Milling v City of New York
2008 NY Slip Op 30690(U)
March 12, 2008
Supreme Court, New York County
Docket Number: 0122470/2002
Judge: Paul G. Feinman
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SCANNED ON 3/12/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN
Justice

PART 52

AMENDED DEC/ORDER

MILLING

- v -

CITY, et al

INDEX NO. 122470/02

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1a
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by Liro Consulting for summary judgment in its favor is GRANTED for the reasons set forth in the annexed decision & order.

This Court's short form/gray sheet order for motion seq. 003 dated 10/24/07 and entered 10/30/07 is vacated for the reasons set forth in the annexed decision & order.

FILED
MAR 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/12/08

PGF
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

SANDRA MILLING and ELLIOTT MILLING,
Plaintiff,
against
THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TULLY CONSTRUCTION CO. INC., GRACE INDUSTRIES, INC., LIRO CONSULTING ENGINEERING, P.C., and NICO ASPHALT, INC.,
Defendants.

Index Number 122470/2002
Mot. Seq. No. 003

DECISION AND AMENDED ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Third-Party Plaintiff,
against
NICO ASPHALT, INC.,
Third-Party Defendant.

T.P. Index No. 591049/2004

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FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment :

Papers	Numbered
Notice of Motion, Memo of Law	1,1a
Affirmations in Opposition	2, 3
Reply Affirmation	4

PAUL G. FEINMAN, J.:

On October 24, 2007, this court heard oral argument on various motions and cross motions for summary judgment bearing motion sequence numbers 002, 003, and 004. The court rendered decisions on the record as concerned the motions and cross-motions in motion sequence numbers

002 and 004. As the transcript of the oral argument makes clear, the court reserved decision as concerned the motion brought by defendant Liro Consulting Engineering, P.C., seeking summary judgment and dismissal of the complaint as against it (motion sequence 003). In an oversight however, the court apparently confused the papers and rendered a short form order on a "grey sheet" that indicated that motion sequence 003, Liro's motion, was "denied for the reasons stated on the record." (Dec./Ord. 10/24/07, mot. seq. 003). That short form order is inconsistent with what transpired in open court and with the court's intention. Accordingly, to correct its own ministerial and scrivener's error, the court *sua sponte* vacates the order of October 24, 2007 pertaining to motion sequence 003, and issues the following decision and order.

Background

Plaintiff alleges that on May 14, 2002, she tripped and fell on an uneven area of the roadway jutting from the abutting curb at Battery Place, approximately 48 feet from Greenwich Street, New York, New York, and suffered breaks of both left and right ankles (Not. of Mot. Ex. A, Ver. Am. Complaint; Ex. E, Ver. Bill of Partic.). She describes the area of the street as having "a concrete lip that was jutting out of the curb" (Not. of Mot. Ex. F, Milling EBT 26:18-19).

In May 2002, co-defendants Tully Construction and Grace Industries were involved in a joint venture involving the milling and paving of streets in lower Manhattan, including Battery Place and Greenwich Street, pursuant to a contract entered into with the City of New York (Not. of Mot. Ex. J, Tim Moyer EBT [hereinafter Moyer EBT], 9:25, 10:2, 11:18-19, 13:2-5; Not. of Mot. Ex. G, Chung EBT [11/16/04] [hereinafter Chung EBT [11/16/04]], 11:4-15).[1] The milling work was

[1]The records show that the joint venture of Tully Grace entered into a contract with Bovis CM on behalf of the City of New York's Department of Design and Construction to perform

[* 4]

done overnight (Not. of Mot. Ex. H, Chung EBT [8/23/06] [hereinafter Chung EBT [8/23/06]] 103:3-4). Milling involves removing a certain depth of asphalt, usually an inch and a half, with a large milling machine, resulting in a road surface one and a half or two inches below the existing road surface, and then new hot asphalt is deposited onto the surface and worked with a paving machine to resurface the roadway (Chung EBT [11/16/04] 28:20-25, 29:2-8; Chung EBT [8/23/06] 9:10-13). The grinding machine that removes the asphalt is built in such a manner that it leaves behind a 10-12 inch strip, requiring a second machine to be used at some point afterwards to rip up the strip (Moyer EBT 28:8-11, 17-24).[2]

Defendant Liro Consulting Engineer was hired by the City of New York's Department of Design and Construction (DDC) to inspect the work and to monitor its process, along with inspectors from the DDC (Not. of Mot. Ex. L, EBT of Prem Singh [hereinafter Singh EBT] 26, 27).[3] According to the City witness, the inspectors did not have authority to direct the work of the milling and paving employees (Chung EBT [8/23/06] 106:9-12). All inspector reports concerning the work, including any discrepancies from the work specifications, were ultimately submitted to the DDC (Chung EBT [8/23/06] 91:15-18, 92:12-25). If inspectors saw problems with the work, they were to call the project engineers, i.e., the City's engineers (Chung EBT [8/23/06] 97:19-25; 98:2-3). According to Liro, all inspectors reported to Liro's supervisor, as he oversaw both the City and the Liro inspectors (Singh EBT 28:10-14, 15-24).

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roadway and sidewalk reconstruction, with the project funded by the Federal Emergency Management Agency. The project was known as HWMWTCA 22/A3.

[2]This work is typically done either with a jackhammer or a payloader (Chung EBT [8/23/06] 75:13-14).

[3]The contract between the DDC and Liro has not been produced by either party.

According to Liro's witness, any specific safety precautions issued by the City or DDC with respect to the work were spelled out in the contract (Singh EBT 40:7-14). The Liro inspectors were told what were the safety precautions in use, and would look for them (Singh EBT 40:19-21). Liro inspectors did not post "no parking" or other signs, as that was the contractor's responsibility (Singh EBT 51:5-11). Liro inspectors were on-site on a consistent basis when the work was done, following the process of the machines (Singh EBT 49:18-25, 50:2-7). They watched to make sure the milling was done properly, that the right depth was being milled (Singh EBT 51:12-20).[4] Liro inspectors also looked to see that the worksites were properly prepared in advance with the appropriate cleaning tools and water, that signs had been posted, and that workers are wearing safety vests and other "simple things" (Singh EBT 53:14-25, 54:2-18). Where a worker was not wearing a vest, for instance, the foreman would be contacted and told to get a vest for the worker (Singh EBT 54:15-18). Milling would not occur unless the site and the workers were properly set up (Singh EBT 53:22-24).

A Liro inspector was assigned to the milling project that took place in the area of Battery Place and Greenwich Street (Singh EBT 27:7-10, 28:2-3). The Liro supervisor did not remember having any conversations about that specific milling work with the Liro inspector, other than giving him his assignment (Singh EBT 28:4-9).

Plaintiff Sandra Milling and her husband commenced their lawsuit on February 13, 2004 (Not. of Mot. Ex. A, Suppl. Summons & Am. Ver. Compl). Note of Issue was filed on May 23,

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[4]Liro's chief inspector also performed a final walk-through after the milling and paving was finished, so as to determine if the work was defective or needed correction, and to notify the contractor of such (Singh EBT 21:24-25, 22:2-10).

2007. Subsequently, summary judgment and dismissal of the complaint was granted as against the co-defendants Con Edison and Nico Asphalt, and denied as to the City of New York and Tully Construction (Dec. & Ord., Mot. Seq. No. 003, Oct. 24, 2007).

Liro Consulting filed its motion for summary judgment and dismissal of the claims as against it, or in the alternative seeks an order granting indemnification on behalf of Liro over and against Tully Construction and Grace Industries. Liro argues that it did not undertake the road work, or direct the manner or method of the work done by Tully and Grace, was not responsible for clean-up or maintenance of the work site, and that it did not create or contribute to the creating of the curb "lip" on which plaintiff fell. It argues that Tully and Grace were contractually responsible for the construction and renovation activities and to ensure all aspects of worker and third-party safety. It concludes that it had no duty to plaintiff. In the alternative, it seeks indemnification from Tully and Grace, arguing that the evidence shows that Tully and Grace were exclusively in control of the site conditions and it was the actions of one or both of those entities which caused the condition on which plaintiff injured herself.

Plaintiffs argue in opposition that Liro had a duty of care which it violated by failing to ensure that the milling work was done with proper safety precautions, including the placement of warnings for pedestrians. They point to Liro's testimony that the inspectors were to see that the work site was cleaned after the milling and that the work was to be performed in a safe manner. They contend that Liro was required to ensure that proper and reasonable procedures were taken to perform the work safely and to warn pedestrians of the dangerous condition of the milled streets, and that Liro was negligent in performing that duty.

Grace Industries also opposes the branch of the motion that seeks an order of common law

indemnity, arguing that Liro cannot establish that it acted without negligence and that Grace acted with negligence.

Although Liro's motion was filed more than 60 days after the filing of the Note of Issue, which is this court's deadline for the filing of summary judgment motions, none of the parties have opposed the motion on the ground that it is untimely. The court therefore entertains Liro's motion seeking summary judgment or, alternatively, for an order granting indemnification on behalf of Liro over and against Tully Construction and Grace Industries.

Legal Analysis

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]).

To establish a *prima facie* case of negligence, a plaintiff must demonstrate (1) that defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing

Bovsun v Sanperi, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]). The scope of any such duty of care varies with the foreseeability of the possible harm (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d at 108, citing *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]).

It is well-established that an independent contractor does not owe a duty of care to a non-contracting third party unless the contractor either creates or increases an unreasonable risk of harm; or where the injured third party reasonably relied upon the contractor's continuing performance arising out of a contractual obligation, or where the contractor has entirely displaced the other party's duty to maintain the premises safely (*Church ex rel. Smith v Callahan Indus. Inc.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs., Inc.*. 98 NY2d at 139-141).

Liro argues that it did not commit any affirmative act of negligence, citing among others, *Domenech v Asociated Engineers,* 257 AD2d 403 (1st Dept. 1999); *Hernandez v Yonkers Contracting Co., Inc.,* 306 AD2d 379 (2d Dept. 2003), and *Fecht v City of N.Y.*, 244 AD2d 315 (2d Dept. 1997). All three decisions grant summary judgment and dismissal as to the engineers hired to inspect various projects, as their contracts only obligated the engineers to report problems to the hiring entity and did not require that the engineers undertake any corrective action or act to ensure the public's safety, or impose liability on the engineer, and because there was no evidence presented that the engineers engaged in any affirmative act of negligence.

Plaintiffs argue that the tesitmony of Liro's inspection supervisor strongly suggested that the work would not proceed without all the safety procedures in place, and contend that this calls into

question whether the Liro inspectors had an affirmative duty pursuant to its contract to ensure that the conditions were proper before the work was undertaken, and that the clean-up was adequate, and thus that it had a duty of care to plaintiff under the first exception to the general rule regarding independent contractors, as articulated in *Espinal* and *Church*. However, the duty to ensure safety compliance has been held not to amount to actual supervision and control of the work site such that the supervising entity would be held liable for the negligent work of the contractor (*see, Warnitz v Liro Group*, 254 AD2d 411, 411, 412 [2d Dept. 1998]; *Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 468-469 [1st Dept. 1998]). Thus, as a matter of law, a fact-finder could not find that Liro owed plaintiffs a duty of care. Liro's motion for summary judgment and dismissal of the complaint as against is therefore granted (CPLR 3212). The remainder of Liro's motion is rendered academic. It is

ORDERED that the short form order dated October 24, 2007 for motion sequence number 003 is vacated and this decision and order substituted for same; and it is further

ORDERED that the motion by Liro Consulting Engineer, P.C. for summary judgment is granted to the extent that the complaint is dismissed as to Liro with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continues as against the remaining parties.

This constitutes the decision and order of the court.

Dated: March 12, 2008
New York, New York

Paul G. Feinman
J.S.C.

FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE