, Suffolk County
Docket Number: 08-40609
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 08-40609
CAL No. 13-00363OT

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 4-18-13 (#003)
MOTION DATE 5-8-13 (#004)
ADJ. DATE 5-14-13
Mot. Seq. # 003 - MD
004 - MG

GONZALO SOLER,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF BROOKHAVEN, AUTO PARTS DEPOT OF BELLPORT, INC., and 1260 MONTAUK HIGHWAY CORP.,

Defendants.

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[* 2]

Upon the following papers numbered 1 to 42 read on this motion to strike; and this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15, 16-34; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 35-38; Replying Affidavits and supporting papers 39-40, 41-42; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that this motion by the defendant Auto Parts Depot of Bellport, Inc. ("Auto Parts") for an order striking the note of issue and certificate of readiness, removing the action from the trial calendar, and compelling further discovery from the plaintiff is decided as set forth herein; and it is further

ORDERED that the motion by the defendant County of Suffolk ("County") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted, and the action is severed and judgment can be entered dismissing the complaint and all cross claims asserted against it.

This action involves a trip and fall which occurred on September 19, 2007, when the plaintiff Gonzalo Soler ("Soler") exited his automobile and fell to the ground in the parking lot of Auto Parts Depot of Bellport, located at 1260 Montauk Highway, East Patchogue, in the Town of Brookhaven. Plaintiff alleges that he suffered serious and permanent injuries as a result of that fall. It is noted that the Town of Brookhaven was granted summary judgment in this action by an order of the Hon. Mark D. Cohen, dated March 31, 2009.

Defendant Auto Parts now moves for an order striking the note of issue and certificate of readiness, removing the action from the trial calendar, and compelling the further discovery from the plaintiff: to supply authorizations for non-privileged portions of legal files, medical records, no-fault records; to appear for a further deposition; to appear for a further IME; to supply authorizations for prior workers' compensation records, as well as Medicare and disability records. In support of the motion defendant Auto Parts submits, *inter alia*, its attorney's affirmation, copies of the pleadings, plaintiff's verified bill of particulars, the deposition transcript of the plaintiff and court documents from the action entitled ***Gonzalo Soler, Jr. And Barbara Soler v Thomas W. Scala and Nancy A. Scala***, under Suffolk County Index No. 97-29685 and two other actions. In opposition plaintiff submits his attorney's affirmation and a copy of the pre-trial order dated January 2, 2013. Defendant 1260 Mont Highway Corp. ("1260 Mont") submits its attorney's affirmation in support of the motion.

Defendant County has now moved for summary judgment dismissing the complaint and all cross claims asserted against it. In support of the motion defendant County 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, the deposition transcript of John Canino, as a witness for the defendant Auto Parts, the deposition transcript of John Dima, as a witness for the defendant 1260 Mont, and the sworn affidavits of Paul Morano and Renee Ortiz. No opposition was submitted with regard to this motion.

The motion by defendant Auto Parts for an order vacating the note of issue and certificate of readiness, and other relief, is based upon certain testimony given by the plaintiff at his deposition in this action. Specifically the plaintiff testified that he had not given testimony in any other proceeding other than this action and a prior workers' compensation claim; that he had never had any dizziness or vertigo prior to the accident that is the subject of this matter; and that he denied ever having prior right hand injuries or having any prior complaints with respect to his right wrist or elbow. The note of issue and statement of readiness was served on February 13, 2013. Movant's counsel alleges that on March 5, 2013 he first learned that the plaintiff had, in fact, been involved in three prior personal injury actions. Defendant Auto Parts has submitted documentation to establish the existence of three prior actions to brought by the plaintiff in Suffolk County captioned *Gonzalo and Barbara Soler v Scala* (Index No.97-29685); *Gonzalo and Barbara Soler v Franklin* (Index No. 90-20531); and *Gonzalo and Barbara Soler v Hickey* (Index No. 83 11746). In each of these actions the plaintiff alleged injuries similar, related or identical to those now claimed in the current action.

CPLR 3101(a) directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (***Kooper v Kooper***, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept 2010]). The Court of Appeals has stated the words "material and necessary" are to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material ... in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, *id*, at 407, 288 NYS2d 449, *quoting* CPLR 3101). It is clear that the undisclosed facts regarding the plaintiff's prior actions and injuries may be relevant to the defense of this action.

Where a party timely moves to vacate a note of issue, it need show only that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect" (22 NYCRR § 202.21[e]; ***Vargas v Villa Josefa Realty Corp.***, 28 AD3d 389, 390, 815 NYS2d 30 [1st Dept 2006]; *see* ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). Moreover, where documents and records have been demanded but not provided, and a plaintiff files a statement of readiness indicating that there are no outstanding discovery requests, striking of the action from the trial calendar is warranted (***Adamson v Airweld, Inc.***, 188 AD2d 575, 592 NYS2d 607 [2d Dept 1992]). Where, as here, a motion to vacate the note of issue and statement of readiness is made more than 20 days after filing, it will be granted only where a material fact in the certificate of readiness is incorrect or upon good cause shown (22 NYCRR 202.21 [e]; ***Witherspoon v. Surat Realty Corp.***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; ***Ferraro v North Babylon Union Free School District***, 69 AD3d 559, 892 NYS2d 507 [2d Dept 2010]). To satisfy the requirement of good cause, the party seeking vacatur must demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and statement of readiness requiring additional pretrial proceedings to prevent substantial prejudice. (***Torres v St. Vincents Catholic Medical Center***, 71 AD3d 873, 895 NYS2d 861 [2d Dept 2010]).

Here, the Court finds, under the facts set forth above, that "unusual and unanticipated circumstances" are present, so as to permit discovery after the filing of the note of issue (*see* 22 NYCRR

202.21 [d]; *cf.* ***Arons v Jutkowitz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; ***Farkas v Orange Regional Medical Center***, 97 AD3d 720, 948 NYS2d 651 [2d Dept 2012]; ***Francis v Bd. of Educ. of City of Mount Vernon***, 278 AD2d 449, 717 NYS2d 660 [2d Dept 2000]).

In light of the facts and law, the court exercises its discretion and declines to grant that portion of Auto Parts's motion to strike the note of issue and certificate of readiness. However, that portion of motion which seeks to compel further discovery is granted, to the extent set forth herein. The plaintiff shall, within 15 days of receipt of a copy of this order with notice of entry, provide the remaining defendants with all authorizations demanded in the motion herein. The parties shall schedule and complete the further deposition and physical examination of the plaintiff. Said discovery shall be completed within 60 days of the service of a copy of this order with notice of entry, unless application is made and granted by this court extending such time. The defendants' time to make a motion for summary judgment is extended up to and including 60 days from the completion of the last examination before trial herein. The failure of a defendant to comply with the time periods set forth herein shall be deemed a waiver of the right to obtain the subject discovery or make the subject motion. The defendants are directed to submit a copy of this order with their motions for summary judgment, if any.

The plaintiff is directed to serve a copy of this order with notice of entry upon the defendants.

The court next turns to the defendant County's motion for summary judgment. 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]).

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see* ***Forbes v Aaron***, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]). Suffolk County Charter § C8-2A provides that the County cannot be held liable as a matter of law for personal injuries sustained as a result of any defective, out of repair, unsafe, dangerous or obstructed condition of any highway, road, street, etc. "unless the County has received written notice within a reasonable time before said injury . . . was sustained." There are only two exceptions to the prior written notice requirement, to wit, "where the locality created the defect or hazard through an affirmative act of negligence . . . and where a special use confers a special benefit

upon the locality" (***Amabile v City of Buffalo***, 93 NY2d 471, 474, 693 NYS2d 77, 79 [1999] [internal citations and quotation marks omitted]). The defendant County submitted the affidavit of Paul Morano, an employee of the Suffolk County Department of Public Works. Part of his duties is to investigate allegations set forth in claims against the County by searching the official records of the Department of Public Works to ascertain whether the County owns, maintains or controls a given location. He states that the County did not construct, design or repair the driveway leading into the parking lot at 1260 Montauk Highway, East Patchogue, in the Town of Brookhaven. He further states that the County has no jurisdiction over said parking lot. The defendant County also submitted the affidavit of Renee Ortiz, the Chief Deputy Clerk of Suffolk County. Her duties require her to maintain records of all written complaints concerning all defects and obstructions, pursuant to Suffolk County Charter § C8-2A on all of the streets, roads etc. in Suffolk County. She searched the appropriate records of the Suffolk County Legislature with regard to this matter and found no prior written complaints with regard to the alleged defect regarding the parking lot at 1260 Montauk Highway, which is the subject of this action. The County also submitted the transcript of the deposition of John Dima, the vice president of the defendant 1260 Montauk Highway, wherein he testified that his company is the owner of the building and parking lot at the subject property at1260 Montauk Highway.

Based upon the foregoing, defendant County has established its prima facie entitlement to summary judgement by showing that the County does not own, occupy or control the property where the plaintiff's alleged accident occurred. Furthermore, the County set forth proof that it had no prior written notice of any alleged defect at the subject property. No opposition has been interposed to the motion. Accordingly, the County's motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

Dated: Aug. 30, 2013

W. Gerard Asher
J.S.C.

_____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION