

Kennedy-Delio v Town of Islip
2013 NY Slip Op 30360(U)
February 5, 2013
Supreme Court, Suffolk County
Docket Number: 07-11188
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-28-12 (#006)MOTION DATE 8-9-12 (#007)ADJ. DATE 9-13-12

Mot. Seq. #006 - MG

#007 - MD

-----X		SIBEN & SIBEN, LLP
CINDY KENNEDY-DELIO and PASQUALE	:	Attorney for Plaintiffs
DELIO,	:	90 East Main Street
	:	Bay Shore, New York 11706
Plaintiffs,	:	
	:	CHESNEY & MURPHY, LLP
	:	Attorney for Defendant Town of Islip
	:	2305 Grand Avenue
- against -	:	Baldwin, New York 11510
	:	
	:	SOBEL LAW GROUP, L.L.C.
	:	Attorney for Defendant SCWA
	:	464 New York Avenue, Suite 100
TOWN OF ISLIP, SUFFOLK COUNTY WATER	:	Huntington, New York 11743
AUTHORITY, ASPLUNDH CONSTRUCTION	:	
CORP. and ADJO CONTRACTING CORP.,	:	LAVIN, O'NEIL, RICCI, CEDRONE, et al.
	:	Attorney for Defendant Asplundh Construction
Defendants.	:	420 Lexington Avenue, Suite 2900
-----X		New York, New York 10170

Upon the following papers numbered 1 to 65 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 23 - 39; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 40 - 57; 58 - 61; Replying Affidavits and supporting papers 62 - 65; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (seq. #006) by defendant Asplundh Construction Corp. and this motion (seq. #007) by defendant Suffolk County Water Authority are consolidated for purposes of this determination; and it is further

ORDERED that this motion (seq. #006) by defendant Asplundh Construction Corp. for summary judgment dismissing the complaint and cross-claims asserted against it is granted; and it is further

ORDERED that this motion (seq. #007) by defendant Suffolk County Water Authority for summary judgment dismissing the complaint and cross-claims asserted against it is denied.

KAK

This is an action for damages from a motor vehicle accident that occurred on June 17, 2006, on the northbound lane of South Clinton Avenue, in Bay Shore, New York. It is undisputed that South Clinton Avenue is a two-way road with one lane in each direction, separated by a double yellow line, and runs north and south. Plaintiff Cindy Kennedy-Delio was the owner/operator of a vehicle, which swerved to avoid hitting a vehicle going in the opposite direction which had steered over the yellow line into plaintiff's lane of travel, causing plaintiff Kennedy-Delio's vehicle to come into contact with a pothole that was located in front of the premises known as 37 South Clinton Avenue. Plaintiff Cindy Kennedy-Delio lost control of her vehicle, hit a telephone pole, thereby allegedly causing serious physical injuries. Plaintiff Pasquale Delio brings a derivative action for loss of services. Plaintiffs assert defendants had prior actual notice of the dangerous condition which was the proximate cause of the accident, and did not rectify it prior to the subject accident.

Defendant Asplundh Construction Corp. ("Asplundh") moves for summary judgment dismissing the complaint and all cross-claims against it on the ground that any work performed by Asplundh was done on the southbound lane of South Clinton Avenue, not on the northbound lane in which plaintiff was traveling and where the alleged pothole was located. In support, Asplundh submits, *inter alia*, the pleadings, a bill of particulars, the testimony given by plaintiffs Cindy Kennedy-Delio and Pasquale Delio at the General Municipal Law § 50-h hearing, and the transcripts of the deposition testimony given by plaintiffs Cindy Kennedy-Delio and Pasquale Delio, Jake Guarino, a representative of Asplundh, Peter Kletchka, a representative of the Town of Islip ("Town"), and Frederick Berg, a representative of Suffolk County Water Authority ("SCWA").

At the General Municipal Law § 50-h hearing, plaintiff Cindy Kennedy-Delio testified to the effect that she lives on South Clinton Avenue, and the subject accident occurred within a mile from her home. On the day of the accident, she made a left turn onto South Clinton Avenue from the parking lot of her apartment complex, and traveled northbound. When an unidentified vehicle coming from the opposite direction "swerved into" the plaintiff's lane of travel, she swerved to the right to avoid the accident and struck a pothole, causing her to lose control of her vehicle and hit a telephone pole. She testified that approximately two years prior to the accident, construction for installing water mains on the southbound side began and was completed a year later. During the period of the construction, she observed the town workers performing the construction work in the area, and believed that the construction caused potholes in the area of the accident.

At the General Municipal Law § 50-h hearing, plaintiff Pasquale Delio testified to the effect that on the day of the accident, he went to the site of the accident and observed potholes on the roadway. He testified that he first observed those potholes almost three years ago when the town employees performed the road work, i.e., installing the water mains on the side of the roadway.

At her deposition, plaintiff Cindy Kennedy-Delio testified to the effect that in May or June 2006, she observed that the "big metal cylinder tubes" were installed on the southbound lane of South Clinton Avenue. She testified that she never observed any workers dig any holes in the northbound side of South Clinton Avenue at the area of the accident.

At his deposition, plaintiff Pasquale Delio testified to the effect that in October 2005, he observed the Town employees “putting in water main down on South Clinton Avenue.” He described the water main as the “big round cylinder pipes.” Thereafter, on two occasions, he got a notice from the landlord that the water would be shut off.

At his deposition, Jake Guarino testified to the effect that at the time of the accident, he was a foreman for Asplundh and worked on the southbound lane of South Clinton Avenue in Bay Shore. The “tie-in work” he had performed was transferring the water services from the old water main to the new water main. Asplundh is responsible to tie in water service to each individual house on the block where the water main is located. Because both old and new water mains were in the southbound lane, the “tie-in work” was performed only on the southbound lanes. The work site was approximately six feet away from the double-yellow line separating the northbound and southbound lanes. When the work began on January 17, 2006, he observed that there existed a trench and holes on the northbound lane for the gas main replacement, and some of holes were patched. However, he did not know how long the trench and holes had been there or who did that gas work. Mr. Guarino testified that his work on the southbound lane was finished in March 2006. While having worked on the southbound lane, he once observed “some town truck repairing patches on the northbound lane,” although he did not identify which town they were. He testified that Asplundh was not involved in installing the water main, and that, according to the records, a contractor named Adjo installed the water main.

At his deposition, Frederick Berg testified to the effect that he is the Superintendent of Maintenance employed by the SCWA and that his job duties include overseeing the new construction and maintenance activities of the construction maintenance department. Mr. Berg testified that the SCWA entered into a contract with Elmore Associates to “perform pipeline installation” for a new water main on South Clinton Avenue. In installing the water main, Elmore Associates dug the hole, installed the pipe, backfilled the earth, and compacted it. All the work that Elmore Associates performed was done approximately in December 2005 on the west side of the road, and it did not do any excavation work on the east side of the road. He also testified that the SCWA entered into a contract with Asplundh, and that Asplundh “tied the services over to the new water main” beginning in January or February 2006. Although a pipeline inspector from the SCWA visited the construction site on a daily basis, he did not visit the work site while the work was ongoing.

At his deposition, Peter Kletchka testified to the effect that he is employed by the Department of Public Works of the Town and searched the Town’s records for a period of five years prior to the subject accident. He testified that the SCWA’s application dated June 24, 2005, for a road opening permit was granted, and the opening was to “excavate a 3,676 foot trench on South Clinton Avenue by the [SCWA]” for a water main repair or installation. He further testified that the water main repairs work was undertaken at the time of the subject accident.

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 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once this showing has been made, the burden

shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (see *Sand v City of New York*, 83 AD3d 923, 921 NYS2d 312 [2d Dept 2011]; *Cohen v Schachter*, 51 AD3d 847, 857 NYS2d 727 [2d Dept 2008]; *Cino v City of New York*, 49 AD3d 796, 854 NYS2d 201 [2d Dept 2008]).

Here, Asplundh established its *prima facie* entitlement to judgment as a matter of law. There is no factual issue as to whether Asplundh might have created the defect that allegedly caused plaintiff Cindy Kennedy-Delio's accident. The adduced evidence indicates that the area where Asplundh performed its work was on the southbound lane of South Clinton Avenue, six feet away from the double-yellow line, while the alleged pothole that plaintiff Cindy Kennedy-Delio struck was located on the northbound lane (see *Cino v City of New York*, *supra*; *Duckworth v Village of Monroe*, 38 AD3d 827, 833 NYS2d 551 [2007]; *Perriconi v St. John's Preparatory High Sch.*, 290 AD2d 546, 736 NYS2d 698 [2002]). Moreover, although plaintiffs alleged in their testimony that the installation of water mains on the southbound lane of South Clinton Avenue created potholes in the area of the accident, the adduced evidence indicates that Asplundh was not involved in installation of water mains.

In opposition, plaintiffs contend that Asplundh could be responsible because there existed a large "north south" trench excavated within the southbound lane and smaller "east west" holes into and across the northbound lane so as to connect the water main to houses situated on that side of the street. However, plaintiff Cindy Kennedy-Delio testified that she never observed any workers dig any holes in the northbound lane at the area of the accident. Plaintiffs' answer to the motion is unsupported speculation (see *Ostrovsky v City of New York*, 2 Misc 3d 151, 772 NYS2d 442 [Sup Ct, Bronx County 2002]). A motion for summary judgment may not be defeated by a response based upon surmise, conjecture and suspicion (see *Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 194 NYS2d 509 [1959]).

Accordingly, Asplundh's motion for summary judgment is granted. Defendant Asplundh Construction Corp. is severed from the complaint and the action is continued as asserted against the remaining defendants.

The SCWA moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that it neither owned the roadway where plaintiff Cindy Kennedy-Delio's accident occurred nor created the allegedly defective condition. In support, the SCWA submits almost identical evidence submitted in Asplundh's motion.

While an employer who hires an independent contractor is not liable for the negligent acts of the independent contractors (see *Posa v Copiague Public Sch. Dist.*, 84 AD3d 770, 922 NYS2d 499 [2d Dept 2011]), the nondelegable municipal duty doctrine provides an applicable exception to this general rule (see *Smith v Suffolk County Water Auth.*, 6 Misc 3d 432, 789 NYS2d 828 [Dist Ct, Suffolk County 2004]). When a municipal authority undertakes to provide public water via a public highway, it

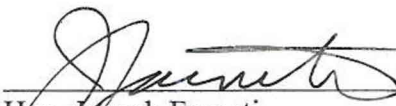
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must do so without its own or its contractor's negligence (*see id.*). Moreover, the credibility of the parties is not an appropriate consideration for the Court (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see Schaffe v SimmsParris*, 82 AD3d 867, 918 NYS2d 531 [2d Dept 2011]).

Here, the SCWA has failed to establish its entitlement to judgment as a matter of law. While Mr. Berg testified that the SCWA hired Elmore Associates to install a new water main on South Clinton Avenue in December 2005 and that Elmore Associates did not do any excavation work on the northbound side of the road, plaintiffs testified that two or three years prior to the subject accident, the town employees installed the water main and that the construction caused potholes in the area of the accident. In addition, contrary to Mr. Berg's testimony, Mr. Guarino testified that the contractor who installed the water main on South Clinton Avenue was a contractor named Adjo. The deposition testimony of Mr. Berg, Mr. Guarino and plaintiffs conflict as to who performed the installation of the water main and as to when it happened. Except for the deposition testimony of Mr. Berg, the SCWA did not submit any evidence demonstrating that it neither installed the water main nor controlled or supervised the installation work which allegedly created the potholes, causing the plaintiff's accident (*see Adler v Suffolk County Water Auth.*, 306 AD2d 229, 760 NYS2d 523 [2d Dept 2003]). There are questions of fact as to who performed the installation of the water main on South Clinton Avenue; whether the installation created any dangerous condition in the area of the accident as to create liability on the part of the SCWA; and whether it exercised reasonable care under the circumstances.

Accordingly, the SCWA's motion for summary judgment is denied.

Dated: February 5, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION