

Morales v County of Suffolk

2010 NY Slip Op 30948(U)

April 16, 2010

Supreme Court, Suffolk County

Docket Number: 07-4002

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY



P R E S E N T :

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9-15-09
ADJ. DATE 11-18-09
Mot. Seq. # 002 - MD
003 - XMD

-----X		
SIENNA MORALES, an infant under the age of	:	MICHAEL S. LANGELLA, P.C.
Fourteen Years, by her father and natural guardian,	:	Attorney for Plaintiff
CARLOS MORALES and CARLOS MORALES,	:	2459 Ocean Avenue
Individually,	:	Ronkonkoma, New York 11779
	:	
Plaintiff,	:	CHRISTINE MALAFI, ESQ., Suffolk Cty Attorney
	:	By: Christopher A. Jeffreys, Esq.
- against -	:	Attorneys for Defendant/Third-Party Plaintiff
	:	County of Suffolk
COUNTY OF SUFFOLK and LANDTEK	:	100 Veterans Memorial Highway, P.O. Box 6100
GROUP, INC.,	:	Hauppauge, New York 11788-0099
	:	
Defendants.	:	TROMELLO, McDONNELL & KEHOE
-----X		
COUNTY OF SUFFOLK	:	Attorneys for Defendant/Third-Party Defendant
	:	Landtek Group, Inc.
Third-Party Plaintiff,	:	P.O. Box 9038
	:	Melville, New York 11747
- against -	:	
	:	
LANDTEK GROUP, INC.,	:	
	:	
Third-Party Defendant.	:	
-----X		

Upon the following papers numbered 1 to 46 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 26; Answering Affidavits and supporting papers 27 - 29; 30 - 38; Replying Affidavits and supporting papers 39 - 44; 45 - 46; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant/third-party defendant Landtek, Inc. is denied; and it is further

ORDERED that the cross motion by defendant County of Suffolk is denied.

Defendant/third-party defendant Landtek, Inc. ("Landtek") moves for an order dismissing the claims against it by plaintiffs Sienna Morales, an infant by her father and natural guardian, Carlos Morales, and Carlos Morales, individually, ("Sienna" and, collectively, "plaintiffs") and the third-party action against it by County of Suffolk ("Suffolk"), and provides copies of the pleadings, and copies of various parties' pretrial deposition testimony. Suffolk cross-moves for summary judgment in its favor on its third-party claims against Landtek and provides copies of the pleadings, a copy of a construction contract, a project manual, certificates of insurance, a notice of claim, correspondence, and a copy of an order of this court dated July 14, 2008 consolidating captioned actions. Plaintiffs and Landtek have submitted affirmations in opposition, and the County and Landtek have replied. Plaintiffs have submitted a sur-reply.

As a threshold matter it is noted that based upon the unopposed motion by the County this Court consolidated separate actions in connection with this matter under captioned index number by order dated July 14, 2008.

By their action, plaintiffs allege that on June 15, 2006, Sienna was injured as she entered a playground at Raynor Beach County Park in Lake Ronkonkoma, New York. They claim that as she pushed inward for a distance of approximately twelve inches on a gate at the entry of the park, it swung back into her forehead, causing a laceration above her left eyebrow and that she subsequently sought the assistance of a physician who sutured the wound. Sienna was seven years old and visiting the park for the first time on the occasion of the alleged injury. Plaintiffs claim that the gate was fabricated and installed by Landtek and consisted of heavy steel. It is further alleged that the park had undergone an extensive renovation and had reopened a week prior to the incident.

In support of its motion, Landtek points to the deposition transcript of Greg Sharp ("Sharp"), an employee of Landtek, who testified that the company was in the business of constructing athletic fields and that it contracted with the County to install athletic fields, fencing, parking lots, tennis courts, basketball courts, and sitting areas at Raynor Beach County Park. Specifically, as to the gate which allegedly caused Sienna's injury, Sharp testified that he did not believe that it was "intended to move in, but . . . the design of it allows it to move in." Sharp acknowledged that he was "not a gate expert," but that it was his "educated guess" that "some people mistakenly push [the gate] and [it] get[s] a bit out of whack." Sharp also testified that the hinges of the gate would become "fatigued" with overuse, causing it to swing partially inward. Landtek contends that it was the County's obligation to maintain the gate in a reasonably safe condition. According to Sharp, after completion of the installation, Ken Boyle, a County employee, inspected the project. According to Landtek, it was never informed by the County that there was any objection concerning the installation of the gate nor was it asked to make any changes or alterations following the completion of the job. Landtek also relies on the deposition of Ralph Borkowski ("Borkowski"), a County employee. Borkowski answered in the affirmative the question as to whether the County adopted the drawings of plans, including the gate, which were prepared by a consulting company, Cameron Engineering. Borkowski acknowledged that Landtek did not prepare the detailed drawings or plans for the various elements which were to be installed in the park. Those, he stated, "were drawn up by the consultant that was hired to draw them up." Citing *Hartofil v McCourt and Trudden Funeral Home, Inc.*, 57 AD3d 943 (2008), Landtek claims that as it performed its work on the park project, including the installation of the gate, in accordance with the contract plans, it may not be held liable for Sienna's injury unless the plans are "so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous." (*Hartofil* at 945).

By its cross motion, the County notes that its third-party complaint seeks indemnity from Landtek based upon the express terms of its contract and “to hold [Landtek] responsible pursuant to the insurance provisions of [its] contract.” According to counsel for the County, it has notified Landtek’s insurance carrier of the personal injury action, but had yet to hear as to whether its demand for defense and indemnity had been granted. The County relies upon the insurance provisions of the contract which, it contends, required Landtek to insure the County for losses such as those claimed by plaintiffs. The County provides a recitation of what it contends are the applicable portions of its contract with Landtek. Article 3 of the contract requires the contractor, in this instance Landtek, to “defend, indemnify and hold harmless the County, its Consultants (if any), officers, employees, agents, contractors or sub-consultants and other persons from and against all losses, claims, costs, judgments, liens, encumbrances and expenses, including attorney’s fees, by reason of liability imposed by law, for damage because of bodily injury . . . sustained by any person . . . arising out of this Agreement or out of the acts or omissions or negligence of the Consultant . . . even if such injuries to persons . . . are due, or claimed to be due. . . . to passive negligence of the County . . . except only in cases of the County’s sole active negligence.” It also relies upon the “Project Manual for Raynor Beach County Park” which includes the following indemnification clause: “Except for the Owners’ and/or Engineer’s own negligent acts, the Contractor shall pay and make good all losses and damages arising out of all causes connected with the Contract, and shall indemnify, defend and save harmless the Owner and Engineer from all claims, liability, and responsibility, of every nature and kind, for losses, damages, and injuries, which any person or persons may sustain or suffer by reason of or in any way arising out of the Contract.” The County also notes that the Project Manual contains a guarantee provision which requires the contractors on the project to guarantee the work done against defects “resulting from the use of inferior materials, equipment or workmanship for one (1) year(s) time for the date of Substantial Completion.” The latter provision, according to the manual, “shall be in addition to the individual specific guarantees called for in the Specifications.”

The County contends that the import of these provisions is readily apparent and that it places the ultimate indemnity responsibility upon Landtek. It further argues that “whether an indemnitor will be found liable after trial is a non-issue and irrelevant on a contractual indemnity motion.” As to its instant motion, the County argues that it need only demonstrate that its contract with Landtek required the latter to name the County as an additional insured on its policy and that the insurer failed to defend and indemnify the County. The County has also asserted a common law indemnity claim against Landtek based upon the performance of a negligent act solely within the latter’s province. It claims to have delegated responsibility for all aspects of the playground to Landtek which, it argues, is evidenced by the bid documents which led to the award of the contract to Landtek. Although the County acknowledges that it relied upon an architect who monitored the progress of construction and ensured that the terms of its contract with Landtek were fulfilled, it claims that such periodic inspection is inadequate to impose liability on the County.

In opposition to Landtek’s motion, plaintiffs submit an affidavit by Peter J. Sarich (“Sarich”), a safety expert in the field of amusement and recreational equipment and devices. Upon review of the relevant documentation, a visit to the site of the injury, photographs, the pleadings and various depositions, Sarich reached a number of conclusions based upon a reasonable degree of engineering certainty. Those conclusions included a finding that there were clear and definite deficiencies in the design of the gate, including its “failure to open exclusively outward away from the play area together with the failure to use a hinge with a ½ inch clear opening.” Sarich further concluded that those deficiencies “are in direct conflict with the generally accepted safety standards for fences and gates in play areas.” Citing the standards

articulated in ASTM F 2049 Standard Safety Performance Specification for Fences/Barriers for Public, Commercial, and Multi-Family Residential Use Outdoor Play Areas, Sarich found a failure to limit the swing of the single leaf pedestrian access gate to the outward direction away from the play environment; a failure to provide a self-closing, self-latching device on the access gate; a failure to provide at least ½ inch clear opening between the gate fence post on the hinge side and the square frame of the gate; and a failure to inspect the gates for proper closing and locking operation. Sarich noted that the “specifications for the construction of the gate are located within the project manual and on drawings provided by the County to LandTek.”

Plaintiffs also point to Sienna’s testimony in which she stated that she had never been to the park prior to the day of her accident and that when she ran up to the gate she stopped and had to push it past the lock and that it flung back at her causing it to strike her. In addition, plaintiffs rely on the deposition of William Gardener, a Suffolk County Parks Department employee, who, upon viewing photographs of the scene, indicated that he was not aware of any other gate at a County park which was designed to push inwards. Plaintiffs note that Landtek employees installed the fencing at the park with its own crew and that it fabricated the fencing product. Sharp’s testimony was also used to support plaintiffs’ motion. He testified that, based upon the plans and specifications, he did not believe the gates were intended to move inwards but that the design permitted such unintended movement. He further testified that it was his belief that the gates were designed to open 180 degrees by pulling back and rotating to the point of 180 degrees. Sharp also testified that the design of the gates would have been part of the plans and specifications which would have been submitted to and approved by the County prior to the commencement of building. He also indicated that the County would have been on site for inspection prior to approval and that the County never objected to the installation of the gates or requested any changes or alterations. Finally, plaintiffs point to Borkowski’s deposition in which he testified that gate hinges are typically designed to permit opening in one direction only. Borkowski also stated that the drawings approved by the County included the gate. In essence, plaintiffs contend that the gate designed by the County and fabricated and installed by Landtek was defective and that each defendant was liable for the alleged deficiencies thus precluding a summary determination in favor of either.

Landtek opposes the County’s cross motion, citing the terms of the contract between the parties and General Obligations Law § 5-322.1 as support for its claim that the County cannot be indemnified for its own negligence. It points to Borkowski’s testimony in which he acknowledged that the County established the specifications for the project and that it accepted or adopted the drawings or plans for the park upon completion of the design process. Landtek argues that since Borkowski was “an integral part of the ‘back and forth process’ concerning components . . . the County could be found to be negligent by a jury.” Landtek also claims that if the hinge of the gate had become “fatigued” as alleged by Sharp during his testimony, then it would have been “incumbent upon the County . . . to replace the hinge.” Landtek also contends that the motion by the County is premature because, it claims, there is an issue of fact as to which entity, if any, negligence can be attributed. It claims that the County is improperly seeking a declaratory judgment directing Landtek’s insurance carrier to defend and indemnify because its carrier is not part of the instant action.

By its reply, the County contends, as a threshold matter, that Landtek’s affirmation in opposition is untimely. It then disputes the alleged “prematurity” of its cross motion, urging that summary determination on contractual indemnity principles is appropriate when the contract at issue clearly demonstrates the

intention to indemnify. It also contends that General Obligations Law § 5-322.1 is inapplicable to the issue before the court. Claiming a failure on the part of Landtek to procure the insurance required under the terms of its contract with the County, it is argued that there is no need for “the County of Suffolk to . . . chase after an insurance company through a declaratory judgment proceeding.”

By its reply, Landtek disputes the qualifications of Sarich, claiming he is not an expert because he is neither an engineer nor qualified by training, work experience or education to provide an expert opinion. It claims that his opinions are “purely conclusory” and therefore insufficient to raise a question of fact. Plaintiffs, by a sur-reply, reiterate the qualifications of Sarich as recited in his affidavit and argue that he is competent to offer an opinion.

Sarich, according to his affidavit, is qualified as a safety expert in the field of amusement and recreational equipment and services based upon his 28 years in the field, his designation as a Level 2 national certification as an Advanced Amusement Ride Inspector, his current appointment as Chief Building Inspector and Safety Officer for the Village of Patchogue and his membership on the American Society of Testing and Materials (ASTM) F15-29 Subcommittee on Public Playground Safety. Sarich’s analysis found four design deficiencies with respect to the design of the gate which, he opines, contributed to Sienna’s injury: (1) failure to limit the swing of the single leaf pedestrian access gate to the outward direction away from the play environment; (2) failure to provide a self-closing, self-latching device on the access gate; (3) failure to provide at least ½ inch clear opening between the gate fence post on the hinge side and the square frame of the gate; and (4) failure to inspect gates for proper closing and locking operation.

According to Sharp’s testimony, Landtek “fabricated” the gate which allegedly caused the injury to Sienna. In response to an inquiry as to whether the inward movement of the gate was in accordance with its specifications, Sharp indicated stated, “I don’t think it’s intended to move in, but I think the design of it allows it to move in.” He further stated that the design is “a standard New York City Parks spec. That fence and that gate is probably in 90 percent of the parks in New York City.” He also stated that he was not “a gate expert.” According to Borkowski’s testimony, the plans, which were apparently prepared in conjunction with a consultant, were Suffolk County plans. Borkowski also acknowledged that the plans included a gate which was contemplated for use in the play areas. Upon viewing a photograph depicting the specific gate which is alleged to have caused Sienna’s injury, Borkowski testified that it appeared to open “slightly” in an inward direction. He testified that the gate was designed to “swing 180 degrees and stop at the fence.” Borkowski further stated that the gate “was intended to be pulled toward” an individual opening the gate “and then pushed all the way around.”

Summary judgment is a drastic remedy and is to be applied sparingly (*Andre v Pomeroy*, 35 NY2d 361 [1947]). The court’s focus in making such determination is upon issue finding, not issue resolving, and all competent evidence must be viewed in the light most favorable to the party opposing the motion (*Stillman v Twentieth Century Fox Corp.*, 3 NY2d 395 [1957]). To prevail on a motion for summary judgment, the movant must proffer sufficient evidence to eliminate all material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). A court will only entertain such motion after the moving party has established, by competent admissible evidence, that it is entitled to judgment as a matter of law. Orly if movant meets this burden is the opposing party obligated to submit evidence which raises a material issue of fact to preclude an award of summary judgment (*see Ware v Baxter Health Care*

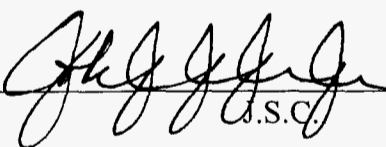
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Corp., 25 AD3d 863, 864 [2006]).

An agreement to purchase insurance coverage is separate from and treated differently than an agreement to indemnify (*see Longwood Central School District v American Employers Insurance Company*, 35 AD3d 550 [2006]). The County, however, has failed to establish a prima facie case that Landtek breached its contractual obligation to procure insurance. Rather, the affirmation of the Assistant County Attorney alleges only that “as of the date of this affirmation neither the third party defendant nor its insurers have agreed to defend and indemnify the County of Suffolk in reference to this litigation.” Further, an issue has been raised as to possible negligence on the part of the County with respect to the plans for the gate. An agreement which purports to indemnify a party for its own negligence violates public policy and the General Obligations Law. Landtek, as a builder, was justified in relying on the County plans and specifications with respect to the fabrication and installation of the gate unless those plans were so obviously defective that a contractor of ordinary prudence would have been alerted to danger of the project (*see West v City of Troy*, 231 AD2d 825 [1996]). A question of fact exists as to whether the gate which was designed by the County was inherently dangerous based on the deficiencies alleged by Sarich. The County does not deny that its consultant developed the design of the gate and that it adopted those plans as its own. Assuming, however, the question as to whether the gate was inherently dangerous is answered by a fact finder in the negative, the concomitant question as to whether it was negligently fabricated or installed remains

As to Landtek’s motion to dismiss plaintiffs’ complaint on the ground that it owes no duty of care, it must be noted that, generally, a contractual obligation will not confer tort liability in favor of a third party, in this instance, plaintiffs (*see Espinal v Melville Snow Contrs.* 98 NY2d 136 [2002]). The Court of Appeals, however, in *Espinal* recognized three scenarios in which a party to a contract may be deemed to have assumed a duty of care to non-contracting third parties. The circumstances under which tort liability for injuries sustained by a third person may be imposed on a contractor are: (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* at 140, quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (*Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]); (2) where a plaintiff suffered injury as a result of her reasonable reliance on the continued performance of the contracting party’s obligation (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220 [1990]); and (3) where the contracting party undertook to displace the landowner’s duty to safely maintain the property (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]). Again, a question of fact exists as to the whether the gate was negligently fabricated or installed raising an issue as to whether Landtek may have launched an instrument of harm thus precluding a summary determination in its favor.

Dated: 16 April 2010



 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION