

Brown v City of New York

2010 NY Slip Op 30984(U)

April 20, 2010

Supreme Court, New York County

Docket Number: 101644/01

Judge: Barbara Jaffe

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

BARBARA JAFFE
J.S.C.

PART 5

Index Number : 101644/2001

BROWN, ERIC

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

CAL #13

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/20/10
APR 20 2010

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
ERIC BROWN,

Plaintiff,

-against-

CITY OF NEW YORK, TROCOM CONSTRUCTION
CORP., ANTHONY SANTORO, JOSEPH TRAVATO,
FELIX EQUITIES, INC., FELIX INDUSTRIES, INC.,
URBITRAN ASSOCIATES, INC., URBITRAN
ASSOCIATE ENGINEERS, P.C., URBITRAN
CONSTRUCTION AND MANAGEMENT CORP.,
JOHN COELLO, and ROBERT COELLO,

Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiff:

For Trocom defendants:

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For defendant City:

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Corporation Counsel
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By notice of motion dated September 22, 2009, defendants Trocom Construction Corp. (Trocom), Anthony Santoro, and Joseph Travato (collectively, Trocom defendants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against them. By notice of motion dated September 24, 2009, defendant City of New York (City) moves pursuant to CPLR 3211 and 3212 for an order dismissing the complaint against it. On March 16, 2010, plaintiff's request for an adjournment to submit opposition papers was denied, and the motions were submitted without opposition except that the Trocom defendants oppose City's motion to the extent that it is seeking judgment on its cross-claim for

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indemnification.

I. BACKGROUND

In April 1998, City and Trocom entered into a contract by which Trocom agreed to perform reconstruction work along the Henry Hudson Parkway (Parkway). Pursuant to article seven of the contract, Trocom was required to indemnify City against any claims arising from Trocom's negligent performance of the contract or failure to comply with any of its provisions or the law. (Affirmation of Lam D. Le, Esq., dated Sept. 22, 2009 [Le Aff.], Exh. F).

On April 21, 1999, City granted Trocom a permit to enter upon and restrict the flow of traffic on the Parkway in order to perform the agreed-upon work. (*Id.*, Exh. K). Trocom was thereby permitted to close the right lane of traffic on the southbound Parkway from West 125th Street to West 100th Street during certain hours, and when the work was performed at night, the work site was required to be illuminated to the satisfaction of the Engineer-in-Charge (EIC). (*Id.*). On October 25, 1999, the permit was amended to allow Trocom to close both the right and center lanes on November 6, 1999 from 1 a.m. to 6:30 a.m. (*Id.*).

On November 6, 1999, pursuant to the permit, Trocom was at the site commencing at 1:00 a.m. installing a catch-basin on the right lane of the southbound Parkway at or about West 103th Street. (*Id.*, Exhs. E, J, L). It closed only the right lane, which it marked with safety barrels and a truck equipped with a flashing arrow board. (*Id.*). Barrels were placed from the start of the lane closure to the truck, spanning approximately 1,500 feet, and for another 500 feet to the end of the construction zone, along with warning signs. The EIC approved the work site, including the lane closure. (*Id.*, Exhs. E, I). An air compressor was located within the construction zone. (*Id.*).

On November 6 at approximately 3:20 a.m., plaintiff, Richie Vasquez, Rafael Costanza,

and Osvaldo Rolon were riding in a vehicle driven by defendant Robert Coello (Coello) and owned by defendant John Coello. They were traveling in the southbound lane of the Parkway near West 103rd Street (*id.*, Exh. D). The speed limit was 50 miles per hour. (*Id.*, Exh. G). At a hearing held at the Department of Motor Vehicles on June 6, 2000, Coello testified that he was driving in the middle lane of the Parkway at 50 to 55 miles per hour when he saw a car coming up fast behind him. (*Id.*, Exh. J). He sped up to approximately 60 miles per hour, and fearing that the other car would hit him, Coello swerved into the left lane to get out of its way, hit the left curb of the Parkway, and lost control of the car. The car spun around, and he let go of the steering wheel as he could not control it, and did not try to brake. The car veered into the construction zone, hit Trocom's air compressor and then the guardrail, became airborne, and landed in the Hudson River. (*Id.*, Exh. J). Rolon died and the others were injured.

Coello denies having seen the construction zone before the accident or drinking alcohol that night, but admits that the car had a recurring alignment problem and would pull to the left if he let go of the steering wheel. (*Id.*, Exh. J).

Vasquez, the front seat passenger, did not see the construction zone until the car was swerving out of control. (*Id.*, Exh. J). According to plaintiff, who was in the back seat, Coello had accelerated after passing West 155th Street on the Parkway. He and Costanzo fruitlessly yelled at Coello to slow down. Plaintiff did not notice the construction zone before the accident. (*Id.*, Exh. D).

At a deposition taken on August 2, 2005, Joseph Travato, Trocom's supervisor at the construction site that morning, heard what sounded like a speeding, out of control vehicle, an engine racing, the screeching of tires or brakes, and finally a crash. (*Id.*, Exh. E).

Juan Perez, a New York City Police Department (NYPD) Highway Unit Patrolman,

arrived at the scene soon thereafter and investigated the accident. (*Id.*, Exh. G). He prepared a sketch of the scene, and included in it skid marks allegedly left on the road by the car. He also administered an alcohol test to Coello which resulted in a zero reading although he did not record the time he administered it. He thought it was within two hours of the accident. (*Id.*). An uncertified pathology report reflects that an alcohol test given Coello at 4:35 a.m. the day of the accident yielded a toxic level reading. (*Id.*, Exh. M).

In an undated NYPD report, the preliminary cause of the accident was attributed to Coello's speed which was calculated at 52 miles per hour. (*Id.*).

II. PROCEDURAL BACKGROUND

On or about February 3, 2000, plaintiff served a notice of claim on City, in which he alleged that City negligently manufactured, designed, maintained or controlled the guardrail at the accident location and that the guardrail was defective as evidenced by its failure to prevent Coello's car from leaving the roadway. (Affirmation of Craig Koster, Esq., dated Sept. 23, 2009 [Koster Aff.], Exh. A).

On or about November 4, 2002, plaintiff filed an amended complaint against defendants, alleging that Coello's car struck a guardrail and/or air compressor, that the non-individual defendants carelessly owned, operated, maintained and/or controlled the roadway so as to cause the accident, and that the Coello defendants carelessly and negligently operated the car. (*Id.*). On or about January 6, 2003, the Trocom defendants served their answer to the amended complaint. (*Id.*, Exh. B).

In his verified bill of particulars, plaintiff alleges that the non-individual defendants created a negligent, hazardous, trap-like, defective, and unsafe condition on the Parkway or permitted it to exist. (*Id.*, Exh. C).

On May 25, 2007, the complaint and all cross-claims were dismissed against the Urbitran and Felix co-defendants.

III. MOTIONS FOR SUMMARY JUDGMENT

A. Summary judgment standard

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). Consequently, a defendant moving for summary dismissal must negate, *prima facie*, an essential element of the plaintiff’s cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

B. Trocom defendants’ motion

1. Contentions

The Trocom defendants argue that plaintiff cannot prove that they breached any duty owed to him as they were permitted to close the right lane on the Parkway on the day of the

accident, and had placed a sufficient number of safety barrels on the Parkway to close the right lane safely along with several warning signs. (Trocom Memorandum of Law, dated Sept. 22, 2009). Moreover, even if they had breached a duty owed to plaintiff, their actions did not proximately cause plaintiff's injuries absent any proof that the lane closure caused Coello to lose control of the car. Rather, they maintain that the sole proximate cause of the accident was Coello's negligence in driving too fast while intoxicated and notwithstanding the acknowledged alignment problem. They rely on Vehicle and Traffic Law § 1103(b) as precluding their liability absent proof that they recklessly placed the air compressor within the construction zone. (*Id.*).

2. Analysis

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]). Although negligence actions are not generally suitable for summary disposition, a motion for summary judgment may be granted where "the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (*Spense v Lake Svce. Station, Inc.*, 13 AD3d 726 [1st Dept 2004], quoting *Morowitz v Naughton*, 150 AD2d 536 [2d Dept 1989]).

Ordinarily, a duty of care to a third party does not arise from a contractual obligation between two other parties. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138-139 [2002]). However, a contracting party may be liable in tort to a third party if it creates an unreasonable risk of harm to others or increases that risk while discharging its contractual obligation. (*Church ex rel. Smith v Callanan Indus., Inc.*, 99 NY2d 104 [2002]).

Here, the Trocom defendants have demonstrated that in discharging their contractual obligations to City on November 6, 1999, they were permitted to close the right lane of the

Parkway, they did so by placing a large number of safety barrels at a distance both required and approved by City, and placed numerous warning signs and flashing arrow signs before the closure. There is no evidence that the lane was improperly closed or that the air compressor was improperly located and thus, there is no evidence that the Trocom defendants failed to exercise reasonable care in closing the lane, alerting motorists to the closure, or placing the air compressor, or that they created or increased an unreasonable risk of harm to others.

A harm is proximately caused by an event when it “in a natural and continuous sequence, unbroken by any new cause, produces the event, and, without which, the event would not have occurred,” or is a substantial factor in bringing about the harm. (79 NY Jur 2d, Negligence § 47 [2010]).

The Trocom defendants have demonstrated, *prima facie*, that the proximate cause of the accident was not the construction site, and there is no evidence that Coello changed lanes due to the presence of the construction site. Rather, neither he nor any of his passengers noticed the site notwithstanding its prominence. Consequently, there is no evidence that the presence of the closure had any impact on Coello’s actions or that the Trocom defendants proximately caused the accident. (*See eg Tucker v Coca-Coca Bottling Co. of Buffalo, Inc.*, 265 AD2d 819 [4th Dept 1999] [contractor did not proximately cause accident even if negligent in removing some warning signs or reducing width of lane as plaintiff stated that he saw no signs and saw trailer at last moment and swerved to avoid it]).

Moreover, the mere fact that a defendant’s conduct provides an opportunity for the harm to occur is not sufficient to create a factual issue as to proximate cause. (79 NY Jur 2d, Negligence § 48). In *Margolin v Friedman*, 43 NY2d 982 (1978), the plaintiff was injured after he lost control of his car at the defendant’s car wash and posited the defendant’s liability based

on the premises' improper design or maintenance or the absence of a warning sign. The Court disagreed, reversing a judgment after trial, finding that the accident was proximately caused by the plaintiff's loss of control of the car, and that the defendant had "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes." (43 NY2d at 983).

As in *Margolin*, even if the Trocom defendants had negligently closed the lane or placed the compressor, the evidence demonstrates that the accident was caused solely by Coello's decision to swerve from the middle to the left lane, his collision with the curb, his release of the steering wheel, and his failure to brake. His alleged speed, intoxication, and alignment problem, while they may have caused him to lose control of the car, did not proximately cause the accident. Rather, Coello's actions were the sole proximate cause of the accident, resulting the car entering the construction site and river.

Similarly, in *Stein v Pat Noto, Inc.*, 226 AD2d 624 (2d Dept 1996), the plaintiff was injured after his vehicle left a roadway and collided with a construction site. The court summarily dismissed the action, holding that the proximate cause of the accident was the plaintiff's undisputed loss of control of his vehicle and that the construction site was the occasion for the occurrence, not its cause. (*See also Latstuvka v Pearson*, 32 AD3d 500 [2d Dept 2006] [where plaintiff's motorcycle was clipped by other vehicle, forcing it to leave roadway and strike sign, proximate cause of accident was manner in which vehicles were operated and not defendant's placement of sign]; *Reynolds v City of New York*, 221 AD2d 185 [1st Dept 1995] [even if construction firm failed to place cones at construction site, no showing that their action or inaction caused driver to swerve on wet pavement into oncoming traffic]; *Pizzaro v City of New York*, 188 AD2d 591 [2d Dept 1992], *lv denied* 82 NY2d 656 [1993] [as accident occurred

at intersection when driver swerved to avoid collision with other vehicle, no evidence that defendant's failure to warn of hazards of intersection was proximate cause of accident]).

Thus, the Trocom defendants have met their burden, *prima facie*, of establishing that there are no triable issues as to the cause of the accident, and the record reflects no evidence that they were negligent. In light of this result, I need not address the Trocom defendants' defense based on the Vehicle and Traffic Law.

C. City's motion

1. Contentions

City contends that plaintiff's notice of claim is defective because he alleges in it that the accident was caused by a defective guardrail whereas in the amended complaint he alleges that the accident occurred due to City's failure to operate the roadway safely, thereby causing Coello's vehicle to hit the guardrail. (City's Memorandum of Law, dated Sept. 24, 2009). It denies that it had a duty to plaintiff arising out of its inspection of the construction site or enforcement of guidelines for setting up the site, that it breached its duty, or that plaintiff's accident was proximately caused by negligence relating to the construction site. Finally, City asserts that if the complaint is not dismissed against it, it is entitled to contractual and/or common law indemnification from Trocom. (*Id.*).

2. Analysis

The allegations set forth in the notice of claim and the complaint are essentially consistent in that they each rely on defendants' alleged failure to maintain the roadway in a safe condition. (*See eg Temple v Chenango County*, 228 AD2d 938 [3d Dept 1996] [whether defect was proximate cause of accident is irrelevant if it was substantial factor in aggravating plaintiff's injuries; plaintiff alleged that guardrail would have prevented vehicle from going down

embankment and causing her injuries]). The notice of claim is thus not defective.

Even if City had a duty to plaintiff (*see Thompson v City of New York*, 78 NY2d 682 [1991] [city has duty to keep streets in reasonably safe condition and may be liable if it permits dangerous condition to exist]; *Gregorio v City of New York*, 246 AD2d 275 [1st Dept 1998], *lv denied* 93 NY2d 917 [1999] [municipality has duty to provide and maintain adequate barriers]), City has demonstrated, *prima facie*, that the construction site was properly set up, and that the lane was properly closed, and that there is no evidence that the guardrail was unsafe or defective. Absent any evidence that City breached any duty to plaintiff, there is no triable issue of fact as to City's liability. (*See eg Lekutanovic v City of New York*, 44 AD3d 461 [1st Dept 2007] [plaintiff claimed that she was injured after vehicle jumped curb and struck her due to defendant's failure to maintain guardrail at location; City's duty to maintain safety of roadway is satisfied when roadway is reasonably safe "for those who obey the rules of the road."]).

In light of this result, I need not determine whether City is entitled to contractual and/or common law indemnification from Trocom.

IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that the Trocom defendants' motion for an order granting them summary judgment is granted; it is further

ORDERED, that defendant City's motion for an order granting it summary judgment is granted; it is further

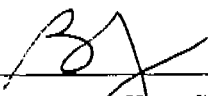
ORDERED, the complaint is dismissed against defendants Trocom Construction Corp., Anthony Santaro, Joseph Travato, and the City of New York, with costs and disbursements to

defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue and the remaining parties are to appear for the previously scheduled mediation on April 27, 2010 at 11 am in room 103; and it is further

ORDERED, if the matter is not settled at the mediation, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Defendants shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158.

This constitutes the decision and order of the court.


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 20, 2010
New York, New York

APR 20 2010

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APR 23 2010
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