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SHORT FORM ORDER

INDEX No. 06-4647
CAL. No. 09-00546-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 6-19-09 (#003)
MOTION DATE 7-2-09 (#004)
ADJ. DATE 8-13-09
Mot. Seq. # 003 - MD
004 - MD

DEAN W. GITTLEMAN and DEBORAH GITTLEMAN, Plaintiffs, - against - JOHNSON ELECTRICAL CONSTRUCTION CORP. and LAURELWOOD LANDSCAPE CONSTRUCTION, INC., Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706 LOCCISANO & LARKIN Attorneys for Defendant/Third-Party Plaintiff Johnson Electrical Construction Corp., 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108 ANDREA G. SAWYERS, ESQ. Attorneys for Defendant Laurelwood Landscaping Construction, Inc. 3 Huntington Quadrangle, Suite 102S P.O. Box 9028 Melville, New York 11747
JOHNSON ELECTRICAL CONSTRUCTION CORP., Third-Party Plaintiff, - against - ALL COUNTY PAVING CORP., Third-Party Defendant.	WESTERMANN SHEEHY KEENAN SAMAAN & AYDELOTT, LLP Attorneys for Third-Party Defendant All County Paving Corp. 100 Quentin Roosevelt Boulevard Garden City, New York 11530

Upon the following papers numbered 1 to 70 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 46 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 47 - 58; 59 - 64; 65 - 66; 67 - 68 ; Replying Affidavits and supporting papers 69 - 70 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by third-party defendant All County Paving Corp. and the motion (#004) by defendant/third-party plaintiff Johnson Electrical Construction Corp. are consolidated for purposes of this determination; and it is further

ORDERED that the motion by third-party defendant All County Paving Corp. for summary judgment dismissing the complaint, the third-party complaint, and the cross claims against it is denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff Johnson Electrical Construction Corp. for, inter alia, summary judgment dismissing the complaint against it is denied.

In February 2006, plaintiff Dean Gittleman commenced this action to recover damages for personal injuries allegedly sustained in August 2004, when he fell into a trench or furrow located in a grassy area along the shoulder of the westbound lanes of the Southern State Parkway. His wife, Deborah Gittleman, sued derivatively for loss of services. At the time of plaintiff's accident, defendant Johnson Electrical Construction Corp. was in contract with the with New York State Department of Transportation (DOT) for a project entitled "ITS Expansion on Routes 908M and 908K in the Towns of Babylon and Islip and Villages of North Lindenhurst, North Babylon and North Bay Shore," which involved the installation of fiber optics, sign structures, and control cabinets along the Southern State Parkway and Sagtikos Parkway for New York State's INFORM (Information for Motorists) traffic system. Johnson Electrical, as the general contractor for this public project, had hired defendant Laurelwood Landscape Construction, Inc. and third-party defendant All County Paving Corp. to perform excavation, installation and other work on the project. More specifically, the subcontract between Johnson Electrical and Laurelwood Landscape required Laurelwood Landscape to perform various tasks, including excavation, backfilling and surface restoration in connection with the installation of conduit pull boxes and fiber optic pull boxes, conduit jacking and boring, installation of multi-cell PVC conduit. Johnson Electrical's subcontract with All County Paving required, in part, that All County perform trench and culvert excavation, excavate and set concrete foundations for control cabinets and camera poles, and provide temporary concrete barriers.

The complaint alleges Johnson Electrical and Laurelwood Landscaping were negligent, among other things, in performing construction work at the location of plaintiff's accident; in causing and permitting the ground at the accident site to be "uneven and sunken in"; in "allowing and permitting holes and/or ruts to be and remain on the ground thereat, creating a hazard and a trap"; in failing to erect barricades, fences, ropes, cones, covers or other safety devices to protect plaintiff and others; in failing to properly supervise the construction project; and in failing to repair any dangerous or defective conditions at the site. Johnson Electrical's answer denies the allegations of negligence and interposes a cross claim seeking apportionment of liability. It also contains a "counterclaim" against plaintiff for contribution. Similarly, Laurelwood Landscape's answer asserts cross claims against Johnson Electrical for contribution. A third-party action by Johnson Electrical against All County Paving asserts causes of action for indemnification, contribution and breach of contract.

In 2007, plaintiffs brought a separate negligence action, assigned index number 06-4647, against All County Paving. By order dated January 28, 2008, this Court granted a motion by plaintiffs for an

order joining for trial the instant action and plaintiffs' action against All County Paving. The Court notes that contrary to the assertions by defense counsel, the January 2008 order did not consolidate the two actions. Laurelwood Landscape then served "cross claims" for contribution and indemnification against All County Paving.

All County Paving now moves for summary judgement dismissing the complaint and all other claims asserted against it, arguing that it did not owe a duty to plaintiff, and that the pretrial testimony establishes as a matter of law that its work on the DOT project was not a proximate cause of plaintiff's injuries. In support of the motion, All County Paving submits, among other things, copies of the pleadings and the bill of particulars; transcripts of its own deposition testimony and the deposition testimony of Johnson Electrical and Laurelwood Landscape; and an affidavit of its vice president, Roger Bigbie. Johnson Electrical moves for summary judgment dismissing the complaint and Laurelwood Landscape's cross claims against it, alleging that, as a contractor, it did not owe a duty of care to plaintiff to keep the shoulder of the parkway in a reasonably safe condition, and that there is no evidence that it created the trench which allegedly caused plaintiff's fall. Johnson Electrical also seeks summary judgment in its favor on its third-party claim against All County Paving for indemnification and on Laurelwood Landscape's claims for contribution. Its submissions on the motion include transcripts of the parties' deposition testimony; a copy of its contract with the DOT for the subject INFORM project; copies of its subcontract agreements with All County Paving and Laurelwood Landscape; and a copy of a photograph, marked at deposition as Defendant's Exhibit A. Plaintiffs opposes both motions, arguing, in part, that a triable question exist as to whether All County Paving created the trench while performing work at the subject location, thereby "launching a force or instrument of harm," and that a triable issue exists as to whether Johnson Electrical had notice of the alleged dangerous condition. Johnson Electrical opposes the motion by All County Paving, arguing an issue of fact exists as to whether Laurelwood Landscape or All County Paving performed excavation work in the area near the accident site. Laurelwood Landscape and All County Paving oppose Johnson Electrical's motion, contending issues of fact exist regarding the creation of the hole and that such issues bar a disposition in favor of Johnson Electrical on its claim for indemnification.

Plaintiff, who is employed by the DOT as a highway equipment operator, testified at an examination before trial that immediately before the subject accident he and two other DOT employees assigned to mowing operations were riding in a truck along the shoulder of the Southern State Parkway looking for debris. He testified that after exiting the truck and picking up debris lying in grass by the shoulder of the road, he stepped into a trench with his left foot and landed in the hole on his back. Plaintiff testified that the trench was located approximately 1/4 mile east of the sign for Exit 36 of the Southern State Parkway, and that he did not see it prior to his accident. At a deposition conducted in June 2007, plaintiff described the trench as approximately ten feet long, five feet wide, and five to six feet deep. However, at a further deposition conducted in December 2008, plaintiff testified his prior testimony regarding the width of the trench was incorrect, and that the trench actually was two to three feet wide.

Donald Leslie, Jr. testified at an examination before trial on behalf of Johnson Electrical that the project work being performed near Exit 36 at the time of plaintiff's accident involved the installation of a fiber optic pull boxes below grade and the setting of a precast concrete bases for control cabinets. Mr.

Leslie testified that under the subcontract agreements with Johnson Electrical, Laurelwood Landscape was responsible for excavation work associated with installation of the fiber optic pull boxes and All County Paving was responsible for setting the precast concrete bases for the control cabinets. He testified a fiber optic pull box measures eight feet by eight feet by eight feet, and that Laurelwood Landscape was responsible for backfilling and restoring an area after installation of a pull box was complete. He testified that the concrete base for a control cabinet was approximately four feet by three feet, and approximately four feet deep, and that All County Paving, like Laurelwood Landscaping, would backfill the area when the base was complete. Mr. Leslie further testified that if an area excavated for a pull box or control cabinet foundation was not backfilled by the end of the work day, the subcontractor that performed the excavation would erect a barrier around that area. He explained that Johnson Electrical field workers and state inspectors determined where to locate the pull boxes, and that, because of a delay in the DOT project, no trenches for conduit were being dug at the time of the subject accident. He testified that the delay in the trench work likely would have caused a delay in the final restoration work around the pull boxes and control cabinets. Mr. Leslie testified that both Laurelwood Landscape and All County Paving used excavators and backhoes on the job, that Laurelwood Landscape used other equipment to restore the grass, and that Johnson Electrical did not perform any excavation work in connection with the project. He testified that a state inspector and a foreman from Johnson Electrical were always at the site while work was being performed. In addition, he testified that a third subcontractor, United Fence and Guardrail, also worked on the project, and that the three subcontractors would, at times, work at the same location at the same time.

John Droskoski, appearing at a pretrial deposition on behalf of Laurelwood Landscape, testified that Laurelwood performed trenching and surface restoration work on the project, and that a supervisor from Johnson Electrical would tell its workers where to dig the trenches. Although he initially testified that Laurelwood Landscape did not do any excavation work in connection with the pull boxes, he later testified that it dug the trenches leading to the pull boxes and dug the holes and installed some of the pull boxes. Mr. Droskoski testified that Laurelwood Landscape's workers performed trench and backfill work on a daily basis and that, if a trench dug by Laurelwood was still open at the end of the day, it would install barriers around the trench as a safety measure. He also testified Laurelwood Landscape's restoration work, which included tilling, adding topsoil and seeding the shoulder of the roadway, was delayed due to the State's decision to expand the scope of the Southern State Parkway project.

John Bigbie testified on behalf of All County Paving that he believed All County did not perform any conduit excavation, and that it did not "have anything to do with the pull boxes." He testified that the subcontract with Johnson Electrical required All County Paving to perform excavation work in the median areas between the eastbound and westbound lanes of the Southern State Parkway and in some "wood sheeting pit areas that were to be utilized for the construction of concrete foundations" for overhead sign structures; to construct concrete foundations for camera poles and control cabinets; and to remove the part of the concrete footings from road signs that had been removed by United Fence and Guardrail. He also testified that All County Paving used a large track excavator, rubber tire excavators, and an auger device for digging footings to perform the work under the subcontract. Mr. Bigbie further testified that All County Paving was responsible for backfilling to grade the excavations that it performed.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eisman v State***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, *supra*). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 229, 513 NYS2d 356 [1987]). Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affecting the expansion or limitation of new channels of liability" (***Pulka v Edelman***, *supra*, at 586, 390 NYS2d 393; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant's negligence (*see* ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see* ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Highway Hosp. Ctr.***, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, *supra*, at 937, 680 NYS2d 900; *see* ***Grob v Kings Realty Assoc.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). The plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see* ***Gayle v City of New York***, *supra*; ***Bernstein v City of New York***, *supra*; ***Bardi v City of New York***, *supra*).

Ordinarily, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); ***Conte v Servisair/Globeground***, 63 AD3d 981, 883 NYS2d 69 [2d Dept 2009]). The Court of Appeals, however, has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, at 140, 746 NYS2d 120, *quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of

harm to others or increasing the existing risk (***Church v Callanan Indus.***, *supra*, at 110-111, 752 NYS2d 254); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

All County Paving's submissions are insufficient to demonstrate as a matter of law that it is entitled to judgment dismissing the claims against it. Significantly, the deposition testimony submitted on the motion fails to establish prima facie All County Paving's defense that it did not negligently create the alleged dangerous condition that caused plaintiff's injury (*see* ***Trenca v Culeton***, 59 AD3d 1098, 872 NYS2d 607 [4th Dept 2009]; ***Prenderville v International Serv. Sys., Inc.***, 10 AD3d 334, 781 NYS2d 110 [1st Dept 2004]; *see generally* ***Wheaton v East End Commons Assoc., LLC***, 50 AD3d 675, 854 NYS2d 528 [2d Dept 2008]). Here, All County Paving relies on the transcripts of deponents who did not witness plaintiff's accident or have first-hand knowledge as to where the accident occurred or the work All County actually performed in that area (*cf.* ***Ealey v City of New York***, 16 AD3d 543, 792 NYS2d 159 [2d Dept 2005]). And though Mr. Bigbie testified that it was his belief that All County Paving did not perform any excavation work in connection with the installation of pull boxes, the evidence fails to demonstrate as a matter of law that the trench at issue was caused by excavation work and that such excavation work was performed by Laurelwood Landscape. Instead, it shows that All County Paving and Laurelwood Landscape often performed their subcontract work on the DOT project at the same time and location (*cf.* ***Carboy v Cauldwell-Wingate Co., Inc.***, 43 AD3d 261, 841 NYS2d 20 [1st Dept 2007]; ***Neely v City of Buffalo***, 171 AD2d 1078, 569 NYS2d 252 [4th Dept 1991]), and that both subcontractors employed heavy machinery in the area of the parkway where plaintiff fell. Further, having failed to failed to submit documentary evidence showing the contractual obligations due under the subject DOT project, namely the DOT contract with Johnson Electrical and Johnson Electrical's subcontracts with it and Laurelwood Landscape, All County Paving did not demonstrate that it was not contractually obligated to perform excavation and backfill work in connection with the work performed in the area of plaintiff's accident. Accordingly, as the evidence submitted shows a triable issue as to whether All County Paving's activities created the alleged dangerous condition, summary judgment dismissing the complaint and the third-party complaint is denied, as are Johnson Electrical's applications for judgment in its favor on its claims for contribution and indemnification (*see* ***Marano v Commander Elec., Inc.***, 12 AD3d 571, 785 NYS2d 109 [2d Dept 2004]).

Johnson Electrical's application for summary judgment dismissing the complaint and the cross claims against it also is denied. Although Johnson Electrical's submissions demonstrate prima facie it did not owe plaintiff a duty of care by virtue of its contract with the DOT and that its workers did not engage in excavation work at the subject location, a general contractor that has control of a work site during a construction project may be held liable for injuries due to its failure to correct a dangerous condition of which it had actual or constructive notice (***Keating v Nanuet Bd. of Educ.***, 40 AD3d 706, 708-709, 835 NYS2d 705 [2d Dept 2007]; ***Tilford v Sweet Home Real Prop. Trust***, 40 AD3d 966, 966, 834 NYS2d 664 [2d Dept 2007]). Here, the deposition testimony offered in support of the motion shows that employees of Johnson Electrical directed where the subcontractors would excavate (*cf.* ***Cohen v Schachter***, 51 AD3d 847, 857 NYS2d 727 [2d Dept 2008]), and no evidence was offered showing it

lacked notice of the alleged dangerous condition on the shoulder of the road (*see* (***Keating v Nanuet Bd. of Educ.***, *supra*). The Court notes that Mr. Leslie's deposition testimony that a photograph, marked for identification as Defendant's Exhibit A, "almost looks like it's the edge of the excavation where the pull box is," and that "[i]f that [trench] was caused by the pull box excavation, that would be Laurelwood's excavation," is insufficient to demonstrate prima facie that such trench was created by Laurelwood Landscape, particularly in view of the pretrial testimony that some of the excavation work done by the two subcontractors would be similar, that excavation work generally would not be left open for an extended period of time, that equipment would be brought into an area to remove excess dirt after excavation and backfilling was complete, that the photograph was taken by plaintiff's wife two weeks after the subject accident, and that the scene of the accident appeared different than depicted in the photograph (*see generally* ***Lustenring v 98-100 Realty, LLC***, 1 AD3d 574, 768 NYS2d 20 [2d Dept 2003], *lv dismissed in part, denied in part* 2 NY3d 791, 781 NYS2d 277 [2004]; ***Truesdell v Rite Aid of N.Y.***, 228 AD2d 922, 644 NYS2d 428 [3d Dept 1996]).

Dated: 11-7-07

DENISE F. MOLIA

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION