

**Black v Tromel Constr. Corp.**

2007 NY Slip Op 30148(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0024223

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 9/8/06  
ADJ. DATE 10/20/06  
Mot. Seq. # 001 - MG  
# 002 - XMG; CASEDISP

-----X	
CATHY BLACK and STEFAN BLACK,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
TROMEL CONSTRUCTION CORP. and NORESCO:	:
LTD.,	:
Defendants.	:
-----X	
TROMEL CONSTRUCTION CORP.	:
	:
Third-Party Plaintiff,	:
	:
- against -	:
	:
NORESCO, LTD.,	:
	:
Third-Party Defendant.	:
-----X	

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Upon the following papers numbered 1 to 78 read on this motion for summary judgment; cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; Notice of Cross Motion and supporting papers 31 - 60; Answering Affidavits and supporting papers 61-65; 66-70; Replying Affidavits and supporting papers 71-74; 75-78; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that defendant Noresco Ltd.'s motion for summary judgment dismissing the complaint and all cross claims against it are granted; and it is further

**ORDERED** that defendant Tromel Construction Corp.'s cross motion for summary judgment dismissing the plaintiffs' complaint is granted.

This is an action to recover damages, personal and derivative, for injuries allegedly sustained by plaintiff Cathy Black (“plaintiff”) on June 9, 2003 when she fell in the parking lot of the Hauppauge Union Free School District Middle School (“the School District”) located at 459 Hoffman Lane in the Town of Islip, County of Suffolk, New York. At the time of the accident, plaintiff was walking to her car when she tripped over a metal spike protruding from the surface of the parking lot. The spike was located near the edge of the black top where parking blocks had been removed and a new gravel base installed to extend the school’s existing parking area. Plaintiffs allege that the contractors hired by the School District, Tromel Construction Corp. (“Tromel”), negligently created the hazardous condition and failed to either maintain the parking lot in a safe manner or provide notice of the dangerous condition. Defendant Tromel subsequently instituted a third party complaint impleading Noresco Ltd—a subcontractor hired to excavate the construction site—and by August 5, 2005 plaintiffs amended their complaint to include Noresco Ltd. as a direct defendant to the action.

Defendant Noresco Ltd. (“Noresco”) now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not create the alleged dangerous condition and it owes no duty of care with respect to any unsafe condition in that it did not own or control the subject parking lot. In support, Noresco submits, *inter alia*, the pleadings; photographs depicting the area of the parking lot where the accident occurred as well as deposition testimony from the plaintiffs, Thomas Healy, president of Tromel Construction Corp., Kevin Orelli, president of Noresco Ltd. John Marek, plant facilities administrator for the Hauppauge School District and Alfred Arnold, the School District’s assistant plant facilities administrator. Noresco also submitted an affidavit from its president and a copy of its contract with Tromel Construction Corp.

Defendant Tromel is also cross moving for summary judgment dismissing the complaint and any and all counterclaims and cross claims against it on the grounds that it neither had actual or constructive notice of the alleged dangerous condition, nor could the plaintiff establish any of the three recognized exceptions to the requirement of privity making it amenable to plaintiffs’ third party claim under its contract with the School District. In addition to the pleadings and identical copies of the deposition transcripts submitted by Noresco, Tromel also submitted a signed statement from the School District’s assistant plant facilities administrator, Alfred Arnold.

Plaintiffs oppose both Tromel’s and Noresco’s motions on similar grounds. Plaintiff contends that there are issues of fact concerning whether both contractors had actual and constructive notice of the dangerous condition and failed to provide the School District or its employees with warning of the condition, and whether as contractors for the school’s parking lot expansion project, they negligently created or exacerbated the defective condition that resulted in plaintiff’s injuries.

Defendant Tromel also opposes Noresco’s motion for summary judgment. Tromel argues that Noresco’s motion should be denied because the excavation of the work site and the creation of the temporary parking lot was exclusively performed by Noresco. Tromel also asserts that Noresco’s motion should be denied because it has a right to both contractual and common law indemnification for damages related to plaintiff’s injuries.

At her examination before trial plaintiff testified that she saw the metal spikes for the first time after she fell and injured herself. Plaintiff testified that the spikes were protruding from the blacktop and not the gravel covered area. Plaintiff testified that the spike was bent at an angle towards the blacktop and was

brown and rusty. Plaintiff also indicated that she did not know of anyone else who made complaints about the spikes and that she neither observed anyone removing parking blocks from the parking lot nor knew how the spikes came to be in the area where she fell.

At his examination before trial Thomas Healy, president of Tromel Construction Corp., testified that their construction work at the school interfered with the existing parking area for the teachers so the School District asked them to clear top soil and put down some temporary stone blend to create additional parking on the opposite side of the school. Mr. Healy testified that they did not work on the existing parking lot and their work was confined to the grass area where which they stripped and lay down stone base. Mr. Healy indicated that the job was subcontracted to Noresco and that no one from Noresco indicated that they removed parking blocks or had knowledge of any metal spikes in their work area. Mr. Healy testified that none of his workmen informed him of the existence of any metal spikes and that after the parking area project was done neither the School District's Construction Coordinator nor the school Facilities Manager, who both inspected the work, had any complaints about the work.

At his examination before trial Kevin Orelli, president of Noresco Ltd, testified that during the excavation of the area designated for the additional parking he never came across any metallic spikes or rods protruding from the ground. Mr. Orelli testified that the excavation begun four feet south of the area where the spike was located. He also indicated that the pay-loader that he used to excavate the work site lifted approximately six inches of top soil and while it was in use he never came across any foreign objects or removed any concrete material.

In his examination before trial the School District's assistant plant facilities administrator, Alfred Arnold, testified that he neither received complaints regarding the temporary parking lot, nor recalled observing metal spikes in the school's parking lot until after plaintiff's accident. Mr. Arnold testified that the "spikes" appeared to be "re-bars" used to hold parking bumpers in place. Mr. Arnold indicated that although the school did not have them anymore, he recalled observing bumpers in the parking lot years ago. He also stated that no work was done to the permanent parking lot during the time the additional parking area was added by Noresco. In a written statement Mr. Arnold also indicated that when the bumpers were removed from the parking lot, it appears that employees of the School District pounded the remaining metal spikes into the ground.

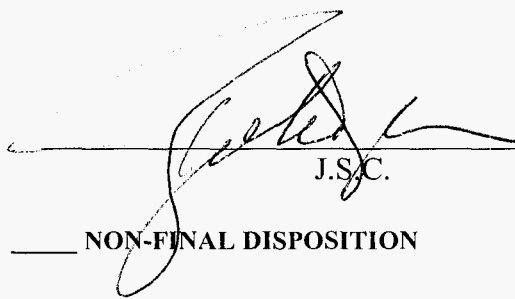
As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (*Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2005]; *Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 670 NYS2d 556 [1998]). The determinative question is one of possession or control (*Smalls v New York City Hous. Auth. Tenants Assn. of Woodside*, 276 AD2d 619, 715 NYS2d 322 [2000]; *Welwood v Association for Children with Down Syndrome*, *supra*). While contractual obligations may create a duty towards a third party if the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (*see, Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]), in the absence of detrimental reliance on continued performance or the existence of a contractual obligation so comprehensive or exclusive in nature as to have removed the landowner's duty, it is the landowner's duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily observable with the reasonable use of one's senses (*see, Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331 [2001]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Bilinski v Bank of Richmondville* 12 AD3d 911, 784 NYS2d 708 [2004]). Apart from the

duty to warn of dangerous conditions on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it (*see, Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 [2003]; *Tulovic v Chase Manhattan Bank*, 309 AD2d 923, 767 NYS2d 44 [2003]).

Defendant Noresco has demonstrated its entitlement to summary judgment by demonstrating that it neither retained control of the area where the accident occurred, nor launched a force or instrument of harm by exacerbating an existing dangerous condition (*see, Espinal v Melville Snow Contrs., supra; Killeen v Our Lady of Mercy Med. Ctr.*, 2006 NY Slip Op 9128; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 822 NYS2d 279 [2006]; *John v Tishman Constr. Corp. Of N.Y.*, 32 AD3d 458, 819 NYS2d 475 [2006]). Here the adduced evidence indicates that defendant Noresco did not have notice of the spikes, did not excavate the area where the spikes were located and did not assume control of the area in such a way to displace the school's duty to maintain its property or invite plaintiff's detrimental reliance on its services. Plaintiff also failed to raise an issue of fact sufficient to warrant denial of Noresco's motion (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Plaintiffs' assertion that Noresco either had notice of the condition or exacerbated the condition because it excavated an area close to the site of the accident is conclusory and speculative (*see, Manning v Americold Logistics, LLC, supra; John v Tishman Constr. Corp. Of N.Y., supra*). Noresco's president, Kevin Orelli, testified that the excavation started some four feet away from the area where the spikes were located. The school's assistant plant facilities administrator, Mr. Arnold also indicated that the "re-bar" was previously attached to parking blocks which had been removed from the school's parking lot years before Noresco's construction project commenced. Accordingly, Noresco Ltd's motion for summary judgment dismissing the complaint and any and all counterclaims and cross claims against it is granted.

Similarly, with respect to Tromel's cross motion for summary judgment, the adduced evidence indicates that Tromel subcontracted the building of additional parking spaces to Noresco and neither had notice of the dangerous condition, nor retained control of the area where the accident happened. Thus, Tromel owed plaintiff no duty of care and its motion for summary judgment dismissing plaintiff's complaint must also be granted (*see, Espinal v Melville Snow Contrs., supra; Killeen v Our Lady of Mercy Med. Ctr., supra; Manning v Americold Logistics, LLC, supra*). Accordingly, Tromel Construction Corp.'s cross motion for summary judgment dismissing plaintiffs' complaint is granted.

Dated:                     MAR 05 2007                    

  
\_\_\_\_\_  
J.S.C.

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION