

Robbie v Home Prop. Westwood VII., LLC

2009 NY Slip Op 30496(U)

February 23, 2009

Supreme Court, Suffolk County

Docket Number: 8398-2005

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #001 #002
#003 #004 Mot. D
R/D: 07/31/08
S/D: 10/22/08

KENNETH J. ROBBIE, JR. and KIRSTEN ROBBIE,

Plaintiff,

-against-

HOME PROPERTIES WESTWOOD VILLAGE, LLC,

Defendant.

HOME PROPERTIES WESTWOOD VILLAGE

Third-Party Plaintiff,

-against-

BERNARD L. SNOW, CUSTOM DESIGN
LANDSCAPING and OCEAN SUPERIOR
ENTERPRISES, INC.,

Third-Party Defendants.

HOME PROPERTIES WESTWOOD VILLAGE, LLC.,

Second Third-Party Plaintiff,

-against-

ZAFFARESE LANDSCAPING, INC.,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to 29 read on this motion for an order pursuant to CPLR §3212
Notice of Motion/Order to
Show Cause and supporting papers 1-4, 5-8; Notice of Cross Motion and supporting papers 9-12, 13-16 Answering
Affidavits and supporting papers 17-19, 20-22, 23-24 Replying Affidavits and supporting papers 25-27, 28-29 Other
_____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion third party defendants CUSTOM DESIGN LANDSCAPING
("CDL") and OCEAN SUPERIOR ENTERPRISES, INC. ("OSE") for an order pursuant to CPLR
Section 3212 granting summary judgment dismissing the third party complaint and the motion by
second third party defendant ZAFFARESE LANDSCAPING, INC. ("ZL") for an order pursuant to

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CPLR Section 3212 granting summary judgment dismissing the second third party complaint and all cross claims against "ZL" and the motion by plaintiffs KENNETH J. ROBBIE, JR. ("ROBBIE") and KIRSTEN ROBBIE seeking an order pursuant to CPLR Sections 3025(b) & 3212 granting leave to permit amendment of the complaint to include an additional cause of action and, upon such amendment, granting partial summary judgment against the defendant HOME PROPERTIES WESTWOOD VILLAGE, LLC ("HOME PROPERTIES") with respect to the issue of liability and the motion by defendant "HOME PROPERTIES" seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiffs complaint are determined as follows:

On May 11, 2004 plaintiff "ROBBIE", a Nassau County Police Officer, fell in a parking lot while chasing an individual suspected of forgery. The lot was owned by defendant "HOME PROPERTIES". Plaintiff claims that defendant failed to adequately maintain the area where he fell, claiming it was littered with pebbles, stone, gravel, sand and debris. Plaintiffs complaint sets forth causes of action sounding in negligence and a violation of General Municipal Law Section 205(e). Plaintiffs motion seeks an order permitting an amendment of the complaint to include an additional cause of action and, upon such amendment, granting partial summary judgment on the issue of liability against the defendant. Defendant's cross motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming no viable cause of action exists against "HOME PROPERTIES".

Second third party defendant "ZL" had an agreement with defendant "HOME PROPERTIES" to perform snow removal services. On March 17, 2004 "ZL" last performed snow removal services on the lot where plaintiff fell. On April 23, 2004 third party defendant "OSE" used a street sweeping machine and two blowers to sweep sand and debris from the same lot. Third party defendant "OSE" was paid for its services and did not return to maintain the lot area. Both contractors have submitted motions seeking summary judgment dismissing all claims against them claiming that there is no relevant, admissible evidence submitted to support negligence claims against them.

In support of their motion, third party defendants "OSE" and "CDL" submit two affirmations of counsel and claim that no valid claim exists against either entity based upon the undisputed facts. Third party defendant "OSE" claims that its only contact with the parking lot was when it swept the premises of sand on April 23, 2004. Movant claims that except for this one occasion "OSE" did not contract or perform any other services on the lot. The third party defendant asserts that the deposition testimony of defendant/owner "HOME PROPERTIES's" manager absolves "OSE" of any remaining negligence claims based upon defendant's manager's testimony that "HOME PROPERTIES's" employees blew sand and debris from the lot on a daily basis after "OSE" had completed its work. It is "OSE's" position that based upon these undisputed facts no legal basis exists to find the contractor responsible for plaintiffs injuries. Third party defendants also claim that "CDL" is an assumed name for a New York corporation registered as Superior Landscaping Enterprises, Inc. ("SLE") and that neither "SLE" nor "CDL" has any relationship to the work performed by "OSE".

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In support of its motion, second third party defendant ZAFFARESE LANDSCAPING, INC. submits an affidavit from "ZL's" corporate president and two affirmations of counsel and claims that no basis exist upon which to find the second third party defendant liable for plaintiff's injuries. "ZL" claims that snow removal services last occurred on March 17, 2004, almost two months before occurrence of the alleged incident, and asserts that no evidence exists to support "HOME PROPERTIES's" negligence claims. "ZL" asserts that it did not create the alleged dangerous condition and did not contract with the owner to assume the duty of maintaining the premises in a reasonably safe condition throughout the year and therefore no viable claim is asserted against "ZL".

In opposition to both motions, defendant "HOME PROPERTIES" submits two affirmations of counsel and claims that significant issues of fact exist concerning second third party defendant "ZAFFARESE LANDSCAPING's" application of sand that may have accumulated over the winter and concerning third party defendant "OCEAN SUPERIOR's" attempted removal of the sand sufficient to defeat both motions. Defendant claims that both contractors may be found liable for plaintiff's injuries since each party may have created the alleged dangerous condition where "ROBBIE" fell; by "ZL's" application of sand in March, 2004 and by "OSE's" failure to adequately remove the sand in April, 2004. It is defendant's position that under these circumstances a possibility remains that these contractors may be held liable in tort to the non-contracting third party (plaintiff) since the contractors can be found to have "launched" the instrument of harm (the sand) which caused "ROBBIE" to fall. Defendant also claims that the "HOME PROPERTIES/ZAFFARESE" contracts require that the contractor purchase a \$1 million general liability insurance policy to indemnify and hold harmless the property owner for any and all claims that arise from "ZL's" work at the premises. Defendant claims that "ZL" is therefore obligated to indemnify "HOME PROPERTIES" under the terms of the parties contract. Defendant also claims that the "HOME PROPERTIES/OCEAN SUPERIOR" contract required that the contractor sweep up the sand that had accumulated over the course of the winter and argues that "OCEAN SUPERIOR" will be required to indemnify the defendant if plaintiffs can prove their claims against "HOME PROPERTIES".

In support of their motion seeking leave to amend the complaint and for partial summary judgment with respect to the issue of liability, plaintiffs submit an affidavit from a licensed engineer and an attorney's affirmation and claim that permission should be granted to allow plaintiff to amend the complaint to add an additional General Municipal Law Section 205(e) cause of action based upon defendant's violation of specific provisions of the New York State Property Maintenance Code. Plaintiff claims that the amendment sets forth a meritorious claim against "HOME PROPERTIES" and asserts that there will be no prejudice to defendant's ability to defend this claim. Plaintiff argues that once the amendment is granted, summary judgment must also be granted against the defendant for the two General Municipal Law Section 205(e) claims set forth in the amended complaint. Plaintiff claims that the three required elements to prove a GML Section 205(e) cause of action have been established as a matter of law based upon the parties deposition testimony and the affidavit from plaintiff's expert and therefore partial summary judgment should be granted on the issue of liability with respect to the second, third and fourth causes of action. Plaintiff claims that the undisputed evidence establishes: 1)

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the ordinances and statutes which were violated- i.e. the Village of Westbury Code & the New York State Property Maintenance Code; 2) the manner in which the officer was injured- plaintiff's fall as a result of defendant's neglect by permitting an accumulation of sand and debris in its parking lot; and 3) the facts revealing that defendant's negligence was the proximate cause of plaintiff's injuries- eyewitness testimony detailing plaintiff's fall on the accumulation of sand. Plaintiff's engineering expert claims that "HOME PROPERTIES's" violated three specific Westbury Village and New York State ordinances and that each violation constituted a substantial factor in causing plaintiff "ROBBIE's" accident and resultant injuries. It is plaintiff's position that under these circumstances partial summary judgment on the issue of liability for the General Municipal Law Section 20(e) violations must be granted against the defendant.

In opposition and in support of its motion for summary judgment, defendant "HOME PROPERTIES" submits an affidavit from a licensed engineer and an attorney's affirmation and claims that plaintiff's GML Section 205(e) claims must be dismissed since plaintiff cannot establish that a statute or ordinance was violated in this case. Defendant claims that although plaintiffs recite Westbury Village Code violations in support of their motion, the premises in issue located in the Town of Oyster Bay are not located within the Village of Westbury and thus the Village Code violations do not apply. Defendant also claims that the amended GML Section 205(e) cause of action, which sets forth alleged violations of the New York State Property Maintenance Code, also fails because an accumulation of sand under the controlling provision of local law (the Town of Oyster Bay Code) does not constitute a Code violation. Defendant claims that the Oyster Bay Code Section 135-47 requires only that paved areas be maintained to "afford safe passage under normal use and weather conditions" and contains no sand accumulation violation provision. It is defendant's position that absent proof of a violation of local law, there can be no violation of the New York State Property Maintenance Code since section 106.1 of the State Maintenance Code provides that any violations are to be dealt with in accordance with the applicable provisions of the local code. Defendant argues that based upon these circumstances summary judgment must be granted dismissing the GML Section 205(e) causes of action. Defendant's engineering expert states that there is no evidence that "HOME PROPERTIES" failed to maintain the parking lot in a reasonably safe condition and no basis to find the defendant liable for plaintiff's injuries.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO

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v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In order to establish tort liability the plaintiff must demonstrate the existence of a breach of duty owed to him by the defendant (Palka v. Edelman, 40 NY2d 781, 390 NYS2d 393 (1976); Palsgraf v. Long Island Railroad, 248 NY 339 (1928); Prosser, "Torts" 4th Edition Section 30, 41-42& 53). He must further demonstrate that the defendant's acts or omissions which constituted such breach were a proximate cause of the plaintiff's injuries (Sheehan v. City of New York, 40 NY2d 496, 387 NYS2d 92 (1976)).

A contractor involved in snow or sand removal has no duty to exercise reasonable care to prevent injury to a non-contracting third party unless: 1) the contractor launched a force or instrument of harm; or 2) the plaintiff detrimentally relied on the continued performance of the contractor's duties; or 3) the contractor entirely displaced the property owner's duty to maintain the premises safely (Church v. Callanan Industries, 99 NY2d 104, 752 NYS2d 254 (2002); Espinal v. Melville Snow Contractors, 98 NY2d 136, 746 NYS2d 120 (2002)).

There is no relevant, admissible evidence submitted to provide a factual basis upon which third party defendant "OCEAN SUPERIOR" or second third party defendant "ZAFFARESE LANDSCAPING" can be found liable for the injuries sustained by the plaintiff. The record shows that the snow removal contractor "ZAFFARESE" cleared snow from defendant's lot on March 17, 2004 and that contractor "OCEAN SUPERIOR" made a one-time clean sweep of defendant's lot on April 23, 2004. Deposition testimony from the defendant's manager revealed that since "OCEAN SUPERIOR's" April, 2004 clearing, employees of "HOME PROPERTIES" maintained and cleared the parking lot on a daily basis up to the date of the May 11, 2004 incident. Moreover none of the three exceptions set forth in the Court of Appeals decisions recited above applies in this case. Based upon these undisputed facts no basis exists to find either contractor liable for the injuries sustained by the plaintiff after falling in the "HOME PROPERTIES's" lot. Third party defendants motion and second third party defendant's motion each seeking summary judgment dismissing all claims against them must therefore be granted.

CPLR §3025(b) provides:

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just first including the granting of costs and continuances.

Leave to amend a pleading should be freely granted in the absence of a showing of prejudice or surprise resulting directly from the delay (FAHEY v. ONTARIO COUNTY, 44 NY2d 9, 34, 408 NYS2d 314 (1978); PREFARIS v. LONG, 114 AD2d 806, 495 NYS2d 176 (1st Dept., 1985)). In considering a motion for leave to amend the pleadings, the Court has discretion to consider the merits of the proposed amendment (MATTER OF COHEN, 154 AD2d 291, 546 NYS2d 368 (1st Dept.,

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1989)).

Plaintiff's application seeking leave to amend the complaint to add an additional General Municipal Law Section 205(e) cause of action must be granted since no prejudice will result from the delay.

With respect to plaintiff's motion and defendant's cross motion each seeking an order granting summary judgment, defendant's motion seeking dismissal of plaintiff's first cause of action sounding in negligence must be granted since police officers are precluded from recovering damages for injuries sustained in the line of duty based upon a "common law" negligence claim (see Santangelo v. State of New York, 71 NY2d 393, 526 NYS2d 812 (1988)). There is no dispute that plaintiff, a police officer, was allegedly injured in the line of duty while chasing a suspect in defendant's parking lot. Plaintiff's "common law" negligence cause of action (first cause of action) must therefore be dismissed.

However, General Municipal Law §205(e) was enacted in 1989 to permit police officers a right to recover for injuries incurred in the line of duty resulting from a "violation of laws, statute or ordinance" negligence. In order to prove a claim pursuant to General Municipal Law Section 205(e) a plaintiff is required to : 1) identify the statute or ordinance with which the defendant failed to comply; 2) describe the manner in which the police officer was injured; and 3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm (Anthony v. NYCTA, 38 AD3d 484, 832 NYS2d 63 (2nd Dept., 2007)). Defendant has submitted a copy of a deed dated March 1, 2002 which shows that the premises where the incident occurred was situated in the Town of Oyster Bay not within the Village of Westbury. Based upon this evidence plaintiff's second cause of action claiming a violation of GML Section 205(e) premised upon violations of the Village of Westbury Code must be dismissed.

However significant issues of fact exist concerning the remaining causes of action set forth in plaintiffs amended complaint for recovery under GML section 205(e) (third cause of action) based upon alleged violations of the New York State Property Maintenance Code sufficient to require a plenary trial. Accordingly it is

ORDERED that third party defendants "CUSTOM DESIGN" and "OCEAN SUPERIOR" motion for an order pursuant to CPLR Section 3212 is granted. The third party complaint against the moving third party defendants is hereby dismissed, and it is further

ORDERED that second third party defendant "ZAFFARESE LANDSCAPING's" motion for an order pursuant to CPLR Section 3212 is granted. The second third party complaint is hereby dismissed, and it is further

ORDERED that plaintiff's motion for an order pursuant to CPLR Section 3025(b) and 3212 is granted solely to the extent that the proposed amended verified complaint shall be deemed served

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nunc pro tunc to the date of service of the motion. Responsive pleadings shall be served within ten days of service of a copy of this order with notice of entry. Plaintiffs remaining requests for relief are denied, and it is further

ORDERED that defendant's motion for an order pursuant to CPLR Section 3212 is granted to the extent that the first and second causes of action set forth in plaintiffs amended verified complaint are hereby dismissed. Defendant's remaining requests for relief are denied, and it is further

ORDERED that the action is otherwise severed and continued.

Dated: February 23, 2009

MELVYN TANENBAUM

J.S.C.