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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x

CHRISTOPHER TARTAGLIONE,

Plaintiff,

-against-

JENNIFER JOSEPH, MERRICK JOSEPH, TRADE WINDS ENVIRONMENTAL RESTORATION, INC., DEPENDABLE TRANSPORT, INC. and JOSEPH RIZZUTO,

Defendant,

----------x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 15259-07

MOTION SEQ. NO: 3, 4, 5

SUBMIT DATE: 08/10/10

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
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Notice of Motion.....4
Opposition.....5, 6
Cross-Motion.....7
Opposition.....8, 9
Reply.....10, 11

Motion by defendants Dependable Transport, Inc. ("Dependable") and Joseph Rizzuto ("Rizzuto") for an order pursuant to CPLR 3211(a)(7) to dismiss plaintiff's complaint for failure to state a cause of action and/or in the alternative for summary judgment is denied. Cross-motion by defendants Jennifer Joseph and Merrick Joseph for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them is denied.

Motion by plaintiff for an order pursuant to CPLR 3024 granting him leave to amend his second amended verified bill of particulars and serve a third amended bill of particulars is granted.

This is an action to recover personal injuries allegedly sustained by plaintiff on March 19, 2007 at approximately 12:00 p.m.

The accident occurred in the basement of the premises located at 1927 Anita Court, Baldwin, New York. The Josephs are the owners of the premises and have owned the property since 1998.

On or about March 10, 2006, Merrick Joseph contacted Dependable to schedule a delivery of home heating oil for that day. Dependable and Rizzuto are in the business of providing home heating oil for residential customers on an as-needed basis. They do not provide any heating system repair or maintenance service.

The Josephs had a 275 gallon heating oil tank located in an unfinished, below-ground basement. Merrick Joseph and Joseph Rizzuto both testified that Merrick Joseph ordered 200 gallons of heating oil. The delivery ticket which is stamped by the truck itself indicates that 204 gallons of heating oil was delivered.

After the delivery truck driver completed the delivery, he informed Mr. Joseph that a small amount of oil had spilled outside the fill line, to which Mr. Joseph told him "that's OK." Mr. Joseph then went inside to check the basement, where he saw oil coming out of the tank.

After the spill, Rizzuto began to make arrangements to have a remediation company clean up the spill. Rizzuto also went to the Josephs' home and upon arrival, he saw Trade-Winds Environmental Restoration, Inc. ("Trade-Winds") was already at the scene. From March 10, 2006 up until the date of plaintiff's accident on March 19, 2006, Trade-Winds was at the Josephs' home every day. Mr. Schrimp was the project manager of Trade-Winds.

In the course of removing all of the oil from the Josephs' basement, Trade-Winds excavated a portion of the basement floor approximately five feet by five feet, and approximately five to six feet deep. According to Mr. Strabia, a Trade-Winds' employee, the hole was covered with plywood and caution tape.

After the hole was dug, and all of the contaminated material removed, the New York State Department of Environmental Conservation inspected the premises before backfilling the excavation.

Mr. Joseph also contacted Automatic Heat Service to replace the boiler and heating oil tank that had been damaged by the oil spill. Tim Buchman, the principal of Automatic Heat, and his assistant, Tartaglione, were the individuals responsible for performing the work in the Josephs' basement.

On the date of the accident, Mr. Buchman and Mr. Tartaglione were preparing to replace the

oil burner when plaintiff fell into the aforementioned hole.

In the second amended verified bill of particulars, plaintiff alleges that "he tripped and fell into a deep latent hole that defendants had covered and/or camouflaged with a certain piece of cardboard."

Dependable and Rizzuto move for an order dismissing the complaint on the grounds that the complaint fails to state a cause of action and/or no issues of fact exist.

In support thereof, they assert that the following facts are undisputed:

Neither Dependable nor Rizzuto owned, leased, managed or otherwise controlled the premises on which plaintiff was injured;

Neither Dependable nor Rizzuto caused or created the hole into which plaintiff fell;

Neither Dependable nor Rizzuto had any duty to safeguard, cover, or otherwise warn against the presence of the hole; and

Neither Dependable nor Rizzuto had any knowledge of the existence of the hole.

Trade-Winds' employees have admitted to digging the hole.

In opposition to the motion and in support of their cross-motion, the Josephs argue that Dependable and Trade-Winds were independent contractors and they cannot be held liable for their negligent acts. Specifically, the Josephs note that Dependable retained Trade-Winds to clean up the spill and they did not know any details about what Trade-Winds was doing at the site other than "clean up." Further, even though Mr. Joseph acknowledged that he saw the hole at some point prior to plaintiff's accident, he denied being aware of the day of plaintiff's accident or even the day prior because he never went into the basement on those days.

Trade-Winds objects to the timeliness of the Josephs' cross-motion which was made more than 60 days after the note of issue was filed and is therefore untimely (*Grande v Peteroy, supra*). An untimely motion or cross-motion for summary judgment, however, may be considered by the court, provided the late motion is based on "nearly identical" grounds as the timely motion (*Lennard v Khan*, 69 AD3d 812 [2nd Dept. 2010]; *Petito v Einhorn*, 62 AD3d 846, 847 [2nd Dept. 2009]). "Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record any award summary judgment to a non-moving party" (*Lennard v Khan, supra; Grande v Peteroy, supra; see* CPLR 3212[b]).

Under the circumstances, we find that the untimely cross-motion should be considered.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Salvatore v Kumari*, 45 AD3d 560 [2nd Dept. 2007], *lv to app den.* 10 NY3d 703 [2008], quoting *Morad v Morad*, 27 AD3d 626, 627 [2nd Dept. 2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez, supra* at 87-88). Notably, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Crepin v Fogarty*, 59 AD3d 837 [3rd Dept. 2009]; *Farber v Breslin*, 47 AD3d 873 [2nd Dept. 2008]).

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept. 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination, is the key to summary judgment (*see Kris v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept. 1993]).

Summary judgment is rarely appropriate in negligence actions (*Ugarriza v Schmeider*, 46 NY2d 471, 475 [1979]), even where the salient facts are conceded, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Davis v Federated Department Stores, Inc.*, 227 AD2d 514 [2nd Dept. 1996]; *see John v Leyba*, 38 AD3d 496 [2nd Dept. 2007]).

On this record, neither defendant has made a *prima facie* showing of entitlement to summary judgment dismissing the complaint. Questions of fact exist including whether the Josephs had prior actual notice of the hole in which plaintiff ultimately fell and whether Dependable pumped an

excessive amount of oil into the oil tank. The issue of comparative negligence is reserved for the trier of fact (*see also McNully v Corwin*, 30 AD3d 482 [2nd Dept. 2006]).

The branch of the motion which seeks leave to amend the bill of particulars is granted. Leave to amend a bill of particulars is freely given absent prejudice or surprise, unless the amendment is sought on the eve of trial (*Nociforo v Penna*, 42 AD3d 514 [2nd Dept. 2007]; *Grande v Peteroy*, 39 AD3d 590 [2nd Dept. 2007]). While we note that the note of issue was filed on March 22, 2010 and this motion was filed on June 15, 2010, there is no evidence that the amendment was sought on the eve of trial, or that the amendment would prejudice defendants. Hence, any delay is insufficient to defeat this motion (*Ito v 324 East 9th Street*, 49 AD3d 896 [2nd Dept. 2008]). To avoid any prejudice, however, we grant defendants the right and opportunity to conduct a physical examination of plaintiff (*Grande v Peteroy, supra*). Accordingly, plaintiff's motion for leave to amend his second bill of particulars is granted and the third amended verified bill of particulars annexed to the motion shall be deemed served when a copy of this order is served upon the attorney for the defendants.

In view of the foregoing, the motion and cross-motion for summary judgment are denied and the motion by plaintiff for leave to amend is granted.

This constitutes the decision and order of the Court.

DATED: September 17, 2010

ENTERED
SEP 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

To:

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