

Canonico v W.J. North Ridge Constr.

2015 NY Slip Op 32441(U)

November 23, 2015

Supreme Court, Suffolk County

Docket Number: 06-35418

Judge: John H. Rouse

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 1/12/15
ADJ. DATE 5/27/15
Mot. Seq. # 002 - MG; CASEDISP
003 - MD

-----X
ANDREW CANONICO,

Plaintiff,

- against -

W.J. NORTH RIDGE CONSTRUCTION
CORP., COUNTRY CARPET DISTRIBUTORS,
INC. and SPECHTS FLOORING
INSTALLATIONS,

Defendants.
-----X

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Upon the following papers numbered 1 to 35 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21, 22-25; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26-28, 29-30; Replying Affidavits and supporting papers 31-32, 33-35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Spechts Flooring Installations ("Spechts") for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross-claims as asserted against it is granted; and it is further

ORDERED that the branch of the cross motion by defendants W.J. Northridge ("Northridge") and Country Carpet Distributors, Inc. ("Country Carpets") for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and all cross-claims asserted against them is granted, and the branch of the cross motion seeking summary judgment on their cross-claim against defendant Spechts Flooring Installations for indemnification is denied as moot.

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This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Andrew Canonico (“Canonico”) on August 17, 2005, when he allegedly tripped and fell on a slippery substance, as he was pulling a hand truck while walking backwards up a flight of stairs at the River Elementary School, Patchogue, in the Town of Brookhaven. It is alleged that his injuries are the result of the negligence of the named defendants.

Defendant Spechts Flooring Installations (“Spechts”) now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant Spechts submits, *inter alia*, its attorney’s affirmation, the pleadings, the transcripts of depositions of the plaintiff, of Greg Boutin, as a witness for the defendant Country Carpet Distributors, Inc. (“Country”), of John H. Specht as a witness for defendant Spechts, of Charles Presinzano as a witness for defendant W.J. North Ridge Construction Corp. (“North Ridge”), six photographs, and the affidavit of John Specht, sworn to on December 9, 2014. Defendants North Ridge and Country Carpets have cross-moved for summary judgment in their favor dismissing the complaint and all cross-claims asserted against them, and granting summary judgment on their cross-claim against defendant Spechts Flooring Installations for indemnification. In support of their motion they have submitted their attorney’s affirmation and have incorporated by reference the exhibits to defendant Spechts’ motion. Plaintiff has submitted his attorney’s affirmation in opposition to both motions.

On August 17, 2005, the date of the alleged accident, plaintiff was employed by the Patchogue-Medford School District as a part-time custodian. His duties included preparing the school for the beginning of the school year, by buffing floors, painting, cleaning out classrooms and moving furniture. He would report to work in the morning and his supervisor would assign him tasks to be completed throughout the day. On the day of the accident, plaintiff reported to work around 8:00 a.m. His accident occurred around 10:00 a.m. He was wearing a shirt, jeans and sneakers with rubber soles. He was instructed to bring sealed boxes of books from the first floor to the second floor (the school has two floors) using a hand truck. Plaintiff stacked a number of boxes on the hand truck, which had two thick rubber wheels, two black grips, and a square standard size platform on which the boxes were placed. After stacking the boxes on the hand truck, he proceeded to the base of the stairs. He then turned around, and with his back facing the stairs he began pulling the hand truck up the stairs. He ascended the first flight of steps and came to a landing. He then pulled the hand truck to the second set of stairs, and began to ascend in the same manner. While ascending, he looked over both shoulders. He did not observe anything on the stairs. Prior to taking his last step onto the landing he did not look to see if there was anything on the floor. As he placed his foot on the landing it felt like it was on ice. It was slippery and he fell on his “butt”. At the time he fell, he was looking straight ahead. He described the substance on which he fell as “an off-white, like a light white, like a gray type color” and that it was “smooth”. The substance covered an area about the size of an eight by eleven inch sheet of paper. He did not observe any boxes of materials, tiles or other objects on the landing immediately after his accident. Plaintiff then got up, walked downstairs and reported the accident to his supervisor. He saw other dark spots in the hallway after his accident. They looked wet. He did not observe any floor work being done on the days prior to the accident. His supervisor told him to find the contractor and report the accident. Other than speaking to two unidentified workman, he did not do so.

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John Specht testified as a witness for defendant Spechts. He is self-employed by Spechts Flooring Installations. Other employees are his sons John and Mike. The company does commercial and residential flooring. He works as a subcontractor for Country Carpets. His company did flooring work at the River Elementary School in August of 2005. There were other contractors ripping down walls, and others were doing ceramic patching. A new entrance was being put on the school. There was a lot of construction going on. They did not work on staircases, but they did work on the landings next to staircases. Aside from invoices, there are no other writings with regard to the work he did for Country Carpet at the school. Prior to the floor installation, another company performed abatement by ripping up the previous tile floor and testing for asbestos. Spechts employees would start work at approximately 8:00 a.m. The first step in the floor installation process was leveling the floor by the application of two products, mapei and a feather finish. The application of mapei takes about 30 minutes, with an additional thirty minutes to dry. The area is then scraped to remove bumps, which takes about an hour. Then the feather finish is applied, it too takes about 30 minutes to apply and thirty more minutes to dry. The applications are dark gray when wet and white or light gray when dry. The last thing they put down is tile glue, which is black. The leveling process is done in large sections, such as an entire floor or hallway. Spechts followed this procedure at the River Elementary School by performing the leveling process on the entire area at one time. There were no areas of the job where a section of tiles or a single tile were to be replaced. The witness was not certain about the dates, which were based upon invoices related to the work. He could not recall if they put down tile that day, but believed that they would have begun installation of the tiles in the afternoon. While they were working, the stairway was closed off by a piece of yellow and black caution tape, which was kept there while the patch was wet. The tape was removed at some point, but not by the witness or his workers. When they left, after the work was completed, they noticed it was gone. He and his sons were there throughout the process. The scrapings from the removal of bumps were swept up and thrown in a bucket.

In his first affidavit, Mr. Specht reiterates that in performing their work, they would prepare an entire hallway floor at the same time. They never worked on an area the size of where plaintiff alleges he fell. No single tiles or section of tiles was involved, but the entire floor. They placed caution tape on the landings of the staircases leading to the second floor. They never left the work site until after they had completed the work. In his second affidavit, Mr. Specht, clarified the amount of time the floor leveling process would take. The first product applied to the floor was mapei. The whole hallway would take approximately 30 minutes to apply and an additional 20 to 30 minutes to dry. They would then scrape the floor to remove any bumps. This would take approximately one hour. Then a product called feather finish would be applied. This would take 30 minutes to apply and an additional 20 to 30 minutes to dry.

Greg Boutin testified as a witness for the defendant Country Carpet. He has been employed by Country Carpet for 14 years, the last 10 as vice president. His company does residential and commercial flooring. Defendant North Ridge, a general contractor who subs out work to Country Carpet. Country Carpet, was given the contract by North Ridge, and subbed out the tile installation at the River Elementary School to defendant Spechts, although Spechts had a direct contract with North Ridge. No work on staircase was involved in the contract. They hired a different company to do ceramic tile repairs at the school. Another sub-contractor, Hilume, was on the site in August of 2005, doing carpentry, ceilings and drywall on both floors of the school. A North Ridge employee named Charlie was

supervising work at the school on a daily basis. North Ridge also had an employee who did clean up work. Spechts would remove any leftover adhesives or epoxies that they would use on jobs; the laborer would remove leftover cartons, containers, debris and put it in the dumpster. The vinyl composition tile that Spechts was installing was put down with an adhesive he referred to as black thin set, which was in fact colored black. They were also installing molding with a cream colored adhesive. He did not know of any reason why a eight and a half by eleven inch area of material would be within or surrounded by flooring.

Charles Presinzano testified as a witness for the defendant North Ridge. He has worked for North Ridge for the last eight years, with the job title of superintendent. He would go to job sites and coordinate the different trades on the site and answer any questions they might have. He recalled that the River Elementary School project included a elevator extension and some flooring work in the hallways. There would be 10 to 15 workers in the school on any given day. No work was done on stairways. He was at the site every day. North Ridge had the responsibility of cleaning up debris at the site. It hired a laborer to do the cleanup work. He testified as to the method in which the tile is installed and noted that it is not installed until the glue is dry (due to some unknown chemical reason) the tile adheres to it even though it is dry to the touch. He observed Spechts put up caution tape on the stairs and he saw it pretty much every day when they worked. It was there when they worked and gone when they were done. He never received any complaints about the work done by Spechts.

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 (*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]).

“To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was the proximate cause of injury to the plaintiff” (*Alvino v Lin*, 300 AD2d 421, 751 NYS2d 585 [2d Dept 2002]; *see Conneally v Diocese of Rockville Ctr.*, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014] *Rubin v Staten Is. Univ. Hosp.*, 39 AD3d 618, 833 NYS2d 241[2d Dept 2007]

The defendant Spechts demonstrated its prima facie entitlement to judgment as a matter of law by showing that there was no evidence that the conduct of its employees caused the plaintiff’s injury (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The evidence presented shows that

in completing their floor installation, Spechts did not create the dangerous condition that caused plaintiff's alleged accident. It has not been firmly established exactly when Spechts performed its work. It is clear, based on the length of time necessary to complete the work, that it was not finished on August 17th, since work would have still been ongoing at the time plaintiff alleges that the accident occurred. When they completed their leveling work, the material they put down dried prior to leaving the work site. If the work was done on the 16th, then, based on the testimony in the record, the materials put down would have been dry for many hours. If, as Mr. Specht asserts, they would have installed the tiling in the afternoon of the same day, then a black adhesive is used and the tiles are not put down until the adhesive is already dried. He further testified that they tiled the entire hallway and that no area the size of an eight by eleven inch sheet of paper would have been left without tile.

In response, plaintiff attempts to raise an issue of fact based solely on circumstantial evidence and speculation. To establish a prima facie case of negligence based on circumstantial evidence, the plaintiff was required to 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 (*see Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]; *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]). The law does not require that plaintiff's proof positively exclude every other possible cause of the accident other than defendant's negligence. Rather, the plaintiff's 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 (*see Hernandez v Alstom Transp., Inc.*, 13 NYS3d 232, 234 [2d Dept 2015]; *Robinson v Limocelli*, 127 AD3d 7217 NYS3d 202 [2d Dept 2015]). Plaintiff has failed to do so. The record establishes that there were a number of other contractors in the building on the dates in question. It also establishes that there was a "clean up" man on the premises who removed debris and other material from the various work sites after a given contractor. Since the plaintiff did not come forward with sufficient proof to render other plausible causes of the accident sufficiently remote, he has failed to raise a triable issue of fact as to whether the conduct of the defendant Specht caused his injury (*see Gomes v Courtesy Bus Co.*, 251 AD2d 625, 676 NYS2d 196); *Nigri v City of New York*, 294 AD2d 477, 478, 742 NYS2d 371 [2d Dept 2002]).

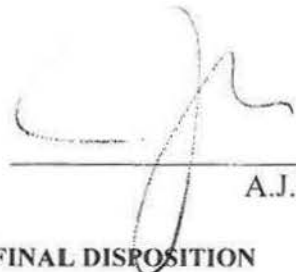
Defendants North Ridge and Country Carpet have also established their entitlement to summary judgment. As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work" (*Saini v Tonju Assoc.*, 299 AD2d 244, 245, 750 NYS2d 55 [1st Dept. 2002]; *see Horowitz v 763 E. Assoc., LLC*, 125 AD3d 808, 5 NYS3d 118 [2d Dept 2015]; *Goodwin v Comcast Corp.*, 42 AD3d 322, 840 NYS2d 781 [1st Dept.2007]). An employer is not liable on ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that employer either knew, or in exercise of reasonable care might have ascertained, that contractor was not properly qualified to undertake the work (*see Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 12 NYS3d 51[1st Dept 2015]; *Begley v City of New York*, 111 AD3d 5, 23, 972 NYS2d 48 [2d Dept 2013]). Neither the retention of inspection privileges nor the general power to supervise and coordinate the work being done constitutes sufficient control to render a defendant liable (*see Fernandez v 707, Inc.*, 85 AD3d 539, 541, 926 NYS2d 408 [1st Dept 2011]; *Farnsworth v Brookside Constr. Co., Inc.*, 31 AD3d 1149, 1151, 818 NYS2d 386; [4th Dept 2006]; *McCune v Black Riv. Constructors*, 225 AD2d 1078, 1079, 639 NYS2d 203 [4th Dept 1996]). North Ridge and Country Carpet have introduced

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evidence that they had no control over the manner in which the defendant Specht, an independent contractor, performed its work. There is also no evidence that Specht was incompetent or not properly qualified to undertake the work. In response, plaintiff has failed to raise any issue of fact.

In light of the foregoing, the motion by defendant Spechts for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and cross-claims is granted. The branch of the cross motion by defendants W.J. Northridge and Country Carpet Distributors, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross-claims is granted, and the branch of the cross motion seeking summary judgment on their cross-claim against defendant Spechts Flooring Installations for indemnification is denied as moot.

Dated: NOVEMBER 23, 2015



A.J.S.C.

JOHN H. ROUSE

X FINAL DISPOSITION ___ NON-FINAL DISPOSITION