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SHORT FORM ORDER

INDEX No. 01-16592
CAL. No. 06-02331-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-28-07
ADJ. DATE 4-30-07
Mot. Seq. # 004 - MD
005 - XMG
006 - XMG

KEVIN ALLEN,
Plaintiff,

- against -

HENDRIKSON/SCALAMANDRE/POSILLICO, A TRIVENTURE, LLC.
Defendants.

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New York, New York 10004-1617

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HENDRICKSON/SCALAMANDRE/POSILLICO, A TRIVENTURE, LLC,
Third-Party Plaintiffs,

- against -

LIRO GROUP, INC.,
Third-Party Defendants.

HAVKINS ROSENFELD RITZERT, et al.
Attorneys for 3rd Party Deft Liro Group, Inc.
114 Old Country Road, Suite 300
Mineola, New York 11501

HENDRICKSON/SCALAMANDRE/POSILLICO, A TRIVENTURE, LLC.,
Second Third-Party Plaintiffs,

- against -

BOHEMIA GARDEN CENTER, INC.,
Second Third-Party Defendants.

MAZZARA & SMALL, P.C.
Attys for 2nd 3rd Party Deft Bohemia Garden
800 Veterans Memorial Highway, Suite LL5
Hauppauge, New York 11788

Upon the following papers numbered 1 to 89 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31 ; Notice of Cross Motion and supporting papers 32 - 66 ; Answering Affidavits and supporting papers 67 - 76 ; Replying Affidavits and supporting papers 71 - 89 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion(#004) by Hendrickson/Scalmandre/Posillico, A Triventure, LLC. for summary judgment, or in the alternative, for contribution and indemnification is denied.

ORDERED that the cross-motion (#005) by Liro Group, Inc. for summary judgment and dismissing all cross-claims against it is granted.

ORDERED that the cross-motion (#006) by Bohemia Garden Center, Inc. for summary judgment and dismissing all cross-claims against it is granted.

This is a negligence action to recover damages for injuries allegedly sustained by plaintiff on October 30, 1998 at approximately 5:50 p.m. when,while operating a motorcycle on the eastbound lanes of the Long Island Expressway, he rear-ended a sport utility vehicle ("SUV") which was at a complete stop after having been involved in a prior accident with a Lincoln Town Car. Plaintiff claims his motorcycle lost control on sand, dirt, and other debris on the road, causing him to collide with the SUV in front of him. After the accident, plaintiff observed that construction was being performed in the vicinity of the accident along the shoulder of the roadway. Plaintiff commenced actions against several defendant-contractors responsible for the construction site alleging that sand and/or dirt was left on the roadway causing him to lose control of his motorcycle which resulted in personal injuries. Defendant/ Third-Party Plaintiff Hendrickson/Scalmandre/Posillico, A Triventure, LLC. ("Triventure"), had entered into a contract with New York State to renovate the portion of the LIE Town of Brookhaven (Town), where plaintiff was injured ("the Triventure V Project"). Triventure subsequently commenced two separate third-party actions against Liro Group, Inc. ("Liro") and Bohemia Garden Center, Inc. ("Bohemia"). Liro, an engineering firm, was hired by New York State to report on the progress of the work performed by Triventure. Bohemia was hired by Triventure pursuant to a subcontract for the limited purpose of planting various trees, bushes, and grass seed in accordance with the New York State specifications.

Plaintiff alleges that defendant Triventure was negligent with respect to the hazardous condition on the roadway in, among other things, negligently permitting sand, debris, cement, dirt, soil and/or other slippery material to be spread across the eastbound lanes which both caused and created the dangerous condition. By written agreement dated May 2, 1997 (the "Agreement"), the State of New York acting through the Department of Transportation, contracted with Triventure to" furnish all materials, appliances, tools, and labor ... and to complete 5.5 miles of asphalt concrete reconstruction on the Long Island Expressway Exits 57-61 ..." Plaintiff asserts that Triventure as general contractor on the project is vicariously liable for the actions of any subcontractors or agents well as any employees of the State of New York.

Defendant Triventure now moves (#004) for summary judgment on the grounds that there is no evidence that Triventure had any duty towards plaintiff or that it contributed to the alleged dangerous condition. In support of its motion, defendant Triventure submits, *inter alia*, the pleadings; and the deposition transcripts of plaintiff, and of Denis McCarthy on behalf of Triventure, John Eskridge on behalf of Liro, Donna DeFede on behalf of Bohemia Garden Center, Inc., Louis Zappulla, the operator of the Lincoln Town Car, and Anthony Reigert, the operator of the SUV .

Third-party defendant Liro Group, Inc. ("Liro") moves (#005") for summary judgment on the grounds it did not commit any affirmative acts of negligence, it owed no contractual or common law duty to the plaintiff, and that plaintiff's conduct was the sole proximate cause of the accident. In addition to the evidence submitted by Triventure, Liro offers the affidavit of Robert Genna, Director of the Suffolk County Crime Laboratory and accident reconstruction expert.

Second third-party defendant Bohemia Garden Center, Inc. ("Bohemia") moves (#006) for summary judgment on the grounds it owed no duty of care to plaintiff, and it did not do anything to cause the alleged hazardous condition . For purposes of this motion, Bohemia adopts the arguments put forth by Triventure and Liro in so far as they seek dismissal of plaintiff's complaint and rely on essentially the same evidence.

Plaintiff was operating a 1978 Harley Davidson motorcycle on the day he was injured. He described the weather as dry and clear; still daylight with the sun setting. The plaintiff had been on the LIE for 25-35 minutes prior to the accident. During that time, he testified, his highest rate of speed was forty or forty-five m.p.h. with his average speed between thirty and thirty-five m.p.h. The plaintiff noted there were numerous warnings that the HOV lane was under construction. The accident occurred on the right hand shoulder on the eastbound LIE just west of the overpass of Old Nichols Road. The shoulder was designated a travel lane at that time due to the ongoing construction which plaintiff testified he had witnessed for months prior to his accident. Plaintiff testified there was a construction area to his right where trucks were parked or stored. Plaintiff testified that due to the lugs on the tires, these trucks would pull dirt and debris from the area where they were parked onto the roadway as they would enter and exit the site. When plaintiff moved from the HOV lane under construction to the shoulder, he testified he was going about 35 m.p.h. Within ten to fifteen seconds of entering the shoulder, he observed the SUV in front of him come to a complete stop. Thereafter, he testified, he applied his brakes and went into a skid. He just recovered control when he was left with the choice of hitting the overpass or going under a tractor trailer alongside him so he attempted to go around the SUV but struck the left side bumper and rear quarter panel.

Mr. Riegert, whose SUV the plaintiff rear-ended, testified the road was clear from any sand or pebbles. At the time of the accident, he did not observe any roadway construction being performed and did not see any construction vehicles or trucks. He also testified that his own vehicle did not skid or slide when he applied the breaks before he collided with the Zappulla Town Car.

Louis Zappulla, the driver of the Lincoln Town Car testified that he did not notice any sand other than "normal windblown sand " or debris in the area where his vehicle was when he got out following the accident.

After the accident, Suffolk County Police investigated the incident and found that the roadway conditions were "dry and clear". Based upon the police investigation, sworn testimony of witnesses and forensic data regarding the accident, Robert Genna, the Director of the Suffolk County Crime laboratory concluded that plaintiff's accident was not caused by any debris or road condition, but by three causes: plaintiff's excessive and unsafe speed under the prevailing traffic conditions; following too close to the vehicle in front of him; and ultimately, failing to pay attention to the flow of traffic stopping in front of him.

Denis McCarthy, a project manager on behalf of Triventure, testified that the Triventure employees would have done excavation, grading, installation of sub base, foundations, median barriers, and asphalt on the Triventure V project. During the course of the project, Triventure stored its vehicles and equipment in a yard at the northwest corner of Exit 58 at Old Nichols Road; the opposite side of the LIE where the accident occurred. At times, during work on the project, equipment would also be left in the median area. McCarthy was not aware of any accidents involving debris, sand, or soil on the LIE during the course of this project. The only reported incident of any sand or debris "runoff" took place about one mile away near Terry Road.

John Eskridge chief inspector for Liro engineers, testified he was hired by the State of New York to provide construction management and site inspection services for the Department of Transportation ("D.O.T.") during the Triventure V project. During the project, Liro would monitor the work of the contractors. If something were done improperly with respect to a lane closure, Eskridge testified Liro would notify Triventure at that time. Liro was also responsible for ensuring that Triventure followed the plans and specifications with respect to the slope and grade of the area adjacent to the LIE. Liro was also responsible for monitoring the quality of the landscaping work performed as part of the project. Bohemia Garden Center was the landscaper. LIRO's field office was in the same staging area as the State and Triventure. Across the highway was the shoulder. Eskridge did not recall trucks being parked in that area. Eskridge had no knowledge of anyone making any complaints with regard to sand, gravel, rocks, debris or any similar type of substance on the roadway in October, 1998. He testified that he was on the site on a daily basis and never observed any excessive dirt, gravel, or debris on the roadway.

Ms. DeFede, president of Bohemia Garden Center, Inc. confirmed that Bohemia would never perform any work without a State inspector (Liro) observing their work. DeFede had no recollection of ever having received any type of complaint about any dirt, gravel or debris on the shoulder or the roadways during the course of their work on the project.

According to the affidavit of Gary Moller, who is employed by the New York State Department of Transportation as an Engineer in Charge, the main staging area for the project was the northwest quadrant near Exit 58. He avers that there was no storage or staging area located across the highway near the shoulder where the accident occurred. According to Moller, the vast majority of the work performed in the construction of the HOV lanes took place in the center of the expressway, behind concrete barriers which enclosed the work area from the east and west bound lanes of the expressway. There were only a limited number of areas for ingress and egress into the work areas for Triventure, subcontractors, and delivery trucks.

According to the affidavit of Angelo Occhiogrosso, general superintendent for J.D. Posillico, Inc., one of the companies comprising Triventure, the daily workforce reports for October 29, 1998 and October 30, 1998 reveal that Triventure was not working anywhere near the accident location at the time of Plaintiff's accident. The records show they were working about one mile west of that location. Occhiogrosso confirmed that during the project, all of the work constructing the HOV lanes between Exits 57 and 61 took place in the center median between two foot concrete barriers, and there were only a limited number of access points to the work area.

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v NYU Medical Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** 172 AD2d 600, 568 NYS2d 423 [1991]). The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1989]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see*, ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Triventure argues that the evidence demonstrates they did not assume a duty of care to plaintiff. Triventure's limited duty under the contract was to the D.O.T. and only obligated Triventure to perform work as specified by the contractual documents and plans under the direct and constant supervision of the State. Further, it has long been established that "a governmental body, be it the state, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty. Because the duty is nondelegable, even if the dangerous condition of the road which caused the injury is created by an independent contractor, the obligation imposed on the governmental body nevertheless remains fixed (***Lopez v Rostad***, 45 NY2d 617, 412 NYS2d 127 1978).

In general, contractual obligations will not create a duty towards a third party unless (1) the third party has reasonably relied, to his or her detriment, on the continued performance of the contracting party's duties under the contract; (2) the contract is so comprehensive and exclusive that it completely displaces the other contracting party's duty toward the third party; or (3) the contracting party has launched a force or instrument of harm, thereby creating or exacerbating a dangerous condition (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Karac v City of Elmira***, 14 AD3d 842, 788 NYS2d 456 [2005]).

Triventure argues there is no evidence before the Court that they created the allegedly dangerous condition or that they had actual or constructive knowledge of its existence (*see*, ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2005]; ***Tsivitis v Sivan Assocs, LLC***, 292 AD2d 594, 741 NYS2d 545 [2002]). An apparent and visible defect must exist for a significant amount of time prior to an accident to allow the defendant time to remedy the situation in order to constitute constructive notice (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bernard v Waldbaums, Inc.***, 232 AD2d 596, 648 NYS2d 700 [1996]). However, the fact that the defendant may have a general awareness that a defective condition may exist is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries (***Kennedy v Wegmans Food Markets,*** Inc., 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***, *supra*; ***Bernard v Waldbaum, Inc.***, *supra*).

Defendant argues the testimony of Denis McCarthy and John Eskridge establishes that they neither created or had actual or constructive notice of the alleged dangerous condition. They did not observe sand, gravel, and other debris in the area where the accident occurred nor had there been any complaints about the condition of the roadway where plaintiff's accident occurred. Further, a review of the addendum to the contract specifications of this project, page 1-75 provides, in relevant part, that "the contractors shall not be responsible for damages resulting from faulty designs as shown by the plans and specifications nor for the damages resulting from willful acts of department officials or employees and nothing in this paragraph or contract shall create or give to third parties any claim or right of action against the contractor or State beyond such as may legally exist irrespective of this paragraph or contract". Accordingly, they argue, a finding of summary judgment in their favor is warranted.

The burden then shifts to the nonmoving party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church*** , 6 AD3d 596, 774 NYS2d 785 [2004]). In support, plaintiff relies on the same deposition testimony offered by Triventure as well as the additional testimony of Carylann Lepre and Steve Brode, and upon the affidavit of Robert Maniello, licensed landscape architect and adjunct professor of architecture at the New York Institute of Technology, and certain photographs.

Carylann Lepre testified that she was traveling directly behind plaintiff at the time of the accident. She testified that plaintiff's motorcycle skid on sand, dirt, soil, and pebbles in the roadway. She noted that she had observed the roadway in this condition on numerous occasions over the past six months.

Steven Brode, the tow truck operator who came to the scene testified that he did not see anyone doing work on the side of the roadway. When he arrived at the scene, the traffic was bumper to bumper. Further, he testified he saw sand, stone, and gravel spread across the roadway that appeared to have fallen from a truck.

Robert Maniello states in his affidavit, that upon his review of the evidence, plaintiff lost control of his vehicle due to the presence of sand and debris in the roadway. He noted that the area where plaintiff skidded was an "unstabilized" area of exposed bare sand and dirt which was being used as a staging and/or parking area for certain vehicles/equipment used in the construction project. He opines that the area,"which was grassy before the project, was stripped and left in a raw state." He states the area did not have proper drainage nor was it graded properly thereby permitting sand, soil, and other debris to be tracked onto the pavement. He concludes that these conditions, combined with inadequate inspection and maintenance of the site were substantial factors in causing the conditions on the roadway leading to plaintiff's accident.

On a motion for summary judgment, the court' s function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1989]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987].

At bar, plaintiff has come forward evidence raising issues of fact that can only be resolved by a jury. The credibility of witnesses, issues concerning the delegation of duties, and the reasonableness of efforts to prevent foreseeable harm are subject to jury determination (CPLR 3212; ***Basso v Miller*** , 40 NY2d 233, 386 NYS2d 564 [1976]; ***Pomeroy v Buccina***, 289 AD2d 944, 735 NYS2d 678 [2001]). Therefore, the motion for summary judgment must be denied.

Liro's cross-motion for summary judgment and dismissing all cross-claims against it is granted. The undisputed facts before the Court establish that Liro did not commit any acts of affirmative negligence leading to plaintiff's accident nor did they have actual or constructive knowledge of the alleged dangerous condition or a duty to plaintiff. According to John Eskridge chief inspector for Liro engineers, it was Triventure's responsibility to keep the shoulder free from debris. Liro was not responsible for the clean-up or maintenance of the site. Liro was hired only as a consulting engineer by New York State to report on the progress of the work performed by Triventure. Further, Liro did not direct the manner or method of the work performed by Triventure and had no duties regarding the supervision and control of work crews, their tasks or the safety of the roadway. In the event that LIRO observed an unsafe action or substandard work performed by Triventure or its contractors, Liro would only recommend that the State reject the work.

The motion by Bohemia Garden Center, Inc. for summary judgment and dismissing all cross-claims against it is granted. The construction of the HOV lane was a multi-year project, involving several miles of the Long Island Expressway, which was performed pursuant to a contract between New York State and defendant Triventure. The project began in May 1997, about a year and a half before plaintiff's accident and was completed several years after his accident. There has been no evidence offered to establish that Bohemia performed any work at or near the accident location in or about October 1998. The uncontested evidence establishes that all of Bohemia's work was inspected and approved on a daily basis and no complaints were ever made to Bohemia about its work.

Lastly, Triventure's motion for indemnification from LIRO and Bohemia is denied. Liro and Bohemia may be liable to Triventure for common-law indemnification even in the absence of a duty running to plaintiff if plaintiff's injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of either of the co-defendants (*see*, ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2003]). As noted, *supra*, however, there are no triable issues of fact as to whether Liro or Bohemia created or exacerbated the alleged dangerous condition which plaintiff claims to have caused him to lose control of his motorcycle. Accordingly, the motion for indemnification is denied.

Dated: JUL 17 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION