

Isaacs v Lipsky Enters.
2011 NY Slip Op 32344(U)
September 1, 2011
Supreme Court, Suffolk County
Docket Number: 08-43607
Judge: Denise F. Molia
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Upon the following papers numbered 1 to 92 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 (002); Notice of Motion/ Order to Show Cause and supporting papers 21 - 39 (003); Notice of Cross Motion and supporting papers 40 - 55 (004); Notice of Motion/ Order to Show Cause and supporting papers 56 - 76 (005); Answering Affidavits and supporting papers 77 - 84; Replying Affidavits and supporting papers 85 - 92; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions of defendant Sullivan Builders Group, Ltd. (“Builders”), defendant Bay Shore Union Free School District (“the School District”), and defendant Lipsky Enterprises (“Lipsky”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims insofar as asserted against them, are consolidated for purposes of this determination, and are decided together with the cross motion of defendant Bay Shore-Brightwaters Public Library (“the Library”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint insofar as asserted against it; and it is further

ORDERED that the motion by Builders, to the extent that it seeks an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint insofar as asserted against it, is denied as moot, and to the extent that it seeks to dismiss all cross claims insofar as asserted against it, is granted; and it is further

ORDERED that the motion by the School District for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted; and it is further

ORDERED that the cross motion by the Library for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims insofar as asserted against it is denied as untimely; and it is further

ORDERED that the motion by Lipsky for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by Ethel Isaacs (“the plaintiff”) when she tripped and fell while on the premises of the Library. According to the plaintiff, she tripped and fell as a result of a slot located in the floor of the new library wing that was still under construction. The accident occurred while she was taking a tour of the new library wing after she finished working for the School District registering voters for the library budget vote. The plaintiff commenced this action against Builders (the construction manager), Lipsky (the contractor), the School District (the plaintiff’s employer on the date of the accident), and the Library.

In the complaint, the plaintiff alleges that the defendants were negligent in, *inter alia*, failing to exercise due care in the construction work at the premises and improperly inviting and permitting the plaintiff to enter parts of the premises which were under construction.

In its answer, Builders asserts cross claims against its co-defendants for contribution, common-law and contractual indemnification, and failure to procure insurance; in its answer, the School District asserts cross claims against its co-defendants for contractual and common-law indemnification; in its answer, the Library asserts cross claims against its co-defendants for contribution, common-law and contractual indemnification; and in its answer, Lipsky asserts cross claims against its co-defendants for contribution,

common-law and contractual indemnification, and failure to procure insurance.

Builders, the School District, and Lipsky now move for summary judgment, and the Library cross-moves for summary judgment.

As a preliminary matter, the Court notes that the plaintiff has voluntarily discontinued the action against Builders and annexed a stipulation of discontinuance to its opposition papers. Thus, Builders' motion, to the extent that it seeks summary judgment dismissing the complaint insofar as asserted against it, is denied as moot. In addition, since the cross motion by the Library was not served within 120 days of the filing of the note of issue, and it has failed to demonstrate good cause for the delay, its cross motion is denied as untimely (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold*, 54 AD3d 899, 864 NYS2d 149 [2d Dept 2008]).

The School District and Lipsky both move for summary judgment on the ground that they owed no duty of care to the plaintiff. In addition, the School District asserts that the dangerous condition was open and obvious, and Lipsky asserts that it did not create or have actual or constructive notice of any dangerous condition.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

The Court notes that it cannot consider the unsigned deposition transcript of non-party witness Catherine Holmes since it was submitted without an explanation as to why it was unsigned (*see McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

Since a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the tortfeasor owed a duty of care to the injured party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]). "The law imposes a duty to maintain property free and clear of dangerous or defective conditions only upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (*Segura v City of New York*, 70 AD3d 670, 670, 892 NYS2d 870, 870 [2d Dept 2010] [internal quotation marks omitted]). While an employer has a duty to provide an employee with a safe place to work (*see Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1990]), that duty only extends to the time of the employee's actual working hours or those times when the

employee is on the employer's premises and engaged in the actual performance of his or her work (*see* 52 NY Jur 2d, Employment Relations § 361). Furthermore, an employer owes no duty of care to an employee who voluntarily goes to another part of the employer's premises, which is not intended for the employee's use, and by doing so, assumes a position of peril merely for his or her own pleasure or convenience (*see* 52 NY Jur 2d, Employment Relations § 362).

Here, the School District established, *prima facie*, its entitlement to summary judgment as a matter of law through the deposition testimony of Ms. Summers (the District Clerk for the School District) and the plaintiff that it owed no duty of care to the plaintiff (*see Alvarez v Prospect Hosp., supra*). It is undisputed that the School District had deeded the library building to the Library prior to the date of the subject accident and, as a result, no longer owned or controlled the building in which the accident occurred. Furthermore, while the plaintiff was employed by the School District on the day of the subject accident, she was injured after she finished working for the School District and while she voluntarily took a tour of the new addition of the library. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the School District owed her a duty of care (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). While the plaintiff asserts that Ms. Summers told her to go on the tour, the evidence, including the plaintiff's testimony, does not bear out her assertion. Accordingly, the School District is entitled to summary judgment dismissing the complaint; since this finding necessarily defeats the cross claims for common-law indemnification and contribution against the School District, they are dismissed as well (*see Stone v Williams*, 64 NY2d 639, 485 NYS2d 42 [1984]). In addition, the School District's own cross claim for common-law indemnification is dismissed as academic.

As to the cross claims against the School District for contractual indemnification and failure to procure insurance, the Court notes that since there is no contract between the School District and any of its co-defendants, all cross claims for contractual indemnification and failure to procure insurance insofar as asserted against the School District are dismissed. In addition, the School District's own cross claim for contractual indemnification is dismissed.

Turning to the issue of whether Lipsky owed the plaintiff a duty of care, a contractor may assume a duty of care and be liable in tort to a third person where the contractor "in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm . . . [or] where it completely displaces a landowner's duty to maintain property in a reasonably safe condition pursuant to a comprehensive and exclusive agreement, or where a plaintiff detrimentally relies on the continued performance of its contractual duties" (*Martin v Huang*, 85 AD3d 1132, 1133, 926 NYS2d 622, 624 [2d Dept 2011] [internal citations and quotation marks omitted]).

Here, Lipsky established its *prima facie* entitlement to summary judgment as a matter of law by demonstrating that it did not owe the plaintiff a duty of care (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]). Specifically, Lipsky demonstrated that the plaintiff did not detrimentally rely on the continued performance of Lipsky's duties (*see Farrell v City of New York*, 83 AD3d 655, 919 NYS2d 531 [2d Dept 2011]; *Collins v J.P. Morgan Chase & Co.*, 72 AD3d 729, 899 NYS2d 306 [2d Dept 2010]). In addition, Lipsky did not launch a force or instrument of harm by creating or exacerbating a dangerous condition (*see Izzo v Proto Constr. & Dev. Corp.*, 81 AD3d 898, 917 NYS2d 287 [2d Dept 2011]) but rather, as set forth in the affidavit of Barry Lipsky (Lipsky's president), took affirmative action to cordon off the construction area with yellow caution tape so that the public could not gain access

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thereto. Further, the contract between Lipsky and the Library was limited and was not so comprehensive and exclusive so as to entirely displace the Library's duty to maintain its building in a reasonably safe condition (*see Farrell v City of New York, supra*). In opposition, the plaintiff failed to raise a triable issue of fact as to whether Lipsky owed her a duty of care (*see Zuckerman v City of New York, supra*). Although the plaintiff asserts that since Lipsky was aware that Ms. Kavanagh (the Director of the Library) wanted to give tours of the construction area, Lipsky should have covered the trench upon which she tripped, Mr. Lipsky testified that he objected to any tours in the construction area and instructed his project manager to cordon off the construction areas so that the public could not gain access thereto. In addition, Ms. Kavanagh testified that prior to the accident, Lipsky was not advised that non-construction personnel would be proceeding past the yellow tape. Furthermore, the plaintiff testified that she either went under or over yellow tape to gain access to the construction area where she fell on the trench in the floor. Accordingly, Lipsky is entitled to summary judgment dismissing the complaint; since this finding necessarily defeats the cross claims for common-law indemnification and contribution against it, they are dismissed as well (*see Stone v Williams*, 64 NY2d 639, 485 NYS2d 42 [1984]). In addition, Lipsky's own cross claims for contribution and common-law indemnification are dismissed as academic.

With respect to the cross claim by the Library against Lipsky for contractual indemnification, since the contract between the Library and Lipsky contains no indemnification clause, this cross claim is dismissed, as is Lipsky's own cross claim for contractual indemnification.

Finally, with regard to any cross claims against Builders, since Builders likewise established that they did not owe the plaintiff a duty of care (*see Espinal v Melville Snow Contrs., supra*), any cross claims for common-law indemnification and contribution against it are dismissed (*see Stone v Williams, supra*). In addition, Builders' own cross claims for contribution and common-law indemnification are dismissed as academic. Furthermore, the Court notes that because the obligation to indemnify set forth in the contract between the Library and Builders is expressly contingent upon proof of a liability arising from injury "to the extent caused by the negligent acts or omissions" of Builders—and such proof cannot be demonstrated—the indemnification clause is not triggered. Therefore, the Library's cross claim for contractual indemnification is also dismissed.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see CPLR 3212 [e] [1]*).

Dated: 9.1.2011


 Hon. Dennis F. Kelly
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION