

|  |
|--|
| <b>Bernstein v Port Washington Tennis Academy, Inc.</b>  |
| 2007 NY Slip Op 33697(U)   |
| November 8, 2007   |
| Supreme Court, Nassau County   |
| Docket Number: 0837-05/  |
| Judge: Geoffrey J. O'Connell   |
| Republished from New York State Unified Court System's E-Courts Service.<br>Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication.   |

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEOFFREY J. O'CONNELL**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

\_\_\_\_\_  
EUGENE BERNSTEIN and CHERYL BERNSTEIN,

Plaintiff(s),

INDEX No. 10837/05

-against-

MOTION DATE: 8/23/07

PORT WASHINGTON TENNIS ACADEMY, INC.  
RACANELLI CONSTRUCTION RESIDENTIAL CORP.,  
RACANELLI CONSTRUCTION COMPANY, INC.,  
EUGENE RACANELLI GENERAL CONSTRUCTION  
AND CONSTRUCTION MANAGEMENT, NICHOLAS  
RACANELLI CONSTRUCTION, L.C. and SISTO DE  
NARDIS CONTRACTING CORP., A.J.V.  
CONSTRUCTION CORP.,

MOTION SEQ. No. 3-MD  
4-MD  
5-MG

Defendant(s).

\_\_\_\_\_  
RACANELLI CONSTRUCTION RESIDENTIAL  
CORP., RACANELLI CONSTRUCTION COMPANY,  
INC., and NICHOLAS RACANELLI CONSTRUCTION, L.C.,

Third-Party Plaintiff(s),

-against-

McNERNEY BASMAJIAN,

Third-Party Defendant(s).

\_\_\_\_\_  
The following papers read on this motion:

- Sisto De Nardis Notice of Motion/Affirmation/Exhibits
- Plaintiff Affirmation in Opposition/Exhibits A-H
- Reply

Bernstein v. Port Washington Tennis Academy, Inc., et al.

Racanelli Notice of Motion/Affirmation/Exhibits  
Plaintiff Affirmation in Opposition/Exhibits A-I  
Basmajian Notice of Motion/Affirmation/Exhibits  
Memorandum of Law  
Racanelli Affirmation in Opposition/Exh A  
Reply/Exh A

In this action Plaintiff EUGENE BERNSTEIN seeks damages for injuries allegedly sustained due to the negligence of the defendants. Defendants RACANELLI CONSTRUCTION RESIDENTIAL CORP., RACANELLI CONSTRUCTION COMPANY, INC., NICHOLAS RACANELLI CONSTRUCTION LLC, and SISTO DE NARDIS CONTRACTING CORP. seek Orders granting them summary judgment dismissing all claims asserted against them. Third Party McNERNEY BASMAJIAN also seeks summary judgment dismissing the third-party action. Plaintiffs and third-party plaintiffs oppose.

SISTO DE NARDIS ("SISTO") argues that its company is in the business of applying asphalt, installing drywells and manhole assemblies. SISTO contends that it was involved in the project at the PORT WASHINGTON TENNIS ACADEMY, which was ongoing in 2003. It claims that it was hired to finish some drainage work and pave the parking lot of the Tennis Academy. The principal of SISTO states that another company, defendant A.J.V CONTRACTING had originally been retained to perform the work.

SISTO claims that it was hired to pave one-half of the lot, remove piles of dirt and apply aggregate over the drywells in preparation for final grading and application of asphalt. It states that 12 manhole covers had to be reset to be flush with the ground, out of the 40 manhole cover assemblies.

One of the reset manhole covers is the one which plaintiff BERNSTEIN claims caused his fall.

SISTO claims that its work was completed in the beginning of August, 2003, and it was notified of a problem with the subject manhole cover in September 2003. The principal states that he inspected the area and found that the manhole cover had not dislodged but was, however, approximately one-eighth of an inch lower than the lip of the manhole assembly.

Bernstein v. Port Washington Tennis Academy, Inc., et al.

SISTO claims that it informed Mr. Zausner that he should contact defendant RACANELLI, as it was RACANELLI's responsibility to replace or change any particular manhole cover assembly. SISTO claims that no one asked it to make a repair or perform any work at that time.

SISTO claims that in late February 2004 it was again asked to inspect the subject manhole assembly, and it again noted the height differential. Mr. Sisto claims that he made the same observation and opened the manhole cover to determine if there was anything which needed fixing. He states that there was a need for cement in an area, which had nothing to do with the raising or lowering of the manhole cover. Mr. Sisto states that he again told Mr. Zausmer that he should contact RACANELLI about replacing or moving the manhole cover.

SISTO notes that at both inspections there was an orange warning cone placed at the location of the offending manhole. Sisto again states that no one requested that SISTO perform any repair work at this time.

SISTO claims that on the date of incident, after the accident he observed the location and could see that the manhole cover had been removed from the assembly. He states that after the accident SISTO was asked to replace the entire manhole cover assembly. SISTO claims that prior to the accident it did not provide any of the manhole cover assemblies. (Motion Affidavit)

SISTO claims that it is entitled to summary judgment as it did nothing to cause or contribute to the defective surface, and there is no evidence that it breached any duty to the plaintiff, nor any co-defendant.

Defendant RACANELLI also seeks summary judgment.

At his deposition plaintiff EUGENE BERNSTEIN testified that he fell through an open manhole in the parking lot after exiting his car. He testified that both legs fell into the hole, but his left leg was partially wedged between the partially overturned manhole cover. He testified that the weather was clear and there was no accumulation of rain or snow on the ground.

Ronald Arnett testified on behalf of RACANELLI. Mr. Arnet testified that he was the field supervisor who oversaw the project on behalf of RACANELLI, and that his duties encompassed coordinating and scheduling subcontractors on construction projects and answering to the owner during the project. He testified that he supervised the construction of the parking lot and the drainage system.

Bernstein v. Port Washington Tennis Academy, Inc., et al.

The witness testified that A.J.V. CONCRETE installed the drainage poles and set the majority of manholes. He further testified that A.J.V. was replaced by defendant SISTO DE NARDIS to install the rest of the storm drains that were not already installed by A.J.V.

Mr. Arnet further testified that he was on site regularly and in the weeks prior to the accident he never saw any problem with any of the manholes, nor did he see any manhole coned off from the public. He testified that he was never told by the owner or SISTO that there was a problem with any of the manholes.

RACANELLI argues that it is entitled to summary judgment as there is no question that it did not create a dangerous or defective condition, nor is there any evidence that it had actual or constructive notice of any problems with the subject manhole which was left unrepaired.

Plaintiff opposes summary judgment contending that RACANELLI, the general contractor, was responsible for the oversight of the subcontractors including those who installed the manhole in question. He states that the proof presented demonstrates that RACANELLI failed to perform its duties in failing to properly inspect the manholes to determine whether the covers were properly seated in their assemblies. Plaintiffs note that SISTO submitted invoices for payment to RACANELLI for the work performed re-setting this particular manhole assembly prior to the accident. He also notes that there is evidence, in the deposition testimony of Richard Zausner, a principal of the property owner, that he personally contacted RACANELLI in the fall or winter prior to the accident regarding problems in the fitting of the subject manhole cover and assembly. Mr. Zausner testified that Mr. Arnet assured him that RACANELLI would take care of the problem, and later assured him that the problem had been taken care of. (Plaintiff Exh. G)

Another principal of TENNIS ACADEMY, Susan Krowitz, testified that during the same period she met with Arnet and discussed the subject manhole cover and assembly. She also testified that the parking spaces in this area were blocked by an apparatus provided by RACANELLI. She testified that the apparatus was removed prior to the date of the accident.

At his deposition plaintiff testified that he was scheduled for a business meeting with the ACADEMY on the date of incident, parked his car and stepped on the manhole cover a few steps from his car on the way to the building. He testified that the cover flipped over and struck BERNSTEIN behind the knees on both legs, causing him to fall into the manhole, resulting in permanent injuries. (Opposition, Exh. I)

Bernstein v. Port Washington Tennis Academy, Inc., et al.

The plaintiff argues that, "Based on this proof" there is a question of fact in dispute whether RACANELLI had actual and constructive knowledge of a problem and failed to correct it, thus breaching a common law and contractual duty.

The Court agrees.

As to SISTO's motion for summary judgment which the plaintiff opposes conceding, SISTO's principal was notified of the problem with the manhole assembly in question, which SISTO reset in November 2003, and again approximately two weeks prior to the accident. The plaintiff argues that SISTO acknowledged that it reset the assembly and acknowledged that it was notified that the cover did not sit correctly on the assemble prior to the accident, yet did nothing to correct the defect. Plaintiff argues that the proof presented demonstrates an issue of fact whether SISTO actually created the defective condition in its work in the lot and with re-setting the assembly. Counsel for plaintiff argues that even though SISTO is a subcontractor of RACANELLI, there is a question of whether SISTO actually created the defective condition, and an unreasonable risk of harm to persons using the parking lot. *Church v. Callanan Industries Inc.*, 99 NY2d 104 (2002).

The uncontested evidence demonstrates that SISTO was made aware of the complained of dangerous condition, and had an opportunity to replace the assembly in question, and did not do so. A trier of fact could determine that the inaction is a wrong by omission. *H.R. Moch Co. v. Rensslear*, 247 NY 160 (1928). In this instance the subcontractor may be liable for failing to make conditions safer for the injured party. *Timmons v. Tishman Construction Corp.*, 9 AD3d 62 (1<sup>st</sup> Dept. 2004). The Court finds that there is a question of whether SISTO, in inspecting and acknowledging the condition, displaced the ACADEMY's duty to maintain the safety of the premises, specifically the manhole cover/assembly in issue. *Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579 (1994).

Thus, based on the proof presented, the motions of RACANELLI and SISTO seeking summary judgment, are Denied.

Finally, third-party defendant McNERNEY BASMAJIAN is the architectural firm hired for the project. It produced its principal, Mr. McNerney, for deposition. Both Arnet and McNerney testified that

Bernstein v. Port Washington Tennis Academy, Inc., et al.

McNERNEY BASMAJIAN was never called by RACANELLI to review a blacktop or paving issue. McNERNEY testified that McNERNEY BASMAJIAN performed the layout design for the parking lot in issue, identifying where the spaces were, the striping and landscaping. He testified that it did no work relating to drainage of the lot. He also testified that the architect was asked to review construction details regarding the layout of the lot, but was never asked to review any construction details with regard to installation of manholes. He testified that he recalled a single meeting with the owner and RACANELLI where the sinkage around a manhole was mentioned, but resolved between those two, and it is undisputed that this was not the manhole in question here.

McNERNEY BASMAJIAN claims that there was no one from its firm at the construction site for nearly seven to eight months prior to the accident. It also states that its contract did not require McNERNEY BASMAJIAN to design the drainage or sewer system, or to provide oversight or inspection responsibilities for the lot

McNERNEY BASMAJIAN therefore seeks summary judgment dismissing the third party complaint, as there is no showing that it was negligent in the performance of its duties.


RACANELLI opposes contending that the architect approve all bills for payment for the property owner TENNIS ACADEMY after it inspected the work performed. Thus, it was responsible for oversight of the parking lot, and inspection of the work. It argues that McNERNEY BASMAJIAN did in fact authorize payment for the work performed in the lot. RACANELLI therefore argues that the third-party defendant may be found liable or negligent in its duties.

The Court disagrees. This speculation is insufficient to demonstrate a triable issue of fact. There is no expert or other evidence presented that McNERNEY BASMAJIAN committed architectural malpractice or was negligent in the performance of its contracted duties. *530 East 89 Corp. v. Unger*, 43 NY2d 776 (1977); *Sheehan v. Pantelidis*, 6 AD3d 251 (1<sup>st</sup> Dept. 2004).

Based on the proof presented, the motion of McNERNEY BASMAJIAN seeking summary judgment dismissing the third-party action, is Granted.

It is, SO ORDERED.

Dated: Nov 8, 2007

  
HON. GEOFFREY K. O'CONNELL, J.C.  
**ENTERED**

NOV 14 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE