

Miglionico v Arbors Homeowners' Assn. Inc.

2018 NY Slip Op 33993(U)

October 22, 2018

Supreme Court, Westchester County

Docket Number: 51682/2017

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
BARBARA MIGLIONICO,

Plaintiff,

-against-

THE ARBORS HOMEOWNERS' ASSOCIATION
INC., STEVE LAUNZINGER d/b/a SRL
LANDSCAPE CONSTRUCTION, WESTCHESTER
CUSTOM PLUMBING & HEATING CORP., DHR
MANAGEMENT, DIANNE FEINSTEIN as managing
agent, C&K LANDSCAPING & POOLS, INC.,
SUEZ WATER WESTCHESTER, INC. and
FREDDY GONZALEZ as a member of C&K LANDSCAPING
& POOLS INC.,

Defendants.

-----X
ECKER, J.

Index No. 51682/2017

DECISION/ORDER

Motion date: 09/05/18

Mot. Seqs. 3, 4, 5, & 6

The following papers numbered 1 through 116 were considered on the motion of defendant C&K LANDSCAPING & POOLS, INC. and FREDDY GONZALEZ, as a member of C&K LANDSCAPING & POOLS, INC. ("jointly C & K Landscaping") [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing plaintiff BARBARA MIGLIONICO's ("plaintiff") complaint and all cross-claims against it, and on the motion of defendant THE ARBORS HOMEOWNERS' ASSOCIATION, DHR MANAGEMENT and DIANNE FEINSTEIN as managing agent (jointly "the Arbors") [Mot. Seq. 4], made pursuant to CPLR 3212, for an order dismissing plaintiff's complaint against it, or in the alternative, granting it summary judgment on its cross-claims, and on the motion of defendant SUEZ WATER WESTCHESTER, INC. ("Suez") [Mot. Seq. 5], made pursuant to CPLR 3212, for an order dismissing the complaint and all cross-claims against it, and on the motion of defendant STEVEN LAUNZINGER d/b/a SRL LANDSCAPE CONSTRUCTION ("SRL Construction") [Mot. Seq. 6], made pursuant to CPLR 3212, for an order dismissing plaintiff's complaint and all cross-claims against it:

PAPERS**NUMBERED****Mot. Seq. 3 [C&K Landscaping]**

Notice of Motion, Affirmation, Memorandum of Law

Exhibits A-EE,

1 -34

Affirmation in Opposition (by the Arbors against SRL Construction, C&K Landscaping & Suez),

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Affirmation in "Reply"(by the Arbors against SRL Construction, C&K Landscaping & Suez),

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Affirmation in Reply (C&K Landscaping),

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Mot. Seq. 4 [the Arbors]

Notice of Motion, Affirmation, Exhibits A-BB

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Affirmation in Opposition (SRL Construction),

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Affirmation in Partial Opposition (C&K Landscaping),

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Affirmation in "Reply"(by the Arbors against SRL Construction, C& K Landscaping & Suez),

Mot. Seq. 5 [Suez]

Notice of Motion, Affirmation, Exhibits A-W

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Affirmation in Opposition (by the Arbors against SRL Construction, C&K Landscaping & Suez),

Reply Affirmation (Suez),

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Affirmation in "Reply"(by the Arbors against SRL Construction, C& K Landscaping & Suez),

Mot. Seq. 6 [SRL Construction]

Notice of Motion, Exhibits A-R,

97-115

Affirmation in Opposition (by the Arbors against SRL Construction, C&K Landscaping & Suez),

Affirmation in "Reply"(by the Arbors against SRL Construction, C& K Landscaping & Suez),

Reply Affirmation (SRL Construction).

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Upon the foregoing papers, the court determines as follows:

This is an action for personal injuries arising from an accident that occurred on April 13, 2014, at around 8:30 a.m. Plaintiff Barbara Miglionico alleges that, on that morning, she was walking with a friend through the trails behind the Arbors Condominium Complex where she resides. At some point, plaintiff and her friend exited from the trail and came upon a construction area, surrounded by yellow tape and a metal portable fence, in the parking area near the streets of Bayberry Lane and Ivy Hill Lane. Plaintiff alleges that due to these barricades, she was caused to step up onto a curb and into an uncovered hole in the dirt adjacent to the curb, causing her to fall. The defect was a water meter pit with a cover that was allegedly only partially covering the hole. It is alleged that, before the construction, the water meter pit had been covered by dirt.

The construction project on the Arbors' property was to remove an old shed and erect a new shed to be a storage facility for landscaping materials and other items. SRL Construction was hired to build the new shed. The new shed required a water connection

to the existing water supply. SRL Construction alleges that, while it contracted to create water access to the shed, it was informed that a water line and meter were in place, and hence that it did not need to create access. SRL Construction claims that it never saw the water meter pit, and does not know who removed the soil covering the pit. SRL Construction admits that, on the day of the occurrence, it put up the warning tape around the accident site, but alleges that it did not place the metal barricades encircling the construction area.

C&K Landscaping was hired, pursuant to a Landscaping/Snow Maintenance and Plowing Contract, by the Arbors to, among other things, maintain the common areas of the development. C&K Landscaping asserts that it placed the metal barriers around the construction site at the request of the Arbors. It further claims that it had no responsibility to cover holes on the property, and that the last time it performed work in the relevant area was in the fall of 2013. Finally, C&K Landscaping denies uncovering the hole or removing the dirt from around the water meter pit.

Suez owned the water meters on the property, but all of the relevant equipment and land, including the water meter pit in question, were owned by the Arbors. Suez's employee testified that he was responsible for supervising work on the meters, he had visited the relevant area many times and possibly worked on the meters that were in the meter pits, but did not recall the specific work or when it was done. Suez alleges, among other things, that it did not, under the circumstances, have exclusive access to the water meter pit.

Plaintiff originally commenced an action on March 5, 2015, naming the Arbors as defendant. Plaintiff then amended the complaint to add SRL Construction as a defendant. Defendants filed answers and discovery was conducted. On January 30, 2017, plaintiff filed a stipulation of discontinuance of the action.

Plaintiff commenced a new action on February 6, 2017, by serving a new summons and complaint naming the Arbors, SRL Construction, Westchester Custom Plumbing & Heating Corp. ("Westchester Custom"), C&K Landscaping and Suez as defendants.

On or about March 7, 2017, Suez filed an answer with general denials and affirmative defenses. [NYSCEF No. 25]. It also alleged cross-claims against the Arbors, SRL Construction, Westchester Custom, and C&K Landscaping for contribution, common law indemnification, contractual indemnification, and breach of contract.

On March 8, 2017, the Arbors filed an answer with general denials, affirmative defenses and cross-claims against SRL Construction, Westchester Custom, C&K Landscaping, and Suez for contractual indemnification, common law indemnification, and contribution [NYSCEF No. 14].

On March 22, 2017, SRL Construction filed an answer with general denials, affirmative defenses, and cross-claims for common law indemnification, contractual

indemnification and contribution as against the Arbors, Westchester Custom, C&K Landscaping, and Suez. [NYSCEF No. 15].

On or about March 29, 2017, SRL Construction filed replies to the Arbors' and Suez's cross-claims against it. [NYSCEF No. 17, 21]. The Arbors filed replies to Suez's and SRL Construction's cross-claims on May 5, 2017 [NYSCEF No. 118].

On May 22, 2017, C&K Landscaping served an answer with general denials, affirmative defenses and cross-claims against the Arbors, SRL Construction, Westchester Custom, and Suez for contribution and common law indemnification. [NYSCEF No. 30]. The Arbors and SRL Construction served replies to C&K Landscaping's cross-claims. [NYSCEF No. 39, 66].

The action and all cross-claims against Westchester Custom were discontinued by stipulation dated February 16, 2018. [NYSCEF No. 71].¹

Plaintiff filed a note of issue on June 19, 2018. By notice of motion dated July 27, 2018, C&K Landscaping moved for summary judgment dismissing plaintiff's complaint and all cross-claims against it [Mot. Seq. 3]. Thereafter, on August 2, 2018, the Arbors moved for summary judgment [Mot. Seq. 4], dismissing plaintiff's complaint against it, or in the alternative, granting it summary judgment on its cross-claims. The next day, on August 3, 2018, both SRL Construction and Suez moved for summary judgment dismissing the complaint and all cross-claims against them [Mot. Seq. 5 & 6]. All of the motions were returnable on August 24, 2018. Various defendants timely submitted opposition to their co-defendant's motions to the extent that the initial motions sought summary judgment granting or dismissing particular cross-claims. Plaintiff, however, failed to submit any opposition before the return date of the motions.

Plaintiff filed an Order to Show Cause, returnable in the Settlement Part, on September 19, 2018, seeking to adjourn the summary judgment motions to permit plaintiff time to file opposition thereto. This motion was opposed by all defendants. By decision and order dated October 16, 2018, the court (Lefkowitz, J.) denied plaintiff's motion. [NYSCEF No. 269]. Accordingly, plaintiff has not submitted any opposition to the motions by defendants that are now before the court.

On its motion for summary judgment, C&K Landscaping argues, and submits evidence in support of the position, that the facts show that: it functioned as an independent contractor and, therefore, did not owe plaintiff a duty; it did not breach a duty to plaintiff; and there is no evidence that it was negligent. For its part, the Arbors, in sum,

¹It appears that Suez has elected to not file a reply to any of the cross-claims alleged against it by the Arbors, SRL Construction and C&K Landscaping. Moreover, while C&K Landscaping served a reply to the cross-claims of Westchester Custom, now dismissed, it appears C&K Landscaping did not reply to the cross-claims asserted against it by the Arbors, SRL Construction or Suez. [NYSCEF No. 37].

argues, with evidentiary support, that plaintiff submitted no competent proof showing that the Arbors created the alleged defective condition or had actual or construction notice of thereof and that, in any event, plaintiff assumed the risk of injury by electing to walk into the barricaded construction zone. Suez, in essence, argues on its motion for summary judgment that, considering all of the evidence presented, there is no competent proof that Suez created the alleged defective condition. SRL Construction puts forth the same argument in its motion for summary judgment, asserting that there is no evidence of any negligence on its part that caused plaintiff's accident.

On the initial motions, each defendant established *prima facie* entitlement to summary judgment (see, *Pulgram v Reisner*, 44 AD3d 503 [1st Dept 2007]). Based on plaintiff's failure to submit opposition to any of the motions, therefore, the court must grant, on default, that part of each motion that seeks an order awarding summary judgment dismissing the complaint (*Kisiletskiy v Pena*, 153 AD3d 800 [2d Dept 2017]). In light of the resulting dismissal of the complaint in its entirety, moreover, that part of each motion that seeks summary judgment either granting or dismissing particular cross-claims is denied as moot.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by movant was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion of defendant C&K LANDSCAPING & POOLS, INC. and FREDDY GONZALEZ, as a member of C&K LANDSCAPING & POOLS, INC. ("jointly C & K Landscaping") [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing plaintiff BARBARA MIGLIONICO's ("plaintiff") complaint as against it is granted without opposition and, that part of the motion that seeks dismissal of all cross-claims asserted against defendant C&K Landscaping is denied as moot; and it is further

ORDERED that the part of the motion of defendant THE ARBORS HOMEOWNERS' ASSOCIATION, DHR MANAGEMENT and DIANNE FEINSTEIN as managing agent (jointly "the Arbors") [Mot. Seq. 4], made pursuant to CPLR 3212, for an order dismissing plaintiff's complaint as against it is granted without opposition, and that part of the motion that seeks summary judgment in the Arbors' favor on its cross-claims is denied as moot, and it is further

ORDERED that the part of the motion of defendant SUEZ WATER WESTCHESTER, INC. ("Suez") [Mot. Seq. 5], made pursuant to CPLR 3212, for an order dismissing the complaint as against it is granted without opposition, and that part of the motion that seeks dismissal of all cross-claims asserted against defendant Suez is denied as moot; and it is further

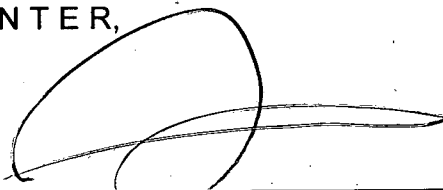
ORDERED that the part of the motion of defendant STEVEN LAUNZINGER d/b/a SRL LANDSCAPE CONSTRUCTION ("SRL Construction") [Mot. Seq. 6], made

pursuant to CPLR 3212, for an order dismissing plaintiff's complaint as against it is granted without opposition, and that part of the motion that seeks dismissal of all cross-claims asserted against defendant SRL Construction is denied as moot.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
October 22, 2018

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Harmon, Linder & Rogowsky, Esq.
Attorneys for Plaintiff
Via NYSCEF

Marshall Dennehey Warner Coleman and Goggin
Attorney for Defendants the Arbors Homeowners' Ass'n., Inc.,
DHR Management & Dianne Feinstein
Via NYSCEF

Law Offices of Craig P. Curcio
Attorneys for Defendant SRL Landscape Construction
Via NYSCEF

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Attorney for Suez Water Westchester, Inc.
Via NYSCEF

Gallo Vitucci Klar, LLP
Attorney for C&K Landscaping & Pools, Inc.
Via NYSCEF