Kenny v Incorporated Vil. of Floral Park
2018 NY Slip Op 34207(U)
August 20, 2018
Supreme Court, Nassau County
Docket Number: Index No. 601310/2016
Judge: Leonard D. Steinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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WILLIAM F. KENNY,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FLORAL PARK, INCORPORATED VILLAGE OF FLORAL PARK SANITATION DEPARTMENT, INCORPORATED VILLAGE OF FLORAL PARK DEPARTMENT OF PUBLIC WORKS and PSEG LONG ISLAND, LLC,

Defendants.

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IAS Part 17
Index No. 601310/2016
Motion Seq. No. 002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant's (PSEG Long Island, LLC) Notice of Motion, Affirmation, Affidavit & Exhibits..... .1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendant's (PSEG Long Island, LLC) Reply Affirmation & Exhibits 3

In this action, plaintiff seeks to recover for injuries sustained in December 2014 when he fell into a sinkhole that was located on a grass strip between the sidewalk and curb in front of his home. Plaintiff contends that the sinkhole was created when PSEG Long Island, LLC replaced a utility pole at that location. He does not claim that PSEG owns the land or otherwise maintained the property in question. PSEG denies that it replaced the utility pole or otherwise created or had notice of the sinkhole. PSEG now moves for summary judgment dismissing the complaint and all cross-claims as against it.[1] For the reasons set forth below, the application is granted, and the complaint is dismissed.

[1] PSEG also seeks to dismiss all cross-claims as against it. On April 28, 2017, this court granted the municipal defendants' unopposed motion for summary judgment because they had not been served timely with a Notice of Claim. Since PSEG is the only remaining defendant in the action, that portion of PSEG's motion seeking to dismiss the cross-claims is denied as moot.

Legal Analysis

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

"[L]iability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property." *Nappi v. Incorporated Village of Lynbrook*, 19 A.D.3d 565 (2d Dept. 2005). *See also Conneally v. Diocese of Rockville Ctr.*, 116 A.D.3d 905 (2d Dept. 2014). "The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care." *Nappi v. Incorporated Village of Lynbrook, supra.* Absent evidence of ownership, occupancy, control, or special use of the property where the alleged defect is located, a defendant will not be liable for injuries that may have been caused by a defect. *Mitchell v. Icolari,* 108 A.D.3d 600 (2d Dept. 2013).

PSEG submits the affidavit of Michael Abrams, a Senior Supervisor at PSEG, whose deposition was taken in this action. Abrams states in his affidavit that PSEG is the operator of the electric transmission and distribution system, which is owned by the Long Island Lighting Company d/b/a/ Long Island Power Advisory ("LIPA"). PSEG came into existence on January 1, 2014. Abrams testified that generally PSEG is responsible for maintaining and replacing LIPA's utility poles (as was its predecessor, National Grid, for whom Abrams also worked). There is no evidence in the record that LIPA owns the existing pole located near plaintiff's fall—Abrams testified that nearly 50% of utility poles are owned by Verizon—although PSEG nowhere claims that it does not own the pole. Abrams attests, based upon his

review of the records maintained by PSEG, that from 2000 through 2015 neither PSEG nor its predecessor removed a utility pole and replaced it with a new utility pole near plaintiff's fall. Abrams further points to a tag affixed to the existing pole which he states reflects that it was inspected in 1988.

In opposition, plaintiff contends that summary judgment is premature because PSEG failed to respond to its post-deposition demands served on April 26, 2018. Plaintiff contends that the discovery sought is necessary to prepare a response to this application. PSEG correctly points out that just days prior to filing his opposition to the application herein, plaintiff filed a Note of Issue attesting that discovery was complete. PSEG further contends that it previously responded to plaintiff's demands for records and documents relating to any work performed by PSEG at the location of the incident and has provided sufficient proof demonstrating that it provided responses to all discovery sought in the post-EBT demands as part of previous discovery responses.

A motion for summary judgment will not be denied based on a "mere hope or speculation" that discovery may uncover evidence sufficient to defeat the motion. *Kimyagarov v. Nixon Taxi Corp.*, 45 A.D.3d 736 (2d Dept. 2007); *Rainford v. Han*, 18 A.D.3d 638 (2d Dept. 2005). Noteworthy is that plaintiff has failed to provide an evidentiary basis that suggests discovery may lead to relevant evidence or that PSEG has exclusive knowledge of facts essential to opposing the motion. Plaintiff has not sought to vacate the Note of Issue nor has he set forth sufficient basis to warrant doing so at this time. *See* 22 NYCRR 202.21(e). Accordingly, the court will not deny the application as premature.

At his deposition, plaintiff testified that the sinkhole into which he fell was thirty-six inches from a utility pole. Plaintiff testified that "[t]here had been an old utility pole like from when I first moved in the house before which they planted the new pole next to the old pole. After an indeterminate amount of time, which could have been months, they removed the old pole and the wires were transferred onto the new pole." Plaintiff surmises that when the old pole was removed the hole was improperly filled and as a result, when he walked on the area, he fell in. Plaintiff cannot remember when the pole was replaced—he testified that it was most likely in 2013 or 2014.

Plaintiff initially testified that he could not recall the color of the truck that installed the new pole or any writing contained on it, and that he did not witness the transfer of the wires or removal of the old pole. After a break during the deposition, plaintiff then claimed that he briefly saw the workers transfer wires to the new pole and that they were wearing uniforms similar in color to those he believed were worn by LIPA employees. Importantly, he conceded again that he did not witness the removal of the old pole and did not recall the coloring or identifying lettering on the workers' uniforms or truck.

Plaintiff's testimony, even if uncontested, is insufficient to hold PSEG liable. He did not see who removed the old pole. He does not know when the pole was removed—an important fact since PSEG did not exist before January 1, 2014. He provides no details to support his conclusory assertion that "LIPA" employees worked on the pole transfer. And no evidence was submitted to support the conclusion that the new pole is owned by LIPA. Therefore, the claim that PSEG replaced the pole in question is merely conjecture and speculation. *See Rosenberg v. Rockville Centre Soccer Club, Inc.*, 166 A.D.2d 570 (2d Dept. 1990).

PSEG does not rest simply upon plaintiff's inability to identify it as the culprit which replaced the pole. PSEG has provided the testimony of a witness who affirmatively states that it did not do so—a statement supported by the company's records. Furthermore, although an improperly filled hole appears to be a logical explanation for the sinkhole in question, sinkholes can naturally form and exist without the presence of negligence. These facts distinguish this case from *Greenidge v. HRH Construction Corp.*, 279 A.D.2d 400 (1st Dept. 2001), in which summary judgment was denied notwithstanding that the plaintiff could not identify HRH Construction, the moving party, as the negligent wrongdoer. In *Greenidge*, HRH Construction was unquestionably on the scene and its lack of records precluded it from establishing its *prima facie* case. The same cannot be said of PSEG.

Plaintiff also submitted the deposition testimony of Danielle McCormack, a neighbor of plaintiff. She testified that she recalls seeing a second utility pole in front of the plaintiff's residence, but couldn't remember when or for how long. This court will not consider the deposition testimony of McCormack, as her deposition transcript is unsigned. Plaintiff has not provided any evidence to reflect that the transcript was forwarded to Ms. McCormack for

her review and signature in accordance with CPLR 3116(a). Therefore, the transcript is inadmissible and will not be considered. *See Santos v. Intown Associates*, 17 A.D.3d 564 (2d Dept. 2005).

Plaintiff also submits the affidavit of Peter Pomeranz, P.E., an engineer.[2] Pomeranz states that he reviewed and inspected the area where plaintiff fell and based upon a reasonable degree of engineering certainty, the hole plaintiff fell into was the result of the installation of the new utility pole or the removal of the old pole. Pomeranz attributed the cause of the condition to PSEG. But Pomerantz provides no factual support for his conclusion. His inspection of the area occurred approximately four years after the alleged incident and he does not indicate how a visual inspection of the unexcavated ground around the pole led to his conclusion. An expert affidavit that is speculative or conclusory is insufficient to raise an issue of fact. *Pankratov v. 2935 OP, LLC*, 160 A.D.3d 757 (2d Dept. 2018); *Castillo v. Wil-Cor Realty Co.*, 109 A.D.3d 863 (2d Dept. 2013).

The court declines to adopt plaintiff's argument that the doctrine *of res ipsa loquitur* is applicable. The doctrine of *res ipsa loquitur* is generally invoked where "the evidence shows at least probability that a particular accident could not have happened without legal wrong by the defendant." *Pollack v. Rapid indus. Plastics Co., Inc.*, 113 A.D.2d 520 (2d Dept. 1985). When applying this doctrine, the circumstantial evidence must establish that "(1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been to any voluntary action or contribution on the part of the plaintiff." *Id.* at 524. PSEG does not own the location where the incident occurred and there is insufficient evidence to conclude that PSEG was the only party to have access to the location or control of the area. *See Everhart v. County of Nassau*, 65 A.D.3d

[2] Defendant seeks for the court to disregard this expert analysis as untimely pursuant to CPLR § 3101(d) since it was disclosed after the Note of Issue and Certificate of Readiness were filed. CPLR § 3101(d) does not require a party to retain and disclose an expert prior to the filing of a Note of Issue. *See Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dept. 2012). The fact that an expert is not disclosed until after the filing of the Note of Issue, and then only in connection with a summary judgment motion, does not, in and of itself, render the disclosure untimely. *Castillo v. Wil-Cor Realty Co., Inc.*, 109 A.D.3d 863 (2d Dept. 2013).

1277 (2d Dept. 2009). In fact, Abrams testified at his deposition that Verizon might have access to the area to access its lines.

In sum, insufficient evidence has been submitted to raise a question of fact as to whether PSEG removed an old utility pole in the area where plaintiff fell. The affidavit of Abrams demonstrates that no utility pole was removed or installed in the location where plaintiff fell between 1990 and 2015—at least by PSEG. Since plaintiff has submitted no credible, admissible evidence that PSEG performed work that may have resulted in the creation of the sinkhole, summary judgment is granted to PSEG and the complaint is dismissed.

All other requested relief, not directly addressed herein, is hereby denied.

The foregoing constitutes the Decision and Order of this court.

Dated: August 20, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.
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ENTERED
AUG 21 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE