SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

STEVEN LOUROS,

Plaintiff,

- against -

CENTEX BUILDERS INCORPORATED,

Defendants.

Index No.: 21653/2012

Motion Date: 12/15/14

Motion No.: 107

Motion Seq.: 1

- x

The following papers numbered 1 to 15 were read on this motion by defendant, CENTEX BUILDERS INCORPORATED, for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
Reply Affirmation.....12 - 15

This is an action for damages for personal injuries sustained by plaintiff, Steven Louros, on December 18, 2011, when he allegedly tripped in a hole and fell on the blacktop at the premises located 250-72 Jericho Turnpike, Bellerose, New York. The plaintiff alleges that defendant Centex Builders Incorporated (Centex) is liable for the accident as they entered into a contract to furnish and install new blacktop to create a larger parking area at the stated premises. Plaintiff alleges that as a result of the fall he sustained a fractured patella requiring an open reduction with internal fixation.

The plaintiff commenced this action by filing a summons and complaint on October 19, 2012. Issue was joined on behalf of

Centex by the service of a verified answer on March 5, 2012. Plaintiff filed a Note of Issue on March 28, 2013. This matter is presently on the calendar of the Trial Scheduling Part for March 10, 2014.

In his bill of particulars, plaintiff alleges that on December 18, 2011, at approximately 10:30 a.m., he tripped in the parking lot in front of the building he owns located at 250-72 Jericho Turnpike, Bellerose, New York. Plaintiff alleges that the defendant was negligent in the performance of its contractual duties relative to the installation and repair of the parking lot. It is alleged that the plaintiff, as the owner of the premises, entered into the contract with Centex for the repaving of the parking lot and failed to complete the job.

The defendant now moves for an order, pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. The defendant alleges that it is not liable to the plaintiff because the defendant did not own, occupy, control, or maintain the subject premises, did not create the dangerous condition and did not owe any duty in tort to the plaintiff. Defendant asserts that although Centex agreed with the plaintiff to repave the parking lot, Centex did not enter into an exclusive and comprehensive maintenance agreement with Louros whereby it displaced plaintiff's duty to maintain his own property. Moreover, it is alleged that Centex did not create a dangerous condition as it did not do any paving work in the area where plaintiff is alleged to have fallen.

In support of the motion, the defendant submits an affirmation from counsel, Edward K. Kitt, Esq; copies of the pleadings; a copy of the plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's deposition testimony; a copy of the contract for work to be done on the interior at the premises; a proposal agreement for work to be done on the parking lot; a copy of the deposition transcript of defendant by Kyriacos Skevas; and an affidavit of Kyriacos Skevas.

The plaintiff, Steven Louros, an attorney, age 64, testified at an examination before trial on May 8, 2014. He stated that he owns and resides at 250-72 Jericho Turnpike in Floral Park, New York, a two-story mixed use building with commercial and residential space and a parking lot in the front. He parked his car and was getting out to go to his apartment. As he exited the vehicle his right foot went into a hole in the parking lot, it got stuck in the hole, he lost his balance, and fell. His right knee hit the sidewalk. He stated that the hole

was adjacent to the sidewalk, approximately 2 feet long and 6 - 12 inches wide. It dipped down to a depth of 2 inches. He stated that although he saw other holes and depressions in the parking he never saw that particular hole before. He stated that he had contacted Centex to repair that area of the parking lot along the perimeter of the sidewalk but they never repaired it. He stated that prior to the accident he complained many times between November 2010 until a month before the accident. He told Centex that they had to fix the depressions and holes that they had been paid to do. He identified a "proposal" dated August 31, 2010 between Centex and himself. He stated that he paid $106,000 for all of the work performed by Centex including work in the parking lot. The relevant portion of the proposal states that Centex was to "furnish and install new blacktop asphalt to create a larger parking area." The total price of the proposal was $8,950. He states that the portion of the proposal as to blacktop was not completed. He also identified a seven page document known as, "Abbreviated Contract between Owner and Contractor," dated September 11, 2010 signed by Centex and by himself.

The "Abbreviated Agreement" between plaintiff and defendant annexed as an exhibit to the defendants motion, contains a description of the work to be completed by Centex including renovations to the kitchen, bathroom, living room, dining room , bedroom, basement, doors, window guards and windows. The work was to be completed within 30 days and the price was $65,000. The contract was signed by plaintiff and by Dennis Mihalatos, as Vice President of the company.

The defendant also submits the transcript of the examination before trial of Kyriacos Skevas, a CPA and part owner of Centex until he split up with his partner, Dennis Mihalatos, in August 2011. He states that his position with Centex was as a silent partner and he was merely a financial backer without any responsibility for the daily running of the company. He stated that Dennis was responsible for the daily operation of the business. The witness testified that he was not involved with the agreement in this case or the renovations to the building or the parking lot at the Louros property. He first spoke to plaintiff prior to the commencement of the lawsuit when the plaintiff inquired as to who the insurance company was for Centex because he had an accident on the property. Skevas was not informed of the accident prior to that time. He did not know what the responsibilities of Centex were with regard to paving the driveway. He states that Mr. Louros did not speak with him regarding any unfinished work. He identified a work permit from his file which includes the repaving of the parking lot.

In his affidavit dated August 22, 2014, Kyriacos Skevas states that he reviewed the proposal and records of Centex for all work done for plaintiff. He states that he did not find any evidence that Centex did any work on the parking lot adjacent to the subject premises. He states that in August or September 2011 he met with plaintiff to discuss the work which was performed. At that meeting it was agreed that the work which was contracted for would now be considered complete and there was no continuing obligation for Centex to perform any work for the plaintiff at the location. He stated that ther plaintiff agreed that all contracted work would be accepted as is and all payments made by Louros would be considered payment in full and there would be no other continuing obligations between the parties.

Defendant contends that the plaintiff's complaint should be dismissed because plaintiff testified that although there was a proposal for Centrex to do the paving work on the parking lot they did not do the work. Counsel asserts that Louros testified that Centex did not make any repairs to the area where he fell and did not repair the holes and depressions along the perimeter of the parking lot as they agreed to do. Thus, counsel argues that Centex cannot bear liability for the plaintiff's accident as it did not own or maintain the property citing Ruffino v. New York City Tr. Auth.,55 AD3d 817 {2d Dept. 2008]; Katz v Queens Theater in the Park,, 27 AD3d 623 [2d Dept. 2006]; Cuce v Bell Atl. Corp., 299 AD2d 387 [2d Dept. 2002]).

In addition, it is argued that because defendant did not do any paving work on the parking lot it could not have created the dangerous condition (citing e.g. B. L. W. Realty Holding Co. v. Socony Mobil Oil Co., 32 AD2d 312 [1st Dept. 1969]). It is alleged that the only connection defendant had with the parking lot was the contract to perform work on the parking lot which it never started. Counsel argues that the contractual relationship does not create a duty in tort nor make the defendant liable for the dangerous condition at the defendant's property. Counsel asserts that generally there is no tort liability between contracting parties for nonfeasance or failing to fulfill what one promises in the contract itself. Therefore, defendant contends that because Centex is not guilty of malfeasance and may only have been liable for nonfeasance there is can be no tort liability (citing Wegman v Dairylea Cooperative, Inc., 50 AD2d 108 [4th Dept. 1975]). Further, it is argued based on the testimony of Skevas that the parties agreed the contract was fulfilled and there were no longer any contractual obligations between them as of the date of the plaintiff's accident. Defendant asserts that under the circumstances, the only possible cause of action would be breach of contract.

In opposition to the motion for summary judgment, the plaintiff submits that the contract at paragraph 7 states that "the contractor shall be responsible for any damage or injury due to his act or neglect." It is alleged that as the contract was drafted by the contractor it should be construed against the defendant. Counsel asserts that the plaintiff relied on the defendant's contractual agreement. Plaintiff contends that there is a question of fact as to whether defendant was negligent in breaching a duty owed to the plaintiff to perform the repairs that were contracted for in the parking lot where the plaintiff fell. Plaintiff asserts that he detrimentally relied on the defendant's contractual promise to repair the parking lot and that this reliance was a proximate cause of his trip and fall in a hole that was supposed to have been repaired. Counsel also asserts that there is a question of as to whether the contract had been concluded.

In his affidavit in support of the opposition, dated November 25, 2014, Steven Louros states that prior to entering a contract with Centrex he spoke with Dennis Milhalatos of Centrex advising Centrex that he wanted all holes, depressions and tripping hazards repaired in the parking lot. Thereafter, he entered into a contact whereby he agreed to repair depressions and holes in the parking lot at the premises. He states that he received assurances that Milhalatos would do the paving work up to an including shortly before he fell. Plaintiff states that he believes that if Milhalatos had repaired the parking lot as he promised he would not have fallen or sustained an injury to his knee. He states that he never agreed at a meeting with Skevas that the work was complete and he did not at any time release Centex from its obligations to repair the holes in the parking lot. He denies that he ever agreed to "call it even" with Centrex.

Mr. Milhalatos submits an affidavit on behalf of the plaintiff dated November 26, 2014, stating that he worked with Skevas from 2009 through 2011. He states that his review of the records reveals that Centex was to perform work for Louros including work in the parking lot. He recalls Louros stating that he wanted any and all depressions in the blacktop including those next to the sidewalk to be repaired. He states that although Centex agreed with Louros to repair the blacktop holes, Centex never did because they were not able to return to the job. He agrees that Centex was not able to live up to its contractual responsibilities pursuant to the agreement. He states that he was never informed that the work was considered complete and he believes that Centex had a continuing obligation to repair the hazardous condition.

Plaintiff also alleges that the motion for summary judgment is untimely.

Firstly, this Court finds that the motion was timely as the Note of Issue was filed on May 9, 2014 and the instant motion for summary judgment was served on September 4, 2014 which was within 120 days of the filing of the Note of Issue as set forth in the preliminary conference order.

Secondly, upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds as follows:

The Court of Appeals has held that "in the ordinary case, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries and mere inaction, without more, establishes only a cause of action for breach of contract (citing, Prosser and Keeton, op. cit., § 92, at 659-660). However the Court went on to say that "inaction may give rise to tort liability where no duty to act would otherwise exist if, for example, performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not "merely in withholding a benefit, but positively or actively in working an injury" (citing Moch Co. v Rensselaer Water Co., 247 NY 160, 167). In such a case, the defendant has undertaken not just by his promises but by his deeds a legal duty to act with due care." (Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220 [1990]; also see Espinal v Melville Snow Contrs., 98 N.Y.2d 136 [2002][under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract]).

This court agrees with the plaintiff that there is a question of fact as to whether the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation. There is no dispute that the parties entered in two agreements in September 2010, one for structural renovations to the property, and a second proposal for concrete and blacktop paving work to the outdoor area including the parking lot. Plaintiff testified that he paid over $100,000 for the two jobs. There is also no dispute that all of the work contracted for was completed other than the paving work on the parking lot. Therefore, as the evidence shows that the defendant had done all the other work on the project there is a question of fact as to whether it was reasonable for the plaintiff to rely on Centex's prior work on the project so as to reasonably expect that Centex would complete the contract and

would repair the holes and depressions in the pavement that was part of the contract and occasioned his injury (see Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220 [1990]). There is also a question as to whether the plaintiff's reliance on the defendant's continued performance and reliance on assurances that he received from the defendant that the paving would be completed per the contract placed him in a more vulnerable position by inducing him to forego an opportunity to retain a new contractor to avoid the risk of harm. Although Skevas testified that the plaintiff stated that he agreed at a meeting in September 2011, prior to the accident, that the contract was concluded, the plaintiff denied such conversation ever occurred leading to a question of fact as to whether the contract was still in effect as of the time of the accident.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: January 28, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.