

Robertson v Cacioppo
2012 NY Slip Op 31644(U)
June 12, 2012
Sup Ct, Nassau County
Docket Number: 16017/10
Judge: Anthony L. Parga
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SHORT FORM ORDER**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY****PRESENT:****HON. ANTHONY L. PARGA****JUSTICE**

-----X

PART 6

MILLCENT ROBERTSON,

INDEX NO. 16017/10

Plaintiffs,

MOTION DATE: 04/19/12

-against-

SEQUENCE NO. 01, 02, 03

STEFANO CACIOPPO and JOSEPH CACIOPPO,

Defendants.

-----X

STEFANO CACIOPPO and JOSEPH CACIOPPO,

Third Party Plaintiffs,

-against-

BANCKER CONSTRUCTION CORP.,

Third Party Defendant.

-----X

BANCKER CONSTRUCTION CORP.,

Second Third Party Plaintiff,

-against-

LONG ISLAND POWER AUTHORITY,

Second Third Party Defendant.

-----X

BANCKER CONSTRUCTION CORP.,

Third Third Party Plaintiff,

-against-

KEYSPAN GAS EAST CORPORATION d/b/a
NATIONAL GRID,

Third Third Party Defendant.

-----X

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Upon the foregoing papers, the motion by third party defendant/second third party plaintiff/third third party plaintiff, Bancker Construction Corp. (hereinafter “Bancker”), to strike the Note of Issue, is determined as directed below. The motion by third party defendant/second third party plaintiff/third third party plaintiff, Bancker, for summary judgment, pursuant to CPLR §3212, dismissing the third party complaint against it, is denied. The motion by second third party defendant, Long Island Power Authority (hereinafter “LIPA”), and third third party defendant, Keyspan Gas East Corporation d/b/a National Grid (hereinafter “Keyspan”), for summary judgment, pursuant to CPLR §3212, dismissing the second third party action and third third party action, is granted.

This is an action for personal injuries allegedly sustained by the plaintiff in an accident that occurred on April 10, 2007 on Lawson Boulevard, near its intersection with Perkins Avenue, in Oceanside, New York. The accident occurred in the left northbound lane on Lawson Boulevard, when the plaintiff’s vehicle and the vehicle driven by defendant Joseph Cacioppo, and owned by defendant Stefano Cacioppo, made contact in a head-on collision. At the time of the collision, there was construction on the roadway where the accident occurred. The construction had closed both southbound lanes of travel on Lawson Boulevard and construction cones channeled southbound traffic into the left northbound lane. Plaintiff testified that the construction cones caused her to merge left prior to the accident, and defendant Joseph Cacioppo testified that he entered into the left lane of travel without indication that he was not permitted to do so because the traffic from the opposite side of the roadway had been redirected into the left lane.

To begin, Bancker moves for summary judgment on the third party action brought against it, contending that Bancker cannot be held liable for the accident. At the time of the accident,

Bancker was installing manholes and replacing electrical cables along Lawson Boulevard at the pursuant to a written contract with Keyspan. Bancker contends that it was a lengthy job, but by the date of the accident, restoration of the roadway was underway. Bancker contends that Paul Delaney, a Senior Field Supervisor for Keyspan who was responsible for overseeing major construction projects and for making sure that contractors follow all pertinent specifications, testified at his deposition that he was onsite daily, performing regular walkthrough inspections to ensure Bancker's compliance with all contractual specifications. Bancker contends that with regard to maintenance of traffic protection ("MPT") and traffic controls, neither Mr. Delaney nor any other Keyspan inspector made any notations regarding deficiencies or unsafe practices. Bancker also argues that Mr. Delaney was empowered to stop Bancker's work for unsafe practices, but never did so for any reason pertaining to MPT or signage, which Bancker contends were in compliance with all contractual and other requirements at "all relevant times."

In addition, Bancker employee, Joseph Brucia, also supervised Bancker's work at the construction site at the accident location. Mr. Brucia testified that he took a direct role in setting up signs, cones, tape, and arrow boards prior to the accident. He also testified that his crew complied with all construction requirements of the contract between it and Keyspan, when channeling the southbound traffic into the left northbound lane. Bancker contends that all of its MPT and traffic controls were, at all times, "in full compliance with contractual and other legal requirements, and met with Mr. Delaney's and other inspectors' full approval."

Further, Bancker contends that Joseph Cacioppo admitted during his deposition that he was the cause of the accident as he "turned into the wrong lane." As such, Bancker contends that the fault for the happening of the accident lies with the defendants/third party plaintiffs, and not with Bancker, and also contends that there is no evidence that establishes that Bancker's MPT, traffic control, and safety measures were deficient or that it was liable for the happening of the accident.

At his deposition, however, Joseph Cacioppo testified that there were no cones where he turned onto Lawson Boulevard prior to the accident. Mr. Cacioppo testified that he entered into the right lane when he first turned onto Lawson Boulevard. He then traveled approximately ten feet in the right lane before he changed lanes and moved into the left lane. Mr. Cacioppo

testified that within a two seconds of changing lanes, the accident with the plaintiff occurred. Mr. Cacioppo testified that he did not notice anything indicating that he was not permitted to enter into the left lane at the location where he changed lanes. He testified specifically that there were no cones where he changed lanes into the left lane. Mr. Cacioppo also testified that there was no “flagman” directing traffic at the scene of the accident or warning traffic not to enter the left lane. Mr. Cacioppo further testified that he saw cones on the other side of the roadway, but that there were no cones on the broken white lines separating the right and left lanes in his direction at the location where the accident occurred. He testified that the cones on the broken white lines which separated the left and right lanes were fifteen to twenty feet away from the location where the accident occurred. Mr. Cacioppo testified that he believed that if there was a “flagman” directing traffic, the accident would not have occurred. Defendant/third party plaintiff Cacioppo contends that traffic from the opposite direction had been redirected into what normally would have been his left lane of travel and that the lane closure/switch was unmarked without the benefit of a “flagman” directing traffic. As such, Cacioppo argues that the accident did not result from his negligence, but rather from a dangerous and unforeseeable circumstance created by third party defendant Bancker.

The proponent of a summary judgment motion “must 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 Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). The deposition testimony of defendant/third party plaintiff Joseph Cacioppo raises questions of fact which warrant the denial of Bancker’s motion for summary judgment. There can be more than one proximate cause of an accident, and there are questions of fact herein as to whether Bancker’s negligence contributed to the accident. (*Cox v. Nunez*, 23 A.D.3d 427, 805 N.Y.S.2d 604 (2d Dept. 2005); *Rotondi v. Rao*, 49 A.D.3d 520, 855 N.Y.S.2d 156 (2d Dept. 2008); *Bonilla v. Calabria*, 80 A.D.3d 720, 915 N.Y.S.2d 615 (2d Dept. 2011); *Tapia v. Royal Tours Service, Inc.*, 67 A.D.3d 894, 889 N.Y.S.2d

225 (2d Dept. 2009)). If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)). Accordingly, Bancker's motion for summary judgment dismissing the third party action against it is denied.

Next, second third party defendant LIPA moves for summary judgment dismissing the second third party complaint against it, contending that it cannot be held liable for the happening of the accident. LIPA contends that there are no questions of fact regarding LIPA's involvement in any work performed at the accident site and that Bancker's own witness testified that Bancker was responsible for all safety measures taken at the accident location and was ultimately responsible for managing the traffic and traffic controls at said location.

LIPA contends that Joseph Brucia, a Bancker employee and supervisor, testified that he was the supervisor for the job that took place at the accident location and that he "took an active role in setting up the MPT early in the morning, and then [he] supervised the job, directing people what to do." Mr. Brucia testified that he determined who placed the signs and safety cones out directing traffic and also determined where the signs and cones were placed at the accident location. Mr. Brucia was actively working when the accident occurred and had directed his crew in the placing of traffic control signs and cones on the morning of the accident.

LIPA contends that Mr. Brucia testified that LIPA did not direct his work and that LIPA did not direct any safety precautions taken by Bancker. Mr. Brucia testified that he was ultimately responsible for the traffic safety precautions taken at the site of the accident. As such, LIPA contends that Bancker did not take any direction from LIPA representatives in managing traffic in the area where Bancker performed work.

In addition, Paul Delaney of Keyspan testified that he oversees major construction jobs for LIPA. He testified that Bancker did all of the trenching work, all of the "area work," and the installation of manholes, pursuant to the contract. He further testified that area protection work is "keeping the area safe for traffic, traffic control." As Bancker's second third party complaint alleges that Bancker took all directions from LIPA, and as the evidence indicates that LIPA did

not control the work and traffic safety, LIPA contends that it is entitled to summary judgment on the second third party complaint. LIPA further argues that it is entitled to contractual indemnification from Bancker pursuant to Section 11 of their contract.

Second third party defendant LIPA has made a prima facie showing of entitlement to summary judgment on the second third party complaint, and there has been no opposition submitted to contest same. As such, LIPA's summary judgment motion is granted, and the second third party complaint is hereby dismissed against LIPA.

Third third party defendant Keyspan also moves for summary judgment dismissing the third third party complaint against it. Keyspan contends that it was in no way involved in any work that Bancker was performing at the time and location of the subject accident. In support of its motion, Keyspan submits the affidavit of Daniel R. Pate, an employee of Keyspan. Mr. Pate attests that Keyspan owns and operates the underground gas distribution system on Long Island. He attests that no work was being performed by or on behalf of Keyspan at the location of the plaintiff's accident in April 2007. In addition, Keyspan contends that the testimony of Mr. Brucia and Mr. Delaney indicates that at the time of the motor vehicle accident, Bancker was performing electrical work on LIPA-owned electrical facilities pursuant to a written agreement and that there is no evidence that there was any work performed on gas facilities. As such, Keyspan argues that Bancker has sued an improper party and that it is entitled to summary judgment on the third third party complaint.

Third third party defendant Keyspan has made a prima facie showing of entitlement to summary judgment on the third third party complaint, and there has been no opposition submitted to contest same. As such, Keyspan's summary judgment motion is granted, and the third third party complaint is hereby dismissed against Keyspan.

Lastly, Bancker moves to strike plaintiff's Note of Issue as it contends that plaintiff has not provided any discovery relating to the claim in her Further Supplemental Bill of Particulars, served November 3, 2011, the same date as the Note of Issue and four days before the Note of Issue was actually filed, which alleges "special damages regarding future medical care... \$190,000." The Court also notes that said Further Supplemental Bill of Particulars was served three months after the Certification Order was issued on August 11, 2011. Bancker contends that

said allegation is unsupported by any proof or discovery whatsoever and should be stricken.

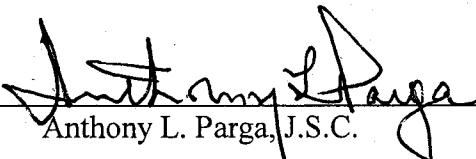
In opposition, plaintiff contends that the claim for future damages is based upon her prior and current medical treatment and condition and upon the medical records previously provided which state that she is a candidate for future surgical intervention. Plaintiff contends that Bancker was made aware of the possibility of future surgical intervention and treatment by way of her Supplemental Verified Bill of Particulars, dated July 20, 2009.

Bancker's motion to strike the Note of Issue is denied, but it is ordered that item number 11(b) of plaintiff's Further Supplemental Bill of Particulars, dated November 3, 2011, alleging special damages for future medical care costs in the amount of \$190,000, is hereby stricken.

No further discovery motions may be brought in this Part without prior permission of the Court.

This constitutes the decision and Order of this Court.

Dated: June 12, 2012


Anthony L. Parga, J.S.C.

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ENTERED
JUN 14 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE