Mejia v County of Suffolk
2017 NY Slip Op 32442(U)
November 17, 2017
Supreme Court, Suffolk County
Docket Number: 13-17076
Judge: Joseph A. Santorelli
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.

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 13-17076
CAL. No. 16-01247OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11-17-16 (001)
MOTION DATE 12-1-16 (002)
MOTION DATE 12-8-16 (003)
ADJ. DATE 6-22-17
Mot. Seq. # 001 - MotD
002 - WDN
003 - MD

----------X

MARTY MEJIA,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK, THE TOWN OF SMITHTOWN, ROSEMAR CONTRACTING, INC, ROSEMAR CONSTRUCTION, INC., RAC 200 REALTY ASSOCIATES and RACANELLI REALTY DEVELOPMENT, LLC,

Defendants.

----------X

THE LATRONICA LAW FIRM, P.C.
Attorney for Plaintiff
64 Division Avenue, Suite 107
Levittown, New York 11756

THE LAW OFFICE OF ANDREA SAWYERS
Attorney for Defendants Rosemar Contracting, Inc., and Rosemar Construction, Inc.
3 Huntington Quadrangle, Suite 102S
Melville, New York 11747

DENNIS M. BROWN, ESQ.
SUFFOLK COUNTY ATTORNEY
Attorney for Defendant County of Suffolk
H. Lee Dennison Building, Box 6100
Hauppauge, New York 11788-0099

LAW OFFICE OF STANELY ORZECHOWSKI, P.C.
Attorney for Defendant Town of Smithtown
104 Bellerose Avenue, Suite 2
Nesconset, New York 11767

Upon the following papers numbered 1 to 69 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-41 ; Notice of Cross Motion and supporting papers 48-63 ; Answering Affidavits and supporting papers 42-43; 64-67 ; Replying Affidavits and supporting papers 44-47; 68-69 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) of defendants Rosemar Contracting, Inc. and Rosemar Construction, Inc., the motion (seq. 002) of defendant Town of Smithtown, and the motion (seq. 003) of defendant County of Suffolk are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (seq. 001) of defendants Rosemar Contracting, Inc. and Rosemar Construction, Inc. for summary judgment dismissing the complaint and cross claims against them is granted to the extent set forth below, and is otherwise denied; and it is further

ORDERED that the motion (seq. 002) of defendant Town of Smithtown shall be permitted to be withdrawn in accordance with correspondence of counsel dated July 17, 2017; and it is further

ORDERED that the cross motion (seq. 003) of defendant County of Suffolk for summary judgment in its favor on its cross claims against Rosemar Contracting, Inc. and Rosemar Construction, Inc. is denied.

Plaintiff Maria Mejia commenced this action to recover damages for personal injuries she allegedly sustained on April 26, 2012, when she tripped and fell on a sidewalk on Adams Avenue in Hauppauge, New York. By her verified bill of particulars, plaintiff alleges that defendants were negligent in failing to maintain the sidewalk in a safe condition, in allowing a dangerous condition to exist, and in failing to post warning signs and barriers.

Defendants Rosemar Contracting, Inc. and Rosemar Construction, Inc. now move for summary judgment dismissing the complaint against them. Rosemar Contracting argues that it did not owe plaintiff a duty of care, as it is a third-party contractor retained by the County of Suffolk. It further argues that it was not present at the subject location when the incident occurred. Rosemar Construction argues that it was not involved with the project at the subject area and did not perform any services at the subject site. In support of the motion, the Rosemar defendants submit copies of the pleadings and the verified bill of particulars, the transcript of plaintiff's testimony at a 50-h hearing, the transcripts of the parties' deposition testimony, affidavits of Robert Garone and Linda Bianca, a copy of the contract between the County of Suffolk and Rosemar Contracting, and copies of photographs of the alleged dangerous condition.

Plaintiff testified at a 50-h hearing and at her deposition that on the day of the incident, at 1:30 p.m., she was walking on a sidewalk on Adams Avenue near Motor Parkway in Hauppauge. She testified that it was a sunny day, that the weather was dry, and that she was prospecting the area for employment. She testified that she was walking for approximately 20 minutes before the incident occurred, and that she had just made a right onto Adams Avenue from Motor Parkway. Plaintiff testified that she observed rocks, sand, and dirt on the entire sidewalk, and that she slipped on the dirt and then tripped and fell in a depression that she did not observe, as it was underneath the dirt. She testified that before she tripped and fell, she observed men in orange vests on the sidewalk working behind an orange fence, but that she did not observe any identification marks on their vests and does not know for whom they were working. She testified that she also observed one of the workers on a "yellow machine" moving dirt. Plaintiff testified that she did not see any signs or barricades on the sidewalk, and that she could not walk in the street as there was oncoming traffic and cars were turning at the intersection. She

testified that after she fell, a passerby assisted her and drove her home. She testified that she returned to the subject area with her husband a few hours later, and that he took pictures of the area. Plaintiff was shown copies of the photographs and testified that they depict the location of the sidewalk where she fell, except that the sidewalk was covered in dirt and sand when she fell, and that there was no orange cone as depicted in the photographs. She marked the location where she fell on a photograph designated "Respondent's Exhibit B." and testified that she tripped on the catch basin/sewer drain which was covered in dirt.

Paul Morano testified that he works for Suffolk County as a civil engineer in the Department of Public Works, and that as part of his responsibilities he researches complaints for the County Attorney's Office. He testified that the County of Suffolk entered into a contract in August 2011 with Rosemar Contracting to expand the roadway near the intersection of Adams Avenue and Motor Parkway in Hauppauge to create turning lanes on Motor Parkway. According to Morano, Rosemar Contracting was to remove the existing catch basins and relocate them after the width of the roadway was expanded. He testified that the County hired an outside inspection company to be present on site while Rosemar Contracting performed the work. Morano was shown daily inspection reports prepared by one of the inspectors, which indicate that on April 19, 2012, the eastbound lane on Adams Avenue was closed, and that signs, barrels, cones and arrow boards were in place for traffic control. Daily reports for April 23 through April 26, 2012 were shown to Morano, who testified that the documents were prepared by the County and indicated there was no scheduled work or personnel on the subject site for the expansion project on those days. Morano testified that he does not know when the work began or when it completed, but that the first daily record of the roadway expansion project was created on March 17, 2012.

Louis Varrialle testified that he is the highway project inspector for the Town of Smithtown. He testified that the sidewalk on Adams Avenue is within the jurisdiction of the County of Suffolk, as it is on a county road, and that the Town does not perform maintenance work at the subject area. He testified further that he searched the computerized database for complaints regarding any issues with the sidewalk at the subject area, and he did not find any.

Steven Vecchia testified that he is an engineer and was working for Rosemar Construction as the project manager for expansion of the subject roadway. He testified that he was present on the job site when the work was performed, and that he searched the daily work sheets for the project and did not find any work tickets for the "relevant time period in April 2012." He testified that while he was on site, he would coordinate subcontractors, utility companies, maintain traffic and safety programs and address issues that arise during the day. He testified that Elizabeth Torres is the engineer for the County and that she was in charge of the project and was the "go to person." Vecchia testified that Rosemar Contracting hired a subcontractor, ADJO, to perform drainage work, and that it had not yet started the excavation work on the date of plaintiff's accident, based on the pictures that he was shown. He testified further that the orange fence and cones shown in the pictures were not placed there by Rosemar Contracting; rather, they were placed there by a utility company, either Verizon or National Grid.

Anthony Racanelli testified on behalf of defendants RAC 200 Realty Associates and Racanelli Development Corp. He testified that RAC 200 is the management company for property located at 200

Motor Parkway, and that in March 2012, a portion of the subject property was transferred to the County of Suffolk for the road expansion project at the subject area.

The affidavits of Robert Garone and Linda Bianca were submitted. In his affidavit, Garone states that he was the president of Rosemar Construction in April 2012. Bianca states in her affidavit that she is and was the president of Rosemar Contracting in 2012. According to the affidavits, Rosemar Contracting was the entity that entered into a written agreement with the County of Suffolk for the road expansion project on Adams Avenue, and Rosemar Construction was not a party to the contract. Both Mr. Garone and Ms. Bianca state in their affidavits that Rosemar Contracting delegated its supervisory role to Robert Vecchia, who is an employee of Rosemar Construction.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). The existence of one or more of these factors is sufficient to give rise to a duty to exercise due car; absent one of these factors, a party cannot be held liable for injuries caused by a dangerous or defective condition (***Zylberberg v Wagner***, 119 AD3d 675, 990 NYS2d 52 [2d Dept 2014]; ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]).

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; ***Nachamie v County of Nassau***, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *id, quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286

[1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

Here, the Rosemar defendants established their prima facie entitlement to summary judgment dismissing the complaint by demonstrating that plaintiff was not a party to the contract and, therefore, they did not owe her a duty of care (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). As plaintiff did not plead any of the ***Espinal*** exceptions in the complaint or in the bill of particulars, defendants are not required to demonstrate that none of the exceptions apply in order to establish their prima facie case (*see* ***Hsu v City of New York***, 145 AD3d 759, 43 NYS3d 139 [2d Dept 2016]; ***Barone v Nickerson***, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). Having established a prima facie case, the burden shifts to plaintiff to submit sufficient proof to raise a triable issue of fact regarding the applicability of one or more of the ***Espinal*** exceptions (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]).

In opposition, plaintiff submits an affirmation of counsel. In his affirmation, counsel speculates that the Rosemar defendants performed construction work on the subject date of the incident and caused a dangerous condition. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Furthermore, to defeat a motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form. Conclusory allegations are insufficient to defeat the motion (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). Here, plaintiff has failed to proffer competent proof to raise a triable issue of fact as to whether any of the ***Espinal*** exceptions apply to the instant matter. Accordingly, the branch of the motion of defendants Rosemar Contracting and Rosemar Construction for summary judgment dismissing the complaint against them is granted.

However, the branch of the motion for summary judgment dismissing the County's cross claims against Rosemar Contracting for contractual indemnification and for breach of contract based on its alleged failure to procure insurance is denied. Article 3 of the agreement between the County and Rosemar Contracting contains an indemnification provision, which provides that Rosemar Contracting shall protect, indemnify, and hold harmless the County and its officers, agents, etc., against all liabilities, suits or actions and reasonable attorneys' fees arising out of the acts or omissions or the negligence of the Contractor in connection with the agreed services. Rosemar Contracting argues that it could not have been negligent, as it was not conducting any work at the subject site on the date of the incident or from April 23, 2012 through April 26, 2012, and, therefore, the indemnification clause has not been triggered.

Whether a party is entitled to contractual indemnification depends on the specific language of the contract (***Campisi v Gambar Food Corp.***, 130 AD3d 854, 13 NYS3d 567 [2d Dept 2015]). Here, Rosemar Contracting, as the movant for summary judgment, must establish that it was free from negligence in order to prevail on its motion to dismiss the County's cross claim for contractual

indemnification (***Tolpa v One Astoria Sq., LLC***, 125 AD3d 755, 4 NYS3d 230 [2d Dept 2015]). The agreement between the County and Rosemar Contracting contains various documents, including a project manual with general conditions. The agreement states that the parties' contract is comprised of these documents, and Linda Bianca signed the agreement and agreed to the terms and conditions.

Pursuant to General Condition 19, entitled "accident prevention," the contractor has "absolute control over the entire site of the work," and paragraph J states that "safety in all aspects is totally the contractor's responsibility." General Condition 19 places the onus on the contractor to maintain signage, barricades, guard lights and railings at all trenches or pits adjacent to public walks and at obstructions at streets, roads and sidewalks. Pursuant to paragraphs D and E of General Condition 19, the contractor assumes full responsibility for safe prosecution of the work and is solely responsible for safety on the job site. Additionally, General Condition 2 requires Rosemar Contracting to coordinate and allow utility companies and other contractors to perform any work at the subject area, and is required to protect the work, clean up the work during and after construction, and maintain it until final acceptance. Work is defined in the contract as "furnishing all labor, materials, equipment, and other incidentals necessary or convenient to the successful final completion of the project and the carrying out of all the duties and obligations imposed by the contract documents."

The mere fact that Rosemar Contracting might not have been on the subject work site on the date of the incident does not establish as a matter of law that it was not negligent given the aforementioned general conditions of the contract. Where a plaintiff is injured, not from the manner in which the work was conducted, but, rather from a dangerous condition on the premises, a contractor may be liable in negligence if it has control over the work site and actual or constructive notice of the dangerous condition (*see* ***Hirsch v Blake Hous., LLC***, 65 AD3d 570, 571, 884 NYS2d 141 [2d Dept 2009]). Triable issues of fact have not been eliminated regarding Rosemar Contracting's conduct and whether the indemnification clause should prevail.

Alternatively, Rosemar Contracting argues that the indemnification clause of the construction agreement violates General Obligations Law and is unenforceable. Rosemar Contracting argues that the County seeks to indemnify itself for its own negligence and that without the language "to the extent provided under law," the indemnification clause is void. General Obligations Law§ 5-322.1 governs agreements exempting owners and contractors from liability for negligence and declares such provisions void and unenforceable in cases, where, inter alia, a party seeks to be indemnified for his or her own negligence. Here, however, the indemnification provision does not purport to indemnify the County for its own negligence; rather, it requires the contractor to indemnify the County for the contractor's negligence. Therefore, the provision does not run afoul of the statute (***Tarpey v Kolanu Partners, LLC***, 68 AD3d 1097, 892 NYS2d 447 [2d Dept 2009]; ***Ostuni v Town of Inlet***, 64 AD3d 854, 881 NYS2d 678 [3d Dept 2009]). Inasmuch as the County does not seek to indemnify itself for its own negligence, the language "to the extent provided under law" is not necessary (*see* ***Reisman v Bay Shore Union Free School Dist.***, 74 AD3d 772, 902 NYS2d 167 [2d Dept 2010]). Accordingly, the branch of the motion by Rosemar Contracting for summary judgment dismissing the cross claim for contractual indemnification is denied.

With respect to the cross claim against Rosemar Contracting for its failure to procure insurance on behalf of the County of Suffolk, a contractual provision that requires that a party be named as an additional insured in a liability policy has been interpreted to mean that the additional insured is insured for all liability arising out of the activities covered by the agreement (*see* ***Ceron v Rector***, 224 AD2d 475, 638 NYS2d 476 [2d Dept 1996]). Here, triable issues of fact have not been eliminated with respect to whether the injury arose out of Rosemar Contracting's failure to maintain the work site in a safe condition (*see* ***Belcastro v Hewlett-Woodmere Union Free Sch. Dist. No.*** 14, 286 AD2d 744, 730 NYS2d 535 [2d Dept 2001]). Furthermore, no proof is submitted by Rosemar Contracting regarding the amount of insurance coverage it procured and whether such coverage comports to the agreement. Accordingly, Rosemar Contracting's application for summary judgment dismissing the cross claim for breach of contract is denied.

Finally, the County of Suffolk's cross motion for summary judgment on its cross claims against Rosemar Contracting for contractual indemnification and breach of contract for failure to procure liability insurance is denied. In order for the court to render a conditional judgment on the issue of contractual indemnity when determination of the primary action is still pending, the party seeking contractual indemnification "must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability" (***Jardin v A Very Special Place, Inc.***, 138 AD3d 927, 931, 30 NYS3d 270 [2d Dept 2016], quoting ***Arriola v City of New York***, 128 AD3d 747, 749, 9 NYS3d 344 [2d Dept 2015]; *see* ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009]). Although Rosemar Contracting expressly agreed to provide indemnification pursuant to the agreement, the County of Suffolk is not entitled, at this juncture, to summary judgment or conditional summary judgment on its cross claim for contractual indemnification against Rosemar Contracting, as there are triable issues of fact as to whose negligence, if any, caused plaintiff's accident (*see* ***McAllister v Construction Consultants L.I., Inc.***, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]). "Where a question of fact exists regarding the owner's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 808, 888 NYS2d 81 [2d Dept 2009]). Regarding the branch of the motion for summary judgment on the County's cross claim against Rosemar Contracting for breach of contract for its alleged failure to procure insurance, no argument is made in the moving papers in support of same. Accordingly, the County's motion for summary judgment in its favor is denied.

Dated: NOV 17 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**