

Mulhall v Connetquot Cent. School Dist. of Islip
2007 NY Slip Op 33286(U)
September 27, 2007
Supreme Court, Suffolk County
Docket Number: 0022713/2004
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-15-07 (002 & 003)
7-16-07 (004, 005 & 006)
ADJ. DATE 8-29-07
Mot. Seq. # 002 - MG 005 - XMG
 003 - MG 006 - XMG
 004 - MD

-----X
ALEXANDER MULHALL, an infant by his :
father and natural guardian, ANTHONY J. :
MULHALL and ANTHONY J. MULHALL, :
individually. :
:

Plaintiffs, :

- against - :

CONNETQUOT CENTRAL SCHOOL DISTRICT :
OF ISLIP, FRENDOLOPH CONSTRUCTION :
CORP., SULLIVAN & NICKEL :
CONSTRUCTION CO., INC., CADILLAC :
CONCRETE, INC. and J.S. McHUGH, INC., :
:

Defendants. :

-----X
FRENDOLOPH CONSTRUCTION CORP., :
:
Third-Party Plaintiff, :

- against - :

CADILLAC CONCRETE, INC. and J.S. :
McHUGH, INC., :
:

Third-Party Defendants. :
-----X

SIBEN & SIBEN, LLP
Attorneys for Plaintiffs
90 East Main Street
Bay Shore, New York 11706

SMITH & LAQUERCIA, LLP
Attys for Deft/3rd Pty Deft Cadillac Concrete
291 Broadway, 16th Floor
New York, New York 10007

MULHOLLAND, MINION & ROE
Attys for Deft Connetquot Central SD of Islip
374 Hillside Avenue
Williston Park, New York 11596

CONNORS & CONNORS, P.C.
Attys for Deft Sullivan & Nickel Construction
766 Castleton Avenue
Staten Island, New York 10310

JEFFREY S. SHEIN & ASSOCIATES, P.C.
Attys for Deft/3rd Pty Pltf Fren dolph Const.
575 Underhill Boulevard, Suite 112
Syosset, New York 11791

JOHN T. RYAN & ASSOCIATES
Attys for Deft/3rd Pty Deft J.S. McHugh, Inc.
633 East Main Street, Suite 3
Riverhead, New York 11901

Mulhall v Connetquot
Index No. 04-22713
Page No. 2

Upon the following papers numbered 1 to 68 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34; Notice of Cross Motion and supporting papers 35 - 50; Answering Affidavits and supporting papers 51 - 58; Replying Affidavits and supporting papers 59 - 68; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant/third-party defendant Cadillac Concrete, Inc. for summary judgment is granted; and it is further

ORDERED that the motion (#003) by defendant Sullivan & Nickel Construction Co., Inc. is granted; and it is further

ORDERED that the motion (#004) by defendant Connetquot Central School District of Islip is denied; and it is further

ORDERED that the cross motion (#005) by defendant and third-party plaintiff Frendolph Construction Corp. is granted; and it is further

ORDERED that the cross motion (#006) by defendant/third-party defendant J.S. Mc Hugh Inc. is granted.

This is an action for personal injuries allegedly sustained by the infant plaintiff Anthony J. Mulhall on February 5, 2004 in the gym locker room of the Ronkonkoma Junior High School when he tripped over a platform/center island where lockers were to be installed.

At the time of the accident, the locker room was in the process of being renovated. Co-defendant Frendolph Construction Corp. ("Frendolph") was the general contractor. This project included the installation of new tile, benches, and lockers. Cadillac Concrete, Inc. ("Cadillac") was contracted to do the concrete work on the project. Bellmore Tile installed the tile, Frendolph, Connetquot Central School district ("Connetquot") and Sullivan & Nickel Construction Co. ("Sullivan"), the construction manager, inspected Cadillac's work and co-defendant J.S. McHugh, Inc. ("McHugh") supplied the new lockers.

Cadillac moves for summary judgment on the grounds it did not breach a duty owed to the plaintiff and therefore cannot be held liable for plaintiff's injuries. In support, they rely on the pleadings, photographs, the deposition testimony of their representative, Joseph Quartuccio, the deposition testimony of Frendolph Construction Corp. by Clifford Rudolph, the deposition testimony of Robert Hochstein on behalf of Connetquot Central School District of Islip, and the deposition testimony of J.S. McHugh, Inc. by their representative, Jeffrey Mulhall.

Sullivan moves for summary judgment on the grounds that the company's only role with respect to the project was that of construction manager providing management services to the school district and accordingly, no duty was owed to plaintiff. In support, they offer, *inter alia*, the deposition testimony of William Szenher.

Connetquot moves for summary judgment on the grounds the allegedly dangerous condition was open and obvious. In support, they plaintiffs' deposition testimony, the deposition testimony of their representative, Robert Hochstein and the deposition testimony of Frendolph Construction Corp. by

Mulhall v Connetquot

Index No. 04-22713

Page No. 3

Clifford Rudolph.

Frendolph Construction cross-moves for summary judgment also on the grounds that the dangerous condition was open and obvious and, in any event, the ultimate decisions regarding installation of the lockers rested with the school. In support, they rely on essentially the same evidence offered by Connetquot.

J.S. McHugh moves for summary judgment on the grounds there is no evidence they were negligent in any manner. They rely on essentially the same evidence offered by Cadillac.

On August 30, 2006, the infant plaintiff Alexander Mulhall was deposed. He testified that the accident occurred in the locker room. On the day of his accident, the locker room consisted of lockers lining the perimeter of the room, as well as benches and platforms. These platforms were where the new lockers would eventually be installed. The locker room had been in this condition for a few months prior to the accident. Old lockers had initially been located on those platforms, but they had been removed a few months before the accident. Mulhall estimated that he had been in the locker room on approximately fifteen occasions since the platforms had been exposed. He described the platforms as being rectangular and approximately four inches in height off the ground. He was not aware of anyone falling over the platforms before his accident. He had not complained about the platforms to anyone. The accident occurred as plaintiff was walking to his locker after gym class. As he walked, his friend on his left began to speak to him. Plaintiff looked towards his friend then tripped over one of the platforms in the room. There was nothing obstructing his view of the platform. There were no barricades, tape, warnings or signs surrounding the platform.

At his examination before trial, Clifford Rudolph testified that Frendolph Construction was the general contractor on this renovation project. His company entered into an agreement with Connetquot concerning Ronkonkoma Junior High School to renovate the entire school, including the locker rooms. Robert Hockstein for the school district, Jeremy Sholdan on behalf of Sullivan and a representative from Frendolph would perform a daily walk through the construction site through September 2003. He testified that the boys locker room at Ronkonkoma Junior High School was completed before the start of the 2003-2004 school year, with the exception of the locker installation. The bases upon which the lockers were to be placed were installed by a sub-contractor Cadillac Concrete. Lockers were installed in the locker room around the perimeter in September 2003. The locker supplier was J.S. McHugh. Initially, the plans called for these same type of lockers to be installed in the center of the room, but after their delivery, it was determined by the school district that they wanted single-tier lockers. The change order was not submitted until September/October 2003 with a 14 to 16 week estimate for delivery. At that time there was a discussion among Frendolph, Sullivan, and the school district about having the two tier lockers installed in the middle until the new lockers arrived. It was determined that the cost was too high and the center bases were left with no lockers on top of them. There were no barricades, construction tape or safety devices placed on the site by either Frendolph, Sullivan, or the school.

On August 30, 2006 Robert Hockstein, the Director of Plant and Facilities testified on behalf of the school district. He testified that after the lockers were delivered, the school, through its athletic director, determined that single lockers would be more appropriate for the center of the room. They did not arrive until March 2004. Prior to plaintiff's accident, there were no complaints about the center

Mulhall v Connetquot

Index No. 04-22713

Page No. 4

island or requests for barricades. He testified the school did have barricade materials which would have been done by the school's custodial staff if deemed necessary. Hockstein was in charge of the custodial staff but never instructed anyone to cordon off the area.

William Szenher testified that he was employed by Sullivan as a project supervisor at the time of plaintiff's accident. With respect to the Ronkonkoma Junior High School, his duties included overseeing the project, coordinating between the school district and contractors and making sure the project was completed on time. Sullivan had a contract solely with the school district. The subcontractors were hired by the district. Szenher or Doug Reena, another representative from Sullivan, were at the school every couple of days from the summer of 2003 through February 2004 to inspect the progress of the work. Sullivan played no role in the school district's decision to change the lockers being used on the center island. The new lockers were installed by McHugh or its subcontractor, who were in contract with Frendolph during the February 2004 winter recess. Up until that point, no barriers or warning devices were placed around the concrete platforms.

On September 13, 2006, Jeffrey Mulhall, the president of J.S. McHugh was deposed. J.S. McHugh had an agreement to provide lockers to various schools within the Connetquot School District. They received an order for lockers for the Ronkonkoma Junior High School which they delivered in the fall of 2003. Some of the lockers were installed, some were returned and a change order was issued by the school. Pursuant to the change order, an additional delivery of lockers was delivered to the junior high school around January 2004 and were installed over the winter recess. According to Mulhall, the scope of the contract regarding services by J.S. McHugh was solely to furnish and install lockers as directed by Frendolph, the general contractor.

Joseph Quartuccio, on behalf of Cadillac, testified that in the summer of 2003, on one day in July, Cadillac poured the concrete bases for the new lockers, including the center island. Cadillac completed its work before the start of the school year, was paid in full, was never asked to place any barriers around the job site, and never returned to the school after it completed its work.

In support of their position, plaintiffs offer the affidavit the expert affidavit of Robert L. Schwartzberg, a licensed and registered professional engineer in New York with over 30 years of experience. After reviewing the testimony and photographs, Schwartzberg found, in his professional opinion, that "placing a concrete base in the middle of a walking area where children congregate creates a dangerous condition". He further determined that "[p]lacing a low rising hazard in the middle of the room creates an unnatural hazard" and the failure to warn pedestrians of its existence "presents a lack of reasonable care".

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]). Landowners owe "a duty to exercise reasonable care maintaining their property under all the circumstances, including the likelihood of injury to others, the seriousness of potential injuries, the burden of avoiding the risk and foreseeability of a potential plaintiff's presence on the property" (*Perrelli v Orlow*, 273 AD2d 533; 708 NYS2d 742 [2000]). Questions of foreseeability are ordinarily questions of fact and summary judgment may only be granted when a single inference can be drawn from undisputed

Mulhall v Connetquot

Index No. 04-22713

Page No. 5

facts (*Id*). In order for a plaintiff to establish a prima facie case, plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*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*).

The motion for summary judgment by defendant/third-party defendant Cadillac(#002) is granted. Cadillac had no control over the job site at the time of the accident, did not owe any duty to the plaintiff, nor did it assume a duty to plaintiff or any other entity with regard to the condition of the locker room. Cadillac was hired solely to create a concrete locker base, completed its work on time and according to specifications. Plaintiff's accident did not take place until several months after Cadillac left the job site. Accordingly, Cadillac cannot be held liable for this accident

With respect to the Sullivan motion (#003)for summary judgment, a construction manager does not have a common law duty to a person outside the scope of the labor law (*see generally, Delahaye v St. Ann's School*, 40 AD3d 679 , 836 NY2d 233[2007]). Without a legal duty running from Sullivan to the plaintiff, the plaintiff cannot make a claim against Sullivan. Accordingly, the motion by Sullivan is granted.

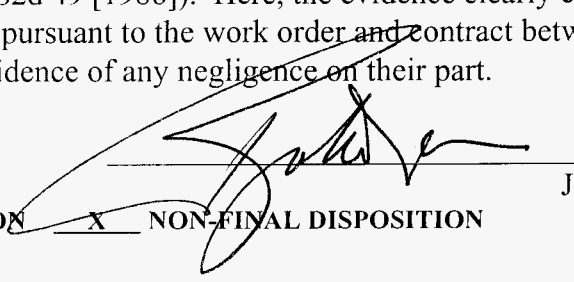
The motion by Connetquot School District (#004) for summary judgment is denied. Defendant school district has argued that the condition that led to plaintiff's fall was open and obvious and therefore they should not be held responsible for this alleged defective condition. However, the affidavit of plaintiff's expert has raised issues of fact whether the district exercised reasonable care under the circumstances to remedy the condition and make the property safe based on such factors as the likelihood of injury to those entering the property and the burden of avoiding risk (*see, Kupel v Karfunkel*, 1 AD3d 48, 767 NYS2d 40[2003]). Clearly, the locker would be used by a large number of students everyday as the were required to change in the locker room after gym and be on time to their next class. The expert noted that leaving a dangerous tripping hazard without any visual clues to warn and/or remind pedestrians of its existence clearly creates a dangerous condition which could lead to an accident such as the one that occurred here. The school made no attempts to warn or divert students from coming into contact with the raised floor which was well below eye level. Accordingly, the motion by Connetquot is denied.

The motion by Frendolph (#005) is granted. The adduced evidence shows that all the lockers were delivered prior to the start of school in September 2003. The decision not to install the double-tiered lockers was not made by Frendolph but by the school. The new lockers arrived in January 2004 but Frendolph was directed to wait and install them during the winter recess in February 2004. Frendolph was not in a position to correct the dangerous condition as it had been directed not to do so by the party with which it contracted, to wit, the school.

Mulhall v Connetquot
Index No. 04-22713
Page No. 6

The motion by J. S. McHugh (#006) is granted. It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see, Turcotte v Fell*, 68 NYS2d 432, 510 NYS2d 49 [1986]). Here, the evidence clearly establishes that McHugh performed all work required of them pursuant to the work order and contract between them and the school. Further, the record is devoid of evidence of any negligence on their part.

Dated: SEP 27 2007



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION