Merckling v FPG CH 350 Hicks, LLC

2023 NY Slip Op 33196(U)

September 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 525351/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of September, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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THOMAS J. MERCKLING,

Plaintiff,

- against-

FPG CH 350 HICKS, LLC, FPG CH 339 HICKS, LLC, GMR SERVICES LLC, PRECISION SERVICES LIMITED LIABILITY COMPANY ALSO KNOWN BY THE FICTITIOUS NAME OF GMR SERVICES LLC, FPG CH 91 PACIFIC, LLC, RAY BUILDERS, INC.,

Defendants.

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DECISION/ORDER

Index No. 525351/2018

MS #1

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affidavits (Affirmations) and Exhibits Annexed	50-68
Opposing Affidavits (Affirmations) and Exhibits	70-73
Reply	76-77

Upon the foregoing papers in this personal injury action, defendants FPG CH 350 HICKS, LLC, hereinafter "350 Hicks" (formed in Delaware and authorized to do business in NY), GMR SERVICES LLC, hereinafter "Precision" (formed in New Jersey as PRECISION SERVICES LIMITED LIABILITY COMPANY and doing business in New York under the assumed name GMR Services LLC) and FPG CH 91 PACIFIC, LLC, hereinafter "Pacific" (formed in Delaware and authorized to do business in NY), move, in motion sequence one, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint in its entirety.

It is noted that this action was discontinued as against defendant Ray Builders Inc. [Doc 44], and has been abandoned as against defendant FPG CH 339 HICKS, LLC, an entity that is not authorized to do business in New York, and which has never been served with the summons and complaint. The complaint is therefore dismissed as against it.

This action was commenced on December 17, 2018 by the filing of a summons and complaint. The complaint was amended twice, without leave of court, and without objection from the defendants. The second amended complaint was answered by defendant Pacific, (FPG CH 91 PACIFIC LLC) [Doc 33], and asserts cross-claims for contribution and indemnification against all of the other defendants. A separate answer was filed by the other two moving defendants, 350 Hicks and Precision [Doc 34], which asserts cross claims against FPG CH 339 HICKS, LLC, FPG CH 91 PACIFIC, LLC and RAY BUILDERS, INC. The cross-claims asserted in Pacific, 350 Hicks and Precision's verified answers to the second amended complaint against FPG CH 339 HICKS, LLC must be dismissed, as they did not serve their answer on this defendant, and thus the court never obtained jurisdiction over it. With regard to Ray Builders, Inc., as none of the defendants executed the stipulation of discontinuance with regard to Ray Builders, Inc. [Doc 44], plaintiff's discontinuance converted the cross claims of these defendants into third-party claims. After the plaintiff discontinued the action against Ray Builders, Inc., counsel for defendants 350 HICKS and PRECISION filed a consent to change attorney [Doc 45], which states that their firm had also become the attorneys for defendant PACIFIC. The moving defendants are thus all of the remaining defendants in the plaintiff's action, and are all represented by one law firm. Plaintiff filed his note of issue on September 15, 2022, and the case is on the trial calendar.

Plaintiff alleges in his second amended complaint, filed 6/5/20 [Document 31], that on September 14, 2017, when he was riding his motorcycle north on Hicks Street approaching Atlantic Avenue in Brooklyn, New York, he passed in front of the defendants' construction site and "was caused to fall and sustain severe personal injures as a result of negligence on the part of" defendants [¶23]. He

further avers that "they failed to provide Plaintiff with a safe place to ride his motorcycle; in that Defendants caused the very incident complained of which was foreseeable; in that Defendants created said dangerous conditions; in that Defendants had notice of the dangerous and defective conditions; in that Defendants failed to remedy said dangerous conditions; in that Defendants caused obstructions and other barriers to exist on the subject roadway; in that Defendants were otherwise careless and negligent" [¶26]. Plaintiff repeats these claims for each of the defendants.

During discovery it was determined that defendant Precision was engaged to perform demolition work at the location, and had placed a water hose across the roadway to provide water to the site, which was connected to the property across the street, which was a part of the construction site as well. A channeled rubber "hose protector" was utilized and signs were placed, which said "bump" and "slow down ahead – speed bump – reduce speed 5 MPH" and "surface utility line: Slow down to 10 MPH" (the photos are in Doc 66). The signs were placed on both sides of the street, and "slow" signs were also placed on barrels at both sides of the hose protector. Plaintiff drove over the hose protector, and claims that it "caught and turned the front tire of his motorcycle" which caused him to fall and be injured [Doc 70].

Defendants' Summary Judgment Motion

On November 10, 2022, defendants moved for summary judgment and an order dismissing the second amended complaint and all cross claims asserted against them. They support the motion with the pleadings, the EBT transcripts of plaintiff and defendant Precision, a number of photographs, the contracts with Precision, and an attorney's affirmation. Defendants' counsel avers [Doc 51 Page 6] that the complaint should be dismissed on the ground that "It is well-established that there is no duty to protect or warn against an open and obvious condition which is not inherently dangerous. She states that

> "a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion. The court may make that determination based on photographs" [citations omitted]. Counsel continues "[i]n the instant case, plaintiff saw the "bump ahead" sign and saw the hose protector when he was a few car lengths away. (Exhibit M, pages 20-21 and 117) He observed the car in front of him crossing over the hose protector, and adjusted his own speed in anticipation. (Exhibit M, pages 20-21) He acknowledged that there was nothing (e.g., leaves, debris, sun glare) interfering with his view of the surface of the hose protector. (Exhibit M, page 69) Under these circumstances, one cannot reasonably argue that the hose protector was not "open and obvious." Counsel then argues that "[w]ith respect to the 'not inherently dangerous' part of the analysis, it is clear from the photographs (Exhibit O) that the gap between the hose and the edges of the channel is quite narrow, obviously not wide enough to actually ensnare a motorcycle tire, particularly when the tire was perpendicular to the channel (Exhibit M, page 24; Exhibit O). Based on the photographs, this Court can find, as a matter of law, that this condition was not inherently dangerous. While defendants do not concede that the narrow gap of which plaintiff complains even constitutes a "defect," if it is a defect, it's far too trivial to be actionable" [*id.* ¶¶33-35].

Counsel then continues to describe the cases that have analyzed trivial defects. The court notes that all of these involved pedestrians who tripped, one involved a bicycle that encountered a pothole and one involved a child on a bicycle that encountered a sidewalk defect. There are no trivial defect cases involving motorcycle drivers or automobile drivers moving along a roadway. This is because the "trivial defect" analysis is inapplicable to motor vehicles.

The court notes that counsel represents all three moving defendants and does not argue that these defendants are not united in interest. The motion is made without disputing that they are the proper defendants in this action, the property owners and their contractor.

Plaintiff's Opposition

Plaintiff, in opposition, first argues that "open and obvious" goes to the plaintiff's comparative fault, and is not a complete defense. He also argues that the hose protector was the wrong one to use for this size hose, and that the photos support his claim, and his expert's claim, that the hose was too small for the channel, which created a gap, and that his front wheel got caught in the gap, which caused his front wheel to turn sideways, causing him to flip over and fall.

Plaintiff provides an expert affidavit from an engineer, Nicholas Bellizzi, [Doc 72] in which he concludes that the "multi-channel hose protector with ramps" was misused, as "it is intended to secure the hose within the channel, to prevent it from being compressed and shifting when stepped on or run over by bicycles, motorcycles and other vehicles, to prevent it from becoming a hazard to pedestrians and the riders of bicycles and motorcycles." He states that there are numerous products on the market today that are made just for protecting hoses from traffic. Mr. Bellizzi states that "Persons and entities employing this type of device are required to cover or fill in empty channels and both cover and bridge the gap between smaller hoses and channels in use, with wood, rubber or similar materials produced for this purpose." The hose protector in this incident had no cover, and the hose and the gap around it were visible, as indicated in the photos.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he proponent of a summary judgment motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept

2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp*., 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski* v *Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc*., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaum's Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'"

(*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

"An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition . . . and must warn of any dangerous or defective condition of which it has actual or constructive notice" (*Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 707 [2015]). However, the Second Department has held that an owner or tenant has no duty to protect or warn against a condition that is *both* open and obvious *and not inherently dangerous* (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *see also Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696-697 [2d Dept 2019] [holding that "to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous"]; *Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]).

Here, running a water hose across a roadway for construction activity at the property is a special use which the property owner is responsible for. "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966, 967 [2017]; *see also Karpel*, 174 AD3d at 695).

There is no dispute that the contractor (Precision) made special use of the roadway by laying a hose and hose protector across the public street, which would result in liability *for any unsafe condition* caused by that use. A contractor who creates a hazardous condition may be liable to passersby, whether pedestrians or drivers (see *Pizzolorusso v Metro Mechanical LLC*, 205 AD3d 748 [2d Dept 2022]). While plaintiff's deposition testimony establishes that the hose, hose protector and accompanying warning signs were open and obvious – since he admittedly observed

the hose protector before he drove over it and fell – there is a triable issue of fact as to whether the hose and hose protector across the road was *also* an inherently dangerous condition.

Plaintiff contends that his tire got caught because the gap between the hose and the hose protector, which was not covered, was a "trap-like" condition which was inherently dangerous. There is nothing in the record to explain why there was no water at one of the two sites so Precision needed to run a hose across a busy street. Defendants knew the hose and hose protector could be dangerous, as they placed numerous signs on the street warning drivers to slow down, and to be aware of the "bump."

The court finds that the defendants have not established their prima facie entitlement to summary judgment, because they fail to present any evidence that the hose and hose protector as it was installed on the street was not inherently dangerous.

The legal standard to succeed on a summary judgment motion in the Second Department, since 2003 when that court issued its decision in *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003] is that, if an owner or tenant wants to prove that it had no duty to protect or warn, the owner or tenant must prove that the condition was both open and obvious and not inherently dangerous. Defendants have not done so here.

In conclusion, whether the hose and hose protector which were run across the public roadway on Hicks Street between Pacific Street and Atlantic Avenue, in the manner that it was assembled and placed, created an inherently dangerous condition, is a question of fact for the jury.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the second amended complaint is denied; and it is further

ORDERED that the caption is amended to reflect the discontinuance by plaintiff as against Ray Builders Inc., the abandonment of the action as against FPG CH 339 HICKS, LLC, such that

the complaint must be dismissed as against it, the correction of the defendant Precision's name, and the conversion of the cross claims asserted against Ray Builders Inc. to third-party claims, as follows:

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THOMAS J. MERCKLING,
Plaintiff,

- against -

FPG CH 350 HICKS, LLC, PRECISION SERVICES LIMITED LIABILITY COMPANY d/b/a GMR SERVICES LLC, and FPG CH 91 PACIFIC, LLC,

Defendants.
---X

FPG CH 91 PACIFIC, LLC,
Third-Party Plaintiff,

-against-

RAY BUILDERS, INC.,
Third-Party Defendant.
---X

FPG CH 350 HICKS, LLC, and PRECISION SERVICES LIMITED LIABILITY COMPANY d/b/a GMR SERVICES LLC,
Second Third-Party Plaintiffs,

-against-

RAY BUILDERS, INC.,
Second Third-Party Defendant.
---X

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J. S. C.