Stakey v Town of Riverhead
2019 NY Slip Op 33210(U)
October 29, 2019
Supreme Court, Suffolk County
Docket Number: 15-000089
Judge: Joseph Farneti

INDEX No. 15-000089
Cal. No.: 18-02110OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 2-28-19 (007)
MOTION DATE 3-28-19 (008)
MOTION DATE 4-11-19 (009)
ADJ. DATE 4-25-19
Mot. Seq. # 007 - MG
008 - MG
009 - MG

CHRISTINE STAKEY,

Plaintiff,

- against -

TOWN OF RIVERHEAD, WOOLWORTH REVITALIZATION LLC, W.J. NORTHRIDGE CONSTRUCTION CORP., A1 RELIABLE INDUSTRIES CORP., C.M., RICHEY ELECTRICAL CONTRACTORS, INC., GRAY GOLD CONTRACTING, INC., and SEAFORD AVENUE CORP,

Defendants.

WOOLWORTH REVITALIZATION LLC,

Third-Party Plaintiff,

- against -

SEAFORD AVENUE CORP., and LIBERTY MUTUAL INSURANCE,

Third-Party Defendants.

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THE NETHERLANDS INSURANCE COMPANY,

Second Third-Party Plaintiff,

- against -

AMERICAN ALTERNATIVE INSURANCE CORPORATION and WESCO INSURANCE COMPANY,

Second Third-Party Defendants.

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Upon the following papers numbered 1 to 112 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 33; 34 - 55; 56 - 85; Answering Affidavits and supporting papers 86 - 105; Replying Affidavits and supporting papers 106 - 107; 108 - 110; 111 - 112; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. #007) by defendant A1 Reliable Industries Corp., the motion (seq. #008) by defendant Town of Riverhead, and the motion (seq. #009) by defendant W.J. Northridge Construction Corp., are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant A1 Reliable Industries Corp. for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by defendant Town of Riverhead for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by defendant W.J. Northridge Construction Corp. for summary judgment dismissing the complaint and cross claims against it is granted.

This action was commenced by plaintiff Christine Stakey to recover damages for injuries she allegedly sustained on July 30, 2014, when she slipped and fell on a piece of plywood covering a hole in the public sidewalk in front of the premises known as 130 East Main Street, Riverhead, New York. It is undisputed that defendant/third-party plaintiff Woolworth Revitalization LLC ("Woolworth Revitalization") owned 130 East Main Street, that the New York State Department of Transportation ("DOT") owned the subject sidewalk, and that defendant/third-party defendant Seaford Avenue Corp. ("Seaford") performed the sidewalk work in question. In their answers, defendants assert various cross claims against each other for contribution and indemnification. The Court notes that plaintiff's complaint against defendants C.M. Richey Electrical Contractors, Inc., and Gray Gold Contracting, Inc., were dismissed pursuant to an Order of the Hon. Arthur G. Pitts dated January 25, 2016. Further, the second third-party action herein was discontinued pursuant to a Stipulation dated October 17, 2018.

Defendant A1 Reliable Industries Corp. ("A1") now moves for summary judgment in its favor, arguing that it neither owned the subject sidewalk, nor performed any work thereupon. In support of its motion, it submits, among other things, transcripts of the parties' deposition testimony, a copy of an agreement between Woolworth Revitalization and A1, various business records, and copies of the Court's prior decisions in this matter.

Defendant Town of Riverhead (the "Town") also moves for summary judgment in its favor, arguing that it did not own the subject sidewalk, "was not responsible for any ongoing construction at the location," did not have written notice of the condition that allegedly caused plaintiff's fall, did not cause or create such condition, and did not owe plaintiff a duty. In support of its motion, it submits, among other things, a copy of plaintiff's notice of claim and a transcript of plaintiff's General Municipal Law § 50-h hearing testimony.

Defendant W.J. Northridge Construction Corp. ("Northridge") moves for summary judgment in its favor, arguing that it did not owe plaintiff a duty, that it did not create the alleged dangerous condition, that the "law of the case is the plaintiff's injuries 'arose from' the actions of Seaford," and that plaintiff "cannot establish that any actions by Northridge were the proximate cause of her injuries." In support of its motion, it submits, among other things, a copy of a contract between Woolworth Revitalization and Northridge, and a copy of a contract between Woolworth Revitalization and Seaford.

Plaintiff testified that at 8:13 a.m. on the date in question she was walking westward on the sidewalk on the north side of East Main Street, just a few steps behind her adult daughter. She stated that as she was walking she encountered a portion of the sidewalk in front of a boarded-up storefront. Plaintiff indicates that there were "haphazardly"-placed pieces of plywood covering the sidewalk in front of the storefront and that her right foot made contact with one of the pieces of plywood, causing her to fall forward onto her face. She further testified that she could see that there was no concrete underneath the pieces of plywood. Plaintiff stated that her daughter took photographs of the scene approximately 10 minutes after her fall, and after police and ambulance personnel had arrived, but avers that the photographs do not depict the subject area as it appeared at the time of her fall. Rather, she indicated that the photographs show orange safety cones had been placed in the area of her fall and that the plywood sheets had been rearranged by police officers responding to the scene.

Tammy Arnau testified that she is plaintiff's daughter and that she was present at the time of plaintiff's fall. She stated that the sidewalk area in question was covered by two sheets of plywood, and that there were three orange caution cones "against the building," but that there was "a path for [them] to walk through." She also indicated that there was caution tape "against the building" that had been "pulled down," and was not blocking their direction of travel. Ms. Arnau testified that the two sheets of plywood were not "flush," and were overlapping to some extent. Shown an exhibit marked Defendant's A, she indicated that the first of the two photographs comprising such exhibit accurately depicts the scene of plaintiff's fall both before and after the accident, and that neither the caution cones nor the plywood sheets had been moved.

Patrick Probst testified that he has been the president of A1 for approximately 11 years, and that A1 is an interior renovations business hired by Woolworth Revitalization to perform work at 130 East

Main Street in Riverhead. He indicated that A1's principal duties at that location involved demolition, including the removal of floors, ceilings, partitions, and HVAC systems within an existing commercial building there. Mr. Probst stated that while A1's final invoice sent to Woolworth Revitalization for payment was dated June 30, 2014, A1 employees returned to the site after that date to perform "cleanup" work. Asked what cleanup entailed, he testified that A1 removed various construction materials and debris from the interior of the building at the subject premises, but did not remove materials from the building's front sidewalk area. He further testified that A1 did not provide plywood or any other materials to cover an opening in that sidewalk. Regarding the specific date of plaintiff's fall, Mr. Probst stated that A1 had two employees, Julian Ocampo and Steve Cochran, present at the work site from 7:00 a.m. until 2:00 p.m. Mr. Probst indicated that both employees "knew nothing" regarding the incident when he questioned them after learning of the instant action.

Drew Dillingham testified that he is town engineer for the Town, and that he was aware of a site plan prepared by Woolworth Revitalization. Specifically, he stated that Woolworth Revitalization's site plan depicts an existing sewer line running from the building at the subject location and connecting to a sewer line buried under the sidewalk. Mr. Dillingham testified that the DOT owns East Main Street and the sidewalks running parallel thereto, and that any construction disturbing such areas would require approval by, and a permit from, the DOT. He stated that maintenance of those areas, however, was the responsibility of the Town's highway department. Asked to describe the difference between "maintenance" and "construction," Mr. Dillingham indicated that maintenance would be the correction of conditions created through "wear and tear," and construction is "actually removing a portion of the sidewalk to install an ancillary item." He further stated that the work being done at the accident location was construction, not maintenance, and that the Town did not perform any work at such location.

James A. Sutherland testified that he is the president and 50% shareholder of Northridge, "a general contracting construction management firm." He indicated that Northridge was hired by Woolworth Revitalization to provide construction management services for a construction project planned for the north side of East Main Street in Riverhead, which included the location of plaintiff's alleged fall. Mr. Sutherland stated that the project entailed renovating an existing vacant building, creating approximately 30,000 square feet of retail space on the ground floor and 20,000 square feet of apartments on the building's second floor. He testified that Northridge had approximately five employees assigned to the project, and that those employees did not engage in any physical labor with regard to demolition or construction. Mr. Sutherland indicated that Woolworth Revitalization decided to engage Northridge as a construction manager rather than a general contractor, because the complete scope of the project was not appreciable prior to its commencement and, therefore, Northridge's fee would be unascertainable until completion. As to the subject project, Northridge's duties included soliciting bids on behalf of Woolworth Revitalization, reviewing those bids, making recommendations as to which contractors to hire, then supervise the work of those contractors once construction began. Questioned regarding his familiarity with A1 and Seaford, he stated that A1 "did some demolition, and . . . on an as-needed basis . . . police[d] and clean[ed] the site." He indicated that Seaford was the plumbing contractor hired for the site, that one of its tasks was excavating the subject sidewalk, and that it was present from 2013 until 2015 when the project was completed. Asked to clarify A1's role, Mr. Sutherland testified that it's employees would intermittently be called to the construction site to "gather

all the debris and dispose of it in the dumpster," but that, to his knowledge, none of their work involved the subject sidewalk.

Mr. Sutherland testified that there was no general contractor involved with the project, that Woolworth Revitalization had the ultimate decision as to which contractors to hire, and that each of the contractors was responsible for employing its own safety measures at the site. He further testified that while Northridge was the only entity present at the subject premises on a daily basis, it did not conduct safety training or have the authority to halt work at the job site if one of its employees witnessed a dangerous condition or practice. Conversely, Michael Butler testified that he is the managing partner of Woolworth Revitalization, a entity created in 2013 to own the property at 126-138 East Main Street in Riverhead, and that Northridge had the authority to stop work at the subject premises.

George Luksch testified that he and his partner, Michael Scott, are the owners of Seaford. He stated that Seaford contracted with Woolworth Revitalization to perform plumbing services on their behalf. In relation to the sewer pipe work at the incident location, Mr. Luksch indicated that A1 had excavated the interior of the building, while Seaford excavated the exterior sidewalk portion. He recalled that the subject sidewalk was excavated the evening prior to plaintiff's fall, in anticipation of the Town's inspection of the underlying pipe the following day, so that it would be disturbed for the shortest period of time.

Kenneth Alveari testified that on the date in question he was employed by Seaford as a plumbing helper, and had performed work on the sidewalk in front of 130 East Main Street. He stated that another employee of Seaford, John Kelly, removed concreted sidewalk slabs "[a] day or two" prior to July 30, 2014, to gain access to pipes below. Mr. Alveari indicated that after the concrete was removed, he and Anthony LoBello used shovels to excavate a hole approximately two feet deep for the purpose of installing a U-trap in the building's waste pipe and connecting it to the Town's existing sewer pipe.

Mr. Alveari testified that he and Mr. LoBello arrived at the job site at 7:00 a.m. on the incident date and began working on the building's second floor while awaiting a visit from a Town inspector. Questioned regarding the condition of the sidewalk when he left the site approximately five hours earlier, Mr. Alveari stated that he and Mr. LoBello "covered it with plywood," placed caution tape "along all the plywood," and placed cones "in front of the plywood so no one could get through it or past or over it." He indicated they placed two pieces of plywood over the void in the sidewalk, "pretty flush," and that the sheets covered an area "beyond the [perimeter of the] hole." However, he stated that no action was taken to secure the two sheets of plywood to each other, or to the ground. Asked if he altered the condition of the sidewalk at any point after their arrival at 7:00 a.m., he replied in the negative, stating "[t]here was no reason to . . . [because it] was the same as [they had left it] the night before."

Mr. Alveari testified that while he and Mr. LoBello were working on the second floor, Joe Koss informed them that someone had fallen outside of the building and was injured. Shown photographs of the incident site, Mr. Alveari denied that such depicted the sidewalk in the condition he and Mr. LoBello had last seen it when they arrived at 7:00 a.m. Rather, he stated that the position of both the cones and the plywood sheets had been altered, and that the caution tape was "ripped off on the side of the plywood." He further explained that "the caution tape was ripped down [and that] [w]hoever ripped it

down did not rip the entire caution tape, so there were ends hanging down from where [he] originally attached it." Upon questioning, Mr. Alveari stated that Northridge had the ability to halt work at the incident site, but that it did not do so.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (***Orlando v New York Homes By J & J Corp.***, 128 AD3d 784, 785, 11 NYS3d 76, 78 [2d Dept 2015], quoting ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565, 576, 934 NYS2d 43, 48 [2011]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278, 280 [2d Dept 2019] [internal quotation marks and citations omitted]). Further, "liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner" (***Hanze v City of New York***, 166 AD3d 734, 735, 87 NYS3d 238 [2d Dept 2018], quoting ***Staruch v 1328 Broadway Owners, LLC***, 111 AD3d 698, 698, 974 NYS2d 796 [2d Dept 2013]). Yet, an abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty (*see* ***Bousquet v Water View Realty Corp.***, 161 AD3d 718, 76 NYS3d 205 [2d Dept 2018]; ***Rodriguez v City of Yonkers***, 106 AD3d 802, 965 NYS2d 527 [2d Dept 2013]).

A contractual obligation alone "will generally not give rise to tort liability in favor of a third party" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 138, 746 NYS2d 120, 122 [2002]). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140, 746 NYS2d at 123 [internal quotation marks and citations omitted]).

The moving defendants have established a prima facie case of entitlement to summary judgment in their favor (*see* ***Orlando v New York Homes By J & J Corp.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Specifically, A1 demonstrated that at all relevant times, its employees worked exclusively within the interior of the building adjacent to the incident location (*see* ***McGee v City of New York***, 161 AD3d 1062, 78 NYS3d 191 [2d Dept 2018]; ***Walton v City of New York***, 105 AD3d 732, 963 NYS2d 275 [2d Dept 2013]; ***Sand v City of New York***, 83 AD3d 923, 921 NYS2d 312 [2d Dept 2011]). The Town demonstrated that it played no role in the placement of safety devices, and that, while it visited the subject location to conduct inspections of certain aspects of the construction, the New York State DOT owned the location of plaintiff's fall (*see* ***Tilford v Greenburgh Hous. Auth.***, *supra*). Northridge established its prima facie case through the testimony of Mr. Sutherland, who averred that Northridge did not perform work on the subject sidewalk, was not responsible for safety, and that Seaford was responsible for keeping its own work site free of hazards (*see* ***Lamar v Hill Intl., Inc.***, 153 AD3d 685, 59 NYS3d 756 [2d Dept 2017]; ***Myles v Claxton***, 115 AD3d 654, 981 NYS2d 447 [2d Dept 2014]; *cf.* ***Cintron v RC Dolner, LLC***, 161 AD3d 636, 78 NYS3d 305 [1st Dept 2018]). Furthermore, Section 3.3.15 of the contract between Woolworth Revitalization and Northridge, dated March 6, 2013, provides that Northridge "shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the Contractors." The moving defendants having established a prima facie case, the burden shifted to plaintiff to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition, plaintiff argues that the moving defendants failed to adduce evidence that they did not "create and/or exacerbate the dangerous and defective condition by removing the safety tape and cones which had allegedly been deployed at the scene by [Seaford]." In addition, as to Northridge only, plaintiff argues that it "bore the ultimate responsibility" to ensure safety at the job site. Plaintiff submits, among other things, her own affidavit, copies of invoices, five unlabeled photographs, a copy of a police incident report, and a copy of an accident report drafted by Joe Koss.

Plaintiff directs the Court's attention to the accident report prepared by Joe Koss for Northridge, wherein its author states that the Town building inspector, Mark Griffin, was present at the site on the date in question. Plaintiff argues that evidence of Mr. Griffin's presence supports her contention that he may have removed the caution tape or cones in order to perform his inspection. However, plaintiff neglects to acknowledge that portion of Mr. Koss's accident report wherein he writes that "[r]emoval of caution tape was well after [plaintiff's] accident and only for inspection." Further, even if the Court assumes, arguendo, that Mr. Griffin was present at the time of plaintiff's fall, there has been no evidence adduced that he removed any safety devices.

In opposing Northridge's motion, plaintiff argues that it had, based upon the deposition testimony of James Sutherland, the ultimate responsibility for ensuring all safety measures were employed at the accident site. Such argument misconstrues Mr. Sutherland's testimony, however. Mr. Sutherland testified that pursuant to its contract with Woolworth Revitalization, Northridge was not responsible for safety at the site, but that Joe Koss would "observe" how the various contractors secured their work sites and, if he observed a dangerous condition, might relay his concerns to the contractor. Further, while Woolworth Revitalization's deponent, Mr. Butler, and others, testified that Northridge

had the authority to stop work at the job site, the contract between Northridge and Woolworth Revitalization explicitly disclaimed any such duty (*see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]; ***Wyant v Professional Furnishing & Equip., Inc.***, 31 AD3d 952, 819 NYS2d 792 [3d Dept 2006]; *cf.* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Piccirillo v Beltrone-Turner***, 284 AD2d 854, 727 NYS2d 721 [3d Dept 2001]; *see also* ***Espinal v Melville Snow Contrs.***, *supra*; ***Marzec v City of New York***, 136 AD3d 410, 24 NYS3d 276 [1st Dept 2016]; ***Cohen v Schachter***, 51 AD3d 847, 857 NYS2d 727 [2d Dept 2008]). In addition, there is no evidence that Northridge ever conducted safety meetings or halted work at the job site due to safety concerns.

Finally, with regard to A1, plaintiff argues that it did not meet its prima facie burden, because it did not submit affidavits of its two employees who were present at the construction site on the date in question denying that they removed safety cones or caution tape from the accident location. Such argument merely attempts to impugn the competency of Mr. Probst's testimony, not its admissibility, and does not constitute evidence that A1 "launched a force or instrument of harm" (*see* ***Espinal v Melville Snow Contrs.***, *supra*).

Therefore, the Court finds that plaintiff has not raised a triable issue regarding the moving defendants' liability. Plaintiff adduced no evidence that any of the moving parties created the alleged dangerous condition, that any of the moving defendants possessed a duty to ensure safety at the accident location, or that any person associated with the moving defendants removed any safety devices at the incident site and, thus, her arguments are speculative (*see generally* ***Somekh v Val. Natl. Bank***, 151 AD3d 783, 57 NYS3d 487 [2d Dept 2017]; ***Jeansimon v Lumsden***, 92 AD3d 640, 937 NYS2d 869 [2d Dept 2012]; *cf.* ***Baird v Gormley***, 116 AD3d 1121, 983 NYS2d 662 [3d Dept 2014]). Accordingly, the motion by A1 Reliable Industries Corp. for summary judgment dismissing the complaint and cross claims against it, the motion by defendant Town of Riverhead for summary judgment dismissing the complaint and cross claims against it, and the motion by defendant W.J. Northridge Construction Corp. for summary judgment dismissing the complaint and cross claims against it are granted.

Dated: October 29, 2019

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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