Critelli v County of Suffolk
2018 NY Slip Op 30272(U)
January 24, 2018
Supreme Court, Suffolk County
Docket Number: 11-30810
Judge: David T. Reilly

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11-30810
CAL. No. 16-02323OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY, J.S.C.

MOTION DATE 5-24-17
ADJ. DATE 8-29-17
Mot. Seq. # 003 MG
004 MG; CASEDISP

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MICHAEL CRITELLI,

Plaintiff,

- against -

COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, TOWN OF BROOKHAVEN, TOWN OF BROOKHAVEN DEPARTMENT OF HIGHWAYS, CARPENTER'S PAVING COMPANY, INC., and TIMOTHY G. CARPENTER and LAURA POWERS,

Defendants.

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Upon the following papers numbered 1 to 97 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-43; 54-80; 94-95; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 44-51; and by the Town A & B; 81-93; Replying Affidavits and supporting papers 52-53; 96-97; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (Seq. No. 003) of defendants Carpenter's Paving Company, Inc. and Timothy Carpenter and the motion (Seq. No. 004) of defendant Town of Brookhaven are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (Seq. No. 003) of defendants Carpenter's Paving Company, Inc. and Timothy Carpenter for summary judgment dismissing the complaint and cross claims against them is granted; and it is further

ORDERED that the motion (Seq. No. 004) of defendant Town of Brookhaven for summary judgment dismissing the complaint and cross claims against it is granted.

Plaintiff Michael Critelli commenced this action to recover damages for personal injuries he allegedly sustained on February 8, 2011, when he slipped and fell on ice on a roadway in Centereach, New York. The complaint, as amplified by the bill of particulars, alleges that defendants were negligent in, among other things, failing to maintain the roadway in a safe condition; failing to remove snow and ice from said area; creating a hazardous condition within the roadway; failing to inspect the area of the accident for ice patches; and failing to post warning signs and barriers.

By stipulation dated August 6, 2013, "So ordered" by the Hon. Daniel Martin, A.J.S.C. [Ret.], the action was discontinued with prejudice as against the Suffolk County defendants. Thereafter, the action was discontinued with prejudice against Laura Powers by stipulation dated November 13, 2015.

Defendants Carpenter's Paving Company, Inc. and Timothy Carpenter now move for summary judgment dismissing the complaint and cross claims against them on the ground that they did not owe plaintiff a duty of care, as Carpenter's Paving Company was a third-party contractor retained by the Town of Brookhaven to perform limited snow removal services. In support of the motion, the Carpenter defendants submit copies of the pleadings, the verified bill of particulars, the transcript from plaintiff's testimony at a 50-h hearing, transcripts of the parties' deposition testimony, and copies of vouchers created by Carpenter.

Plaintiff testified that on the date of the subject incident, the weather was cold, there was no precipitation and it was dark outside. He testified that it had snowed a few days prior to the incident and that snow mounds created by snow plows abutted the streets. He testified that at approximately 6:00 p.m. on the date of the incident, he was carrying a recycling container to the curb and intended to place it on the snow pile which covered the grassy area where he typically places it for pickup. Plaintiff testified that the pile was approximately two feet high, and that as he planted his left foot in front of the snow mound to place the container down, he slipped and fell on his left side. He testified that as he walked to the street with the container, he held it in front of his body and his view was obstructed. He testified that he did not observe any icy condition until after he slipped and fell to the ground, at which time he observed a white and gray ice patch, half an inch in thickness, which appeared very smooth. He testified that his house is on a corner at the intersection of Evelyn Lane and Van Bergen Boulevard, and that he fell in the street on Van Bergen Boulevard. At his 50-h hearing, plaintiff testified that he observed sand on the ground and that the asphalt was visible. Plaintiff testified that he has observed snow plows during snow storms, but he does not know who plows the streets and he never heard of Carpenter's Paving Company.

Dennis Foley testified that he has worked for the Town of Brookhaven for 28 years and presently works in the Highway Department. He testified that in 2011, he was a highway maintenance crew leader

and his duties included repairing sidewalks, potholes, drainage, and was in charge of hiring contractors for snow removal and designating areas for plowing by the Town's employees. He testified that he maintains a list of contractors for snow removal services and contacts them when he is directed to do so by the Town Superintendent. Foley testified that Carpenter is on his list and that it performed snow removal services for the Town in 2011, but that he is unaware of any written contract or verbal agreement that the Town has with Carpenter. He testified that he oversees the snow removal work performed by contractors and that he inspects the areas after they are plowed by the contractors to ensure the removal was sufficient. He testified that if the snow was not properly removed, and the contractors do not return, the Town sends its own snow plows to remediate the areas.

Tim Carpenter testified that he is the owner of Carpenter's Paving Company, and that it is one of several contractors which perform snow removal services for the Town. He testified that the Town foreman phones him when his snow removal services are needed, and that he plows various roads in South Centereach and salts the roads upon request. Carpenter testified that he owns dump trucks and pickup trucks with plows, and that the Town provides sanding equipment which he installs on his trucks when sanding is requested. He testified that his trucks are too large to plow Van Bergen Boulevard, as it is a very tiny road and that the Town uses its "low boys" and other contractors to plow Van Bergen Boulevard. He testified that he performed snow removal services for the Town on February 2, 2011 and February 21, 2011.

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 Carpenter defendants established their prima facie entitlement to summary judgment by demonstrating that plaintiff was not a party to the snow removal contract; therefore, they did not owe him 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]). Although the Carpenter defendants submitted proof that none of the ***Espinal*** exceptions apply to the instant situation, such proof is unnecessary, as plaintiff did not plead such exceptions in the complaint, nor were they expressly set forth in the bill of particulars (*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]). 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 [2d Dept 2016]; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]).

In opposition, counsel for plaintiff argues that plaintiff detrimentally relied on Carpenter's snow removal services. However, no competent proof is submitted to support counsel's allegation, and, significantly, plaintiff testified that he never heard of Carpenter's Paving Company. 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 plaintiff detrimentally relied on the continued performance of the Carpenter defendant's duties (*see* ***Santos v Deanco Servs., Inc.***, 104 AD3d 933, 961 NYS2d 581 [2d Dept 2013]). Nor has plaintiff raised a triable issue of fact as to whether the remaining ***Espinal*** exceptions apply to the instant matter. Accordingly, the motion of defendants Timothy Carpenter and Carpenter's Paving Company for summary judgment dismissing the complaint against them is granted.

The Town of Brookhaven moves for summary judgment dismissing the complaint against it on the grounds that it did not have prior written notice of the alleged icy condition. In support of its motion, the Town submits, among other things, affidavits by Marie Angelone and Linda Sullivan.

A municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition (***Wittorf v City of New York***, 23 NY3d 473, 479, 991 NYS2d 578 [2014]; ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 215 [1995]), and that duty extends to conditions adjacent to the highway (***Finn v Town of Southampton***, 289 AD2d 285, 286, 734 NYS2d 215 [2d Dept 2001]). However, a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a dangerous condition which allegedly caused the accident unless it either has received written notice of the defect or an exception to the written notice requirement applies (***Dibble v Village of Sleepy Hollow***, __ AD3d __, 2017 NY Slip Op 08503 [2d Dept 2017]; ***Poveromo v Town of Cortlandt***, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]; ***Dutka v Odierno***, 116 AD3d 823, 983 NYS2d 405 [2d Dept 2014]; ***Forsythe-Kane v Town of Yorktown***, 249 AD2d 505, 672 NYS2d 355 [2d Dept 1998]). The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 720, 2 NYS3d 527 [2d Dept 2015]).

The Town of Brookhaven has enacted a prior written notice statute. Section 84.1 of the Code of the Town of Brookhaven provides, in relevant part:

> No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street ... unless previous to the occurrence resulting in such damages or injuries, written notice of such defective ... condition complained of, was actually given, in writing, by a person with firsthand knowledge of the condition complained of and specified in the notice, tothe Town Clerk or the Town Superintendent of Highways... No such civil action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, street, bridge, culvert, or crosswalk or pedestrian walkway open to the public, unless written notice was actually given, in writing, by a person with firsthand knowledge of the condition complained of and specified in the notice, to the Town Clerk or the Town Superintendent of Highways by personal service or service by registered or certified mail actually received by the Town officer or officers specified herein, and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice.

The Court notes that the affidavit by Marie Angelone, an employee of the Town of Brookhaven, is not notarized and, thus, not in admissible form. However, the affidavit of Linda Sullivan is submitted. In her affidavit, Ms. Sullivan states that she works in the Town Clerk's Office as a Senior Clerk Typist, and that her duties include conducting searches of the Town's log book to determine whether the Town had prior written notice of defects at incident locations. Ms. Sullivan avers that she conducted a diligent search of the records and files for the subject location for three years prior to the date of the incident, and she did not discover any prior written complaints about a dangerous condition. Ms. Sullivan's affidavit is sufficient to establish that the Town did not receive prior written notice. Additionally, the testimony of the parties establishes that the icy condition was not created through the affirmative acts of negligence by the Town. The affirmative negligence exception is limited to work done by a municipality that

immediately results in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS 2d 261 [2008]). Consequently, the exception does not apply to a claim of negligence in failing to remove snow or ice (*see* ***Wohlars v Town of Islip***, 71 AD3d 1007, 898 NYS2d 59 [2d Dept 2010]; ***Stallone v Long Is. R.R.***, 69 AD3d 705, 894 NYS2d 65 [2d Dept 2010]).

The Town has met its burden on its motion for summary judgment tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS 2d 923 [1986]), and shifted the burden to plaintiff to proffer evidence in admissible form raising a triable issue of fact (***see Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition to the Town's motion, plaintiff has failed to come forward with admissible evidence raising a triable issue of fact as to whether written notice was given.

While meteorological records and an expert affidavit have been submitted by plaintiff in an attempt to raise a triable issue of fact as to whether the affirmative negligence exception applies, such theory is not alleged in the pleadings or the bill of particulars. Moreover, the affidavit of plaintiff's expert, Michael Merin, is devoid of any facts or opinions as to whether the Town affirmatively created a dangerous condition. Rather, it only demonstrates that "improperly treated snow" can refreeze during "sub-freezing temperatures." Counsel's argument that the Town improperly removed the snow by creating snow piles several days prior to the subject incident which melted and refroze, is not supported by competent proof, is not expressly set forth in the pleadings and is insufficient to raise a triable issue of fact. Moreover, even if supported by competent proof, such allegations do not demonstrate that the Town's actions "immediately resulted in the existence of a dangerous condition" (*see* ***Loghry v Village of Scarsdale***, 149 AD3d 714, 53 NYS3d 318 [2d Dept 2017]). As plaintiff has failed to raise a triable issue of fact as to whether the Town created or exacerbated the alleged snow condition through its affirmative negligent acts, or whether a special use conferred a special benefit on the Town (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77; ***Long v City of Mount Vernon,*** 107 AD3d 765, 967 NYS 2d 749 [2d Dept 2013]; ***Gianna v Town of Islip*** 230 AD2d 824, 646 NYS 2d 707 [2d Dept 1996]), the Town's motion for summary judgment is granted, and the complaint is dismissed against it.

In view of the foregoing, the application by the Carpenter defendants for summary judgment dismissing the cross claims by the Town, and the application by the Town for summary judgment dismissing the cross claims by the Carpenter defendants are dismissed as academic.

Dated: January 24, 2018

J.S.C.

HON. DAVID T. REILLY

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION