Celli v Orange Rockland Util., Inc.

2020 NY Slip Op 34645(U)

October 30, 2020

Supreme Court, Rockland County

Docket Number: Index No. 034854/2017

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
FRANK J. CELLI, JR.,

Plaintiff,

DECISION AND ORDER

(Motion #1)

-against-

Index No.: 034854/2017

ORANGE AND ROCKLAND UTILITIES, INC.

Defendants.
----------X

Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 6, were considered in connection with Defendant Orange and Rockland Utilities, Inc.'s ("O & R") Notice of Motion, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment and dismissal of the Complaint against it:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF DANIEL PERETTI/EXHIBITS A-J	1-3
AFFIRMATION IN OPPOSITION/AFFIDAVIT OF WAYNE T. BALLARD/ EXHIBITS A-BB	4-5
AFFIRMATION IN REPLY/EXHIBITS A-E	6

Upon the foregoing papers, the Court now rules as follows:

The above captioned action seeks to recover for serious personal injuries sustained by the Plaintiff, Frank J. Celli Jr., on July 10, 2015, when the motorcycle he was riding struck broken-up uneven asphalt on west-bound Route 59, in Clarkstown, New York. An action was commenced on October 5, 2017, and issue was joined as to Defendant O & R by service of an Answer on November 27, 2017. After the completion of discovery, and the filing of a Note of Issue on January 16, 2020, Defendant timely filed its summary judgment motion. The Court notes that a companion action arising from the same incident was filed against the State of New York in the Court of Claims.

Testimony

Plaintiff Celli testified that his accident occurred on July 10, 2015, a clear evening, as he rode his motorcycle in the far-right westbound lane of Rt. 59, in the Town of Clarkstown. As he traveled approximately 30-35 miles per hour, on a curve in the roadway, the front tire of his motorcycle made contact with potholes and uneven pavement in the roadway, causing him to fly over the handlebars and to come to rest approximately 25 feet away on the roadway. Mr. Celli did not observe the potholes prior to contact. Thereafter, a woman named Desiree Salerno, who was driving immediately behind him, got out of her car and came to his aid, EMS arrived, and Mr. Celli was transported to Nyack Hospital. At his Court of Claims deposition, Plaintiff identified photographs taken of the roadway approximately one month after the accident as fairly and accurately depicting the condition of the roadway at the time of the incident.

Eyewitness, Desiree Salerno, testified as a non-party witness at an examination before trial in the Court of Claims action. She testified that she witnessed Plaintiff's accident as she travelled behind Plaintiff's motorcycle in the right westbound lane. The accident occurred on a bend in the road where a large pothole was located. Ms. Salerno marked a photograph depicting the location of the pothole, which she described as being two feet wide by two feet long. She testified that when Plaintiff's motorcycle came into contact with the pothole, she observed the steering wheel of the motorcycle go to the right and the back of the bike swerved out to the left, at which time Mr. Celli was thrown off.

Defendant O & R produced Daniel Peretti, manager of the law department of Con-Ed[1], whose duties include the investigation of accidents and claims involving Defendant O & R. Mr. Celli testified that O & R performed gas work on Route 59, near its intersection with Broome Boulevard, where gas valves and gas main were located. In August 2012, O & R performed work related to the elimination of gas leaks on the steel gas main which included

[1] Consolidated Edison Company of New York ("Con Ed") purchased all shares of O & R which became a wholly owned subsidiary of Con Ed.

the cut out of approximately forty (40) feet of gas main and the replacement with plastic so as to eliminate corrosion leaks on the steel main. In order to perform such work, a forty (40) foot long trench was dug in the right westbound lane of Rt. 59, and after the work was completed, the area was restored back to asphalt.

In July 2013, a larger job was undertaken in the area which involved the retirement of approximately one thousand feet of gas main. This work began on the western most end of the 2012 work and proceeded in a westerly direction. To perform this work, O & R dug two (2) four by eight feet (4 x 8) trenches. The plastic main is embedded in sand, rock aggregate is compacted to within eight or nine inches of the final grade, and then final asphalt is put down, without milling. Work records show a project completion date of August 12, 2015, a date post-accident.

At his deposition, Mr. Peretti testified that O & R never makes repairs on state roads, even if it is their facilities which are the cause of a dangerous condition on the roadway. He further contended that O & R never received any notice from the New York Department of Transportation ("DOT") regarding the area of Plaintiff's accident or the condition of the pavement surface prior to the accident. He did, however, confirm that O & R performed paving work in the subject area after the accident in August 2015, but did not know why they performed this work.[2]

Plaintiff also submits the deposition testimony of James Murawski, employed by the DOT as an Assistant Resident Engineer, taken in connection with the Court of Claims action. Mr. Murawski's duties include overseeing the operations of the DOT, maintenance of roads, work zones, safety and complaints regarding State highways in Rockland County. He testified that in June 2015, in response to complaints of a rough riding surface, Mr. Murawski went to the site and observed that the pavement had multiple asphalt patches from the work of both O & R and DOT, so he reached out to O & R to schedule joint repair work in the area.

[2] The Court notes that several photographs were marked as exhibits which depict the general area of the accident and which show O & R workers and company vehicles parked on the side of the road.

DOT crews did temporary patching work to make the road surface better. The notification to O & R regarding the condition of the roadway in the area of Plaintiff's accident took place prior to Plaintiff's accident.

Mr. Murawski further testified that this work was necessitated by the sinking of an O & R gas valve which caused the pavement level to compact. Mr. Murawski determined that O & R was required to do certain work to repair the area of the trench/utility cut. This would involve O & R milling out the asphalt around its valve; excavation of the area; application of new subbase which would then be recompacted to be stronger and not settle; placement of proper asphalt lifts; and putting down a subbase, a medium course and then a riding course. Mr. Murawski testified that O & R would fix their area and DOT would fix anything that was not part of O & R's area. Final repairs, including some made by O & R, were made in July or early August 2015.

The Parties' Contentions

Defendant O & R moves for summary judgment and argues that there is no evidence that O & R owed any duty of care to Plaintiff. It asserts that the limited excavations undertaken in 2012 and 2013 were performed pursuant to a permit issued by DOT and that O & R fully complied with the requirements of the permit and an assistant resident DOT engineer approved the work. Relying upon the case of Espinal v. Melville Snow Contractors, Inc, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002), Defendant asserts that no duty was owed to plaintiff who was not a party to the contract and none of the exceptions are applicable. It further contends that it had no obligation to conduct inspections after the work and that there is no evidence that it failed to exercise reasonable care in the performance of its duties.

Other arguments asserted by Defendant are that the State of New York has a non-delegable duty to maintain the state highways; the superseding intervening acts of the NYS DOT completely relieve O & R of any potential liability because they inspected the sites after the work was performed; there was no notice of a dangerous or defective condition; and

Plaintiff's failure to identify the cause of his accident is fatal to his claim because he did not see the road conditions beforehand.

In opposition to O & R's motion, Plaintiff contends that Defendant has failed to satisfy its prima facie showing that there are no triable issues of fact as to its negligence. He notes that a contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk. Here, Defendant made no showing that it did not create a dangerous condition.

Additionally, Plaintiff argues that a triable issue of fact exists as to Defendant's negligence, which requires the denial of summary judgment. In support of this contention, Plaintiff submits the expert affidavit of Wayne Ballard, P.E. In his affidavit, Mr. Ballard opines that O & R's failure to perform a proper restoration of the roadway created and resulted in the dangerous and defective condition which caused Plaintiff's accident. More specifically, Mr. Ballard avers that the jagged edges around O & R's restoration work reflects an improper restoration resulting in voids within the joint that allowed the joint to open up, permitting water to infiltrate the road and subjecting the road to the freeze/thaw cycles resulting in a heaved and depressed road surface. Additionally, he contends that the photographs show evidence of a failure to extend the removal of the top layer beyond the excavation area by milling the road and using tack coat prior to repaving the work area to bond the binder of the existing road to the new top layer. Plaintiff also argues that James Murawski's testimony raises triable issues of fact, including that he provided to O & R actual notice of the dangerous and defective conditions at issue prior to Plaintiff's accident.

As to the O & R's claim that it is not liable to Plaintiff under the standard set forth in Espinal, Plaintiff argues that affirmative acts of negligence fall within one of the exceptions. With respect to the claim that the State owes a non-delegable duty to maintain the roads, Plaintiff contends that this does not abrogate O & R's liability for its affirmative negligence in creating a dangerous condition. Plaintiff further argues that any acts by the State in restoring the roadway do not constitute an intervening act, as such actions are a

foreseeable and normal consequence of O & R's failure to properly restore the subject area. Lastly, Plaintiff argues that his failure to observe the defect before the accident does not mean that he cannot identify the cause of the accident. He contends that evidence including photographs of the accident site, as well as the testimony by Desiree Salerno who witnessed the accident, demonstrate triable issues of fact as to causation.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant. Pearson v. Dix McBride, LLC, 63 A.D.3d 895, 883 N.Y.S.2d 53 (2d Dept. 2009).

As a general rule, a contract does not give rise to a duty on the part of the contractor, to use reasonable care to prevent foreseeable harm to third-persons not privy to the contract. Espinal v. Melville Snow Contras., 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); Roach v. AVR Realty Company, 41 A.D.3d 821, 639 N.Y.S.2d 173 (2d Dept. 2007). However,

there are three exceptions to that general rule: (1) where the contractor failed to use reasonable care in the performance of its duties, thereby launching a force or instrument of harm; (2) where the plaintiff detrimentally relies upon the continued performance of the contractor's duties; or (3) where the contractor displaced the property owner's duty to maintain the premises in a reasonably safe condition. Id. With regard to the first exception, a contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition. Losito v. City of New York, 38 A.D.3d 854, 855, 833 N.Y.S.2d 564 (2d Dept. 2007); Espinal v. Melville Snow Contras., 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002).

Moreover, the law is clear that a contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk. Brown v. Welsbach Corporation, 301 N.Y.202, 205 (1950); Schwartz v. Orange and Rockland Utilities, Inc., 93 A.D.3d 776, 940 N.Y.S.2d 320 (2d Dept. 2012). "On a motion for summary judgment, such a defendant may sustain its burden by establishing that it did not perform any work on the portion of the roadway where the accident occurred or that it did not otherwise create the allegedly defective condition which caused the plaintiff's injuries." Malayeva v. City of New York, 180 A.D.3d 888, 889, 116 N.Y.S.3d 588 (2d Dept. 2020).

In the instant matter, the Court finds that Defendant has failed to meet its prima facie burden on summary judgment, and accordingly, the motion is denied. In his Verified Bill of Particulars, Plaintiff claims that Defendant affirmatively created the dangerous and defective conditions at issue. Notwithstanding such claim, Defendant made no prima facie showing by expert affidavit or otherwise that it did not create a dangerous condition on the roadway as a result of the restoration work in 2012 and 2013, and did not eliminate all issues of fact that the accident did not occur in the area of the restoration work.

Even if Defendant had met its burden, summary judgment must be denied as Plaintiff has established a triable issues of fact. Mr. Murawski testified that he gave prior notice to O & R of a dangerous and/or defective condition in the location of its restoration work prior

to the subject accident. Additionally, although O & R takes the position that it was not their responsibility to undertake any repairs on the street, Mr. Murawski testified that O & R was responsible. Moreover, while evidence of subsequent repairs and remedial measures is ordinally not admissible in a negligence case, it can be introduced where an issue exists as to the identity of the entity responsible for maintenance. Soto v. CBS Corp., 157 A.D.3d 740, 69 N.Y.S.3d 61 (2d Dept. 2018); Klatz v. Armor Elevator Co., Inc., 93 A.D.2d 633, 462 N.Y.S.2d 677 (2d Dept. 1983).

Here, O & R's post-accident repairs, as evidenced by the photographs, raise issues of fact as to whether it had control of the subject area and was responsible for repairing the alleged defective condition. Furthermore, Plaintiff through the expert affidavit of Mr. Ballard, has demonstrated triable issues of fact as to whether the restoration work in 2012 and/or 2013 was negligently performed such that it affirmatively created the dangerous condition alleged to have caused the accident.

Nor is there merit to Defendant's argument that summary judgment must be granted because Plaintiff is unable to identify the cause of his accident. A plaintiff with no recollection of an accident or who cannot testify exactly as to how an accident occurred, can establish negligence wholly through circumstantial evidence. Timmins v. Benjamin, 77 A.D.3d 1254, 1256, 910 N.Y.S.2d 584 (3d Dept. 2010); Patrikis v. Arniotis, 129 A.D.3d 928, 12 N.Y.S.3d 174 (2d Dept. 2015). A case of negligence based wholly on circumstantial evidence may be established if the plaintiffs "show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." Seelinger v. Town of Middletown, 79 A.D.3d 1227, 1229, 913 N.Y.S.2d 376 (3d Dept. 2010). Here, Plaintiff was able to say how his accident occurred notwithstanding the fact that he did not see the potholes before his fall. Additionally, the testimony of Ms. Salerno, who was an eyewitness to the subject occurrence, raises triable issues of fact as to the cause of Plaintiff's accident. Lastly, the Court finds no merit to Defendant's arguments that it cannot

be liable to Plaintiff due to the State's non-delegable duty to maintain the roadways or that the State's actions constitute a superseding cause of the occurrence.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Defendant Orange & Rockland Utilities Inc. for summary judgment and dismissal of the Complaint (Motion #1) is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a settlement conference on **JANUARY 6, 2021, at 10:20 a.m** via Microsoft Teams. Link to be provided the day prior to the conference.

The foregoing constitutes the Decision and Order of this Court on Motion #1

Dated: New City, New York
October 30, 2020

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-