

D'Anna v Incorporated Vil. of Hempstead

2010 NY Slip Op 33116(U)

November 1, 2010

Supreme Court, Nassau County

Docket Number: 025366/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____X

SALVATORE D'ANNA,

Plaintiff,

Index No. 025366/09
Motion Sequence...01, 02, 03, 04,
05, 06, 07
Motion Date... 09/30/10

-against-

THE INCORPORATED VILLAGE OF HEMPSTEAD,
THE TOWN OF HEMPSTEAD, THE COUNTY OF
NASSAU, JACKSON PRIME REALTY, LLC,
MILLENNIUM TOYOTA, RED ROCK INDUSTRIES,
INC., J.S. HEMPSTEAD REALTY, LLC, GALLI
ENGINEERING. P.C., MILLENNIUM SUPER STORE,
LTD., NEW YORK AUTOMOTIVE GIANT, LLC.,
VIGILANT CESSPOOL & SEWER SERVICE, INC.,
DOBLER CHEVROLET, INC., GLEN BROCK,
JOHN STALUPPI and JOHN F. CAPOBIANCO,

Defendants.

_____X

Papers Submitted:

- Notice of Motion (Mot. Seq. 01).....x
- Notice of Motion (Mot. Seq. 02).....x
- Notice of Motion (Mot. Seq. 03).....x
- Notice of Motion (Mot. Seq. 04).....x
- Notice of Motion (Mot. Seq. 05).....x
- Notice of Motion (Mot. Seq. 06).....x
- Notice of Cross-Motion (Mot. Seq. 07).....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Affirmation in Partial Opposition.....x

Affirmation in Opposition.....	X
Affirmation in Opposition.....	X
Affirmation in Opposition.....	X
Affirmation in Opposition.....	X
Affirmation in Partial Opposition.....	X
Reply.....	X
Reply Affirmation.....	X
Reply Affirmation.....	X
Reply.....	X
Reply.....	X
Reply Affirmation.....	X
Reply Affirmation.....	X

Upon the foregoing papers, the motion (Mot. Seq. 01) by the attorneys for the Defendant, The Incorporated Village of Hempstead (hereinafter “Village”) seeking an order, pursuant to CPLR § 3212 granting summary judgment in favor of the Village dismissing the complaint and all cross-claims against it; the motion (Mot. Seq. 02) and the Amended Notice of Motion (Mot. Seq. 05) by the attorneys for the Defendant, Galli Engineering P.C. (hereinafter “Galli”) seeking an order pursuant to CPLR § 3212 granting summary judgment in favor of Galli dismissing the complaint and all cross-claims against Galli; the motion (Mot. Seq. 03) by the attorneys for the Defendant, The County of Nassau (hereinafter “County”) seeking an order pursuant to CPLR § 3212 granting summary judgment in favor of the County dismissing the complaint and all cross claims against the County; the motion (Mot. Seq. 04) by the attorneys for the Defendant, The Town of Hempstead (hereinafter “Town”) seeking an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint and all cross-claims against the Town; the motion (Mot. Seq. 06) by the attorneys for the Defendants, J.S. Hempstead Realty, LLC and John Staluppi (hereinafter

“J.S. Hempstead” and “Staluppi”), seeking an order pursuant to CPLR § 3212 granting summary judgment in favor J.S. Hempstead and Staluppi dismissing the complaint and all cross-claims against them; and the cross-motion (Mot. Seq. 07) by the attorneys for the Defendant, Red Rock Industries, Inc. (hereinafter “Red Rock”) seeking an order pursuant to CPLR § 3211 (a) (7) and CPLR § 3212 granting dismissal and summary judgment in favor of Red Rock dismissing the complaint and all claims against it are determined as herein provided.

This is an action for personal injuries allegedly sustained by the Plaintiff on December 5, 2008. The Plaintiff alleges that he slipped and fell on the west side of North Franklin Street, Hempstead, New York approximately 50 feet south of the southwest corner of Smith Street and North Franklin Street. The area is adjacent to 286 N. Franklin Street, Hempstead, New York, which is also known as 257 N. Franklin Street, Hempstead, New York and referred to hereinafter as the “subject premises.” The Plaintiff is a retired union iron worker now employed by a union to protest at “non-union construction sites.” Since October, 2008, the Plaintiff was in charge of bringing a large inflatable rat to the subject construction site. He had set up the inflatable rat at the same location and place on the sidewalk at the subject construction site prior to the alleged accident.

In support of its motion for summary judgment, the Village has submitted an affidavit executed by the Village clerk. Pursuant to Section 39-1 of the Code of the Village of Hempstead, prior written notice of a sidewalk defect must be given to the Village Clerk,

as a condition precedent to the commencement of an action against the Village. Pursuant to Section 4-402(g) of the New York Village Law, the Village Clerk is the party required to maintain an index record of all written notices of defects received by the Village. The Village Clerk states that she investigated and conducted a search for a period of five (5) years prior to and including December 5, 2008 (the date of the Plaintiff's alleged accident) to determine if the Village received any prior written notice of a defect at the Plaintiff's accident site. Pursuant to Section 39-1 of the Village code, her office conducted the search of the Village's "Sidewalk Book," the official depository index of all prior written notices received by the Village reporting any defective streets, highways, bridges, coverts, crosswalks, sidewalks, traffic signs, parking fields/parking lots, walkways, footpaths or bicycle paths. She asserts the search revealed that the Village did not receive any prior written notice of the existence of a defect at the location of the Plaintiff's alleged accident for a period of five (5) years prior to and including December 5, 2008. Based on the search, the Village did not receive any prior written notice of a defect at the location of the Plaintiff's alleged accident, as required by General Municipal Law, Section 50-e; Village Law, Section 6-628; Section 9804 of the CPLR; and Section 39-1 of the Incorporated Village of Hempstead Code.

Also submitted is an affidavit executed by a senior engineering aide in the Public Works/Engineering Department for the Village. He also investigated and conducted a search of the property records, including the sidewalk, curb cut and/or driveway adjacent

to the premises commonly designated as 286 N. Franklin Street, Hempstead, New York. He stated that a search of the property records maintained by the Public Works/Engineering Department for 286 N. Franklin Street, Hempstead, New York, and for 257 N. Franklin Street, Hempstead, New York, revealed that the Village does not own the property contiguous to the location of the alleged accident. Pursuant to Section 116-1(b) of the Hempstead Village code, the owner and/or occupant of the real property contiguous to a sidewalk area is responsible for maintaining said sidewalk. Since the Village did not own the property contiguous to the site of the alleged accident, The Village was not responsible for maintaining the area at issue. Section 116-2 of the Hempstead Village code makes the owner or occupant of the real property, contiguous to the alleged accident site, liable for any personal injuries emanating from said accident site. The aide also checked the records for a period of five (5) years prior to and including December 5, 2008 to determine if the Village performed any work at the location at issue. The records disclosed that the Village did not perform any work at the premises or area in issue during the five years prior to and including December 5, 2008. Additionally, there is no evidence to support a claim that the Village created the defect through an affirmative act of negligence.

The claim against the Defendant, Galli Engineering P.C. (Galli) is that Galli was negligent in the manner in which it owned, operated, inspected, controlled, repaired and maintained the subject premises causing the adjacent sidewalk to become defective (complaint at ¶¶ 158-174). Richard D. Galli, the President of Galli, has submitted an

affidavit in which he states that in September 2009 he was contacted by the Defendant, Red Rock Industries to inspect and certify fireproofing that had been installed in a building located on the subject premises. Mr. Galli states that on September 22, 2009 he performed an inspection of fireproofing installed on a building located at the subject premises and certified the fireproofing complied with applicable project specifications. Mr. Galli also states that no other work was undertaken by Galli at the property either before or after the September 22, 2009 inspection. The agreement between Galli and Red Rock Industries was oral and not in writing.

In support of its motion for summary judgment the County argues that Nassau County Administrative code §§ 12-4.0 (c) (1) and 12-4.0 (c) (2) provides that jurisdiction over sidewalks abutting roadways under the County's jurisdiction falls to the Incorporated Village in which they lie. Therefore, the County argues the Plaintiff's action against the County should be dismissed since the alleged accident occurred on a sidewalk in the Incorporated Village of Hempstead. As such, the County contends it has no jurisdiction over the subject location and no duty is owed to the Plaintiff. Further, the County submitted the affidavit of Veronica A. Cox, an employee in the Claims and Investigations Bureau of the Office of the Nassau County Attorney, which establishes that the County did not receive prior written notice of the defects alleged by the Plaintiff. Ms. Cox's responsibilities not only included maintaining the County notice of claim files, but also maintaining of the County notice of defect files which contain written complaints. According to Ms. Cox, she

personally searched the County notice of claim and notice of defect files located at the Office of the Nassau County Attorney, One West Street, Mineola, New York 11501 to determine whether the Office of the Nassau County Attorney received prior written notice of any defective conditions on the sidewalk adjacent to the premises known as 257 North Franklin Street (also known as 286 N. Franklin Street), Hempstead, New York 11501 for a period of five (5) years prior to and including December 5, 2008. Said files are kept by location and year. Based upon said search, she determined that the County received no prior notices of claim or prior written complaints involving any defective conditions at the subject location for a period of five (5) years prior to and including December 5, 2008.

In support of its motion for summary judgment, the Town of Hempstead has submitted an affidavit of Andrew A. Brust, the Records Access Officer of the Sidewalk Division of the Highway Department of the Town of Hempstead, that states from his own personal knowledge that the Town did not own, operate, maintain, inspect, repair or perform construction work to the sidewalk at the subject accident location on or prior to December 5, 2008. Further, he states that the sidewalk is not under the jurisdiction of the Town, but rather, the sidewalk at the subject accident location is located within the Incorporated Village of Hempstead. Additionally, he states that there are no records reflecting prior written notice to the Town about any defective condition regarding the sidewalk at the location of the subject accident. Prior written notice of a defective sidewalk condition is required by Chapter 6 of the Code of the Town of Hempstead, specifically Section 6-3 and Section 65-a

subd. 2 of the Town Law of the State of New York. He also states there were no contracts involving the Town regarding the repair, maintenance or construction work performed to the sidewalk at the subject accident location prior to the date of the accident. The Town has established there is no connection between the Town and the site of the Plaintiff's alleged accident, with respect to its ownership, operation, maintenance, inspection or repair of the sidewalk at the subject accident location. The Town performed no affirmative acts including any repair or maintenance work to the sidewalk at the subject accident location, had no contracts for the maintenance or repair of the sidewalk, and had no prior written notice of any defect.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v. Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611 (2nd Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132 (2nd Dept. 1986).

The Village, the Town, the County and Galli have each made an adequate *prima facie* showing of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such

facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v. Associated Fur Mfgs, Inc.*, 46 N.Y.2d 1065 (1979). Conclusory statements are insufficient. *Sofsky v. Rosenberg*, 163 A.D.2d 240 (1st Dept. 1990) *aff'd* 76 N.Y.2d 927; *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *see Indig v. Finkelstein*, 23 N.Y.2d 728 (1968); *Werner v. Nelkin*, 206 A.D.2d 422 (2nd Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781 (1st Dept. 1981), *app disp* 53 N.Y.2d 1028; *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 A.D.2d 868 (3rd Dept. 1993), *lv app den.* 82 N.Y.2d 660. None of the parties have presented evidentiary proof in admissible form to create an issue of fact to preclude the granting of summary judgment to the Village, the County, the Town and Galli.

There is no showing that any of the other parties made any attempt to discover facts at variance with the claims of the Village, the County or the Town. *See Monteleone v. Village of Floral Park*, 123 A.D.2d 312 (2nd Dept. 1986). None of the other parties offer any evidence in admissible form to refute Galli's assertion that it did not undertake work at the subject premises until 10 months after the alleged incident. Nor has any party provided any basis, other than speculation, for this Court to conclude that discovery will yield information inconsistent with the affidavits provided by the Defendant, Galli. *See White v. NYC Transit Authority*, 308 A.D.2d 341 (1st Dept. 2003).

In the affirmation in support of the motion by the attorneys for the Defendants, J.S. Hempstead Realty, LLC and John Staluppi, the attorney states that "the defendants J.S.

Hempstead Realty and John Staluppi are alleged to be the absentee owners of the adjacent premises.” There is no affidavit in evidentiary form from either Defendant, J.S. Hempstead Realty or John Staluppi attesting to personal knowledge of the alleged facts affirmed by their counsel. It is black letter law that a CPLR § 3212 motion for summary judgment supported solely by an attorney’s affirmation, who has no personal knowledge of the facts, has no evidentiary value. *See Zuckerman, supra; Stahl v. Stralberg*, 287 A.D.2d 613 (2nd Dept. 2001). The Plaintiff alleges that J. S. Hempstead Realty, LLC was the owner of premises and the construction project was at the subject premises. J.S. Hempstead Realty’s attorney asserts in the reply affirmation that John Staluppi was “not the owner of the adjacent premises.”

Building Permit Application No. 24391, issued by the Town of Hempstead Building Department, lists the Defendant, Red Rock Industries as “contractor” and the Defendant, John Staluppi as “owner” for premises known as 257 North Franklin Street. The building permit contradicts the affirmation of the Defendant’s counsel that the Defendant, Staluppi was not the owner of the subject premises. There is no affidavit, in evidentiary form, from either John Staluppi or a principal of J.S. Hempstead Realty, LLC stating their relationship, if any, to the subject premises.

Transparency by the Defendants, J.S. Hempstead Realty, LLC and John Staluppi as to their relationship to the construction site is anticipated. 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 merits of its claim or defense. *See*

Fromme v. Lamour, 292 A.D.2d 417 (2nd Dept. 2002); *George Larkin Trucking Co. v. Lisbon Tire Mart*, 185 A.D.2d 614 (4th Dept. 1992). The Defendants, J.S. Hempstead Realty, LLC and John Staluppi have failed to make a *prima facie* showing of entitlement to judgment as a matter of law to warrant dismissal of the complaint and cross-claims against them. *Smith v. Merrill Lynch & Co.*, 69 A.D.3d 843 (2nd Dept. 2010).

The Defendant, Red Rock Industries, Inc. was a subcontractor at the subject premises that performed, among other things, structural steel and concrete work for the building at the subject premises. Red Rock entered into a “Contract Package for Superstructure & MisWork, 257 N. Franklin Street, Hempstead, New York” (the contract) dated June 25, 2008, with the Defendant, J.S. Hempstead Realty, LLC. In support of its motion for summary judgment, the Defendant, Red Rock’s President states in his Affidavit that at the time Red Rock began work, the Defendant, Vigilant Cesspools had cut a portion of the sidewalk and installed a temporary asphalt patch. He noticed the temporary asphalt patch installed by the Defendant, Vigilant Cesspools had not been permanently repaired. It is alleged that Red Rock did not perform work to the sidewalk around the construction site before the subject incident with the exception of installing a chainlink fence and reinforced plastic fence. Once all the work was completed, Red Rock installed a new sidewalk around the entire perimeter of the construction site. At this stage of the proceedings, without discovery, the Defendant, Red Rock has failed to make a *prima facie* showing that it was not responsible for the maintenance of the sidewalk to warrant judgment as a matter of law and

dismissal of the complaint and all cross-claims against Red Rock. *Smith v. Merrill Lynch & Co., supra.*

Moreover, as to the remaining allegations of the Defendants, J.S. Hempstead Realty, LLC, John Staluppi and Red Rock Industries, the Plaintiff has not had an adequate opportunity to conduct discovery. *Valdiva v. Consolidated Resistance Company of America*, 54 A.D.3d 753 (2nd Dept. 2008).

Accordingly, it is hereby

ORDERED, that the motion (Mot. Seq. 01) by the Defendant, The Incorporated Village of Hempstead seeking an order, pursuant to CPLR § 3212 granting summary judgment in favor of the Village dismissing the complaint and all cross-claims against it is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 02) and the Amended Notice of Motion (Mot. Seq. 05) by the Defendant, Galli Engineering P.C. seeking an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and all cross-claims against it is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 03) by the Defendant, The County of Nassau seeking an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and all cross claims against it is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 04) by the Defendant, The Town of Hempstead seeking an order pursuant to CPLR § 3212 granting summary judgment

dismissing the complaint and all cross-claims against it is **GRANTED**; and it is further

ORDERED, that the motion (Mot. Seq. 06) by the Defendants, J.S. Hempstead Realty, LLC and John Staluppi, seeking an order pursuant to CPLR § 3212 granting summary judgment in favor of the Defendants, J.S. Hempstead Realty, LLC and John Staluppi dismissing the complaint and all cross-claims against them is **DENIED**; and it is further

ORDERED, that the motion (Mot. Seq. 07) by the Defendant, Red Rock Industries, Inc. seeking an order pursuant to CPLR § 3211 (a) (7) and CPLR § 3212 granting dismissal and summary judgment in favor of Red Rock Industries, Inc. dismissing the complaint and all claims against it is **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York
November 1, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
NOV 03 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE