Wong v Deer Park Union Free Sch. Dist.
2015 NY Slip Op 30551(U)
April 13, 2015
Supreme Court, Suffolk County
Docket Number: 09-18180
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 09-18180
CAL. No. 14-00080OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-8-14 (#002)
MOTION DATE 4-15-14 (#003)
ADJ. DATE 7-1-14
Mot. Seq. # 002 - MG
003 - MD

----------X

ELLEN WONG and TREVOR WONG,

Plaintiffs,

- against -

DEER PARK UNION FREE SCHOOL DISTRICT and KINGS PARK INDUSTRIES, INC.,

Defendants.

----------X

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Upon the following papers numbered 1 to 16 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 10; Replying Affidavits and supporting papers 11 - 16; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) by defendant Kings Park Industries, Inc. for summary judgment dismissing the complaint and cross claims as asserted against it is granted; and it is further

ORDERED that the motion (003) by defendant Deer Park Union Free School District for summary judgment is denied.

Plaintiffs Ellen Wong (the "injured plaintiff"), and her husband derivatively, commenced this action seeking damages for personal injuries she allegedly sustained to her right knee on November 4,

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Plaintiffs Ellen Wong (the "injured plaintiff"), and her husband derivatively, commenced this action seeking damages for personal injuries she allegedly sustained to her right knee on November 4,

2008 when she tripped on a speed bump and fell by the northwest parking lot entrance of the Deer Park High School at 30 Rockaway Avenue (the "High School"). Defendant Deer Park Union Free School District (the "School District") is responsible for maintaining the parking lot at the High School. Defendant Kings Park Industries, Inc. ("KPI") entered into a contract with the Town of Babylon (the "Town") to perform road work on Rockaway Avenue, including Falcon Place, the roadway/driveway with the subject speed bump that leads to the northwest parking lot entrance to the High School.

In the amended complaint, as amplified by the bill of particulars, plaintiffs allege that the School District was negligent in its ownership, maintenance and control of the High School in allowing the speed bump to be obstructed, not visible and to remain in a state of disrepair, in failing to paint or otherwise mark the speed bump and in failing to provide adequate functioning lighting at the subject location so as to provide the injured plaintiff with a safe place to walk. Plaintiffs allege that the School District had actual notice as its employees or agents created and were aware of the dangerous condition, and alleges constructive notice as the dangerous condition existed for a sufficient period of time to allow it to be discovered upon inspection, and remedied. As to KPI, plaintiffs allege it was negligent in performing its contract to repair the subject roadway, Falcon Place, which is the entrance/exit driveway to the High School parking lot where the speed bump is located. Plaintiffs further allege, KPI covered the speed bump with black or dark colored pavement sealer and did not thereafter paint it, thereby obstructing the speed bump from view causing a tripping hazard and trap-like dangerous condition. In their respective answers, the School District and KPI deny liability, interpose several affirmative defenses and assert cross claims against each other for contribution and indemnification.

Discovery has been completed and the note of issue filed. The defendants now each move for summary judgment dismissing the complaint. KPI argues it was a contractor hired by the Town to reconstruct Rockaway Avenue, and thus, it did not owe a duty to the injured plaintiff. The School District argues there is no evidence that it owned, operated, maintained or controlled either the speed bump or the lights in the vicinity, and thus, any claim of negligence cannot be ascribed to it. The School District also disputes that the subject accident caused the injured plaintiff's knee injury arguing that it was a pre-existing degenerative non-traumatic tear of her lateral meniscus. KPI and the School District each argue that it cannot be held liable for the accident and any purported resulting injuries as a matter of law because the speed bump was open and obvious and not inherently dangerous.

In support of their respective motions, the defendants have submitted the transcripts of the injured plaintiff's 50-h and examination before trial testimony and that of the president of KPI and of the facilities manager for the School District. The injured plaintiff testified that she arrived at the High School on the evening of November 4, 2008, election day, to vote. She parked on the street outside the fence surrounding the High School property as the gate to the parking lot was closed. She walked through the pedestrian gate next to the parking lot and proceeded to the building. There were neither signs posted as to which door to enter to vote, nor anyone outside giving directions, so the injured plaintiff walked to the front entrance of the High School as she had done on previous election days. The front door was locked so she followed the crowd around to the side door, entered the High School and after approximately twenty minutes, she voted and left the building. She walked on the sidewalk back through the same pedestrian gate. As she stepped down from the sidewalk onto the driveway/roadway which led to the parking lot of the High School, her left foot hit an elevated portion on the road, causing

her to trip. She attempted to prevent herself from falling by planting her right foot down, but was unsuccessful and fell to the ground; she immediately felt pain in her right knee. The injured plaintiff testified that she was looking down as she walked, but it was very dark as the lighting was inadequate, therefore, she did not see what she realized was a speed bump until after she fell. She did not notice if the lights were on or not, but when she drove by the area after being treated in the emergency room, she noticed that the light over the speed bump was not illuminated.

The KPI president testified that pursuant to a contract with the Town, KPI reconstructed several roadways. The president testified that to comply with the work order regarding Falcon Place, the workers had to cut the side of the speed bump facing Rockaway Avenue in half lengthwise and remove it so that asphalt could be applied according to the Town's plans. According to the president, the Town determined the start and end points for each road which were shown on plans provided to KPI prior to the start of the project. After the asphalt was applied to Falcon Place, the half of the speed bump which had been cut and removed was reconstructed. The contract did not require KPI to paint the speed bump or any other surface. The subject work started approximately June 9, 2008 and was completed, together with the punch list, by approximately September 18, 2008.

The facilities manager testified that the School District is responsible for the maintenance of the High School property, including the speed bumps and some of the street lights, and that LIPA was responsible for some of the lights. He testified that there were several speed bumps on the High School property that were maintained by the School District's grounds crew during the school year, and repaired and painted every summer. However, the facilities manager posited that the subject speed bump is on Town property, not on the High School's property, thus the School District was not responsible for painting or maintaining it. As to the lighting, the facilities manager testified that the security crews patrolling the School District's property at night, were required to report any outages on a check list which was submitted to the facilities manager. If any outages were noted, the facilities manager would inspect the street light and determine if it was the School District's responsibility or LIPA's responsibility to fix. According to the facilities manager, the security crew had not reported any blown out lights prior to or after the subject accident. Upon reviewing the photographs, the facilities manager testified that he believed the light in the vicinity of the speed bump was LIPA's responsibility. He also testified that he was not aware of any prior complaints regarding inadequate or blown out lights in the area of the injured plaintiff's accident, or prior complaints regarding the subject speed bump. However, when questioned about the procedure for making such complaints, the facilities manager could not articulate one.

"'[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property'" (***Hickman v Medina***, 114 AD3d 907, 907, 980 NYS2d 834 [2d Dept 2014], quoting ***Aversano v City of N.Y.***, 265 AD2d 437, 437, 696 NYS2d 233 [2d Dept 1999]). Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly dangerous or defective condition on the property (*id.*; ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 921 NYS2d 648 [2d Dept 2011]).

Here, all of the indicia of special use are present. The principle of special use involves the installation of some object in the sidewalk or street for an abutting landowner's benefit which is different

from the normal intended use of the public way (*see* ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]; ***Minott v City of N.Y.***, 230 AD2d 719, 645 NYS2d 879 [2d Dept 1996]; ***Balsam v Delma Engineering Corp.***, 139 AD2d 292, 532 YS2d 105 [1st Dept 1988]). Such special use gives rise to maintenance responsibilities to keep the installed object, here the speed bump, in a reasonably safe condition to avoid injuries to others (*see* ***Thomas v Triangle Realty Co.***, 255 AD2d 153, 679 NYS2d 394 [1st Dept 1998]; ***Minott v City of N.Y.***, *supra*). While it has not been established in the record before the court as to when or what entity originally installed the speed bump, it is circumstantially evident that it was constructed not for public use, but for the School District and the safety of those on the High School property. Indeed, Falcon Place is not a thoroughfare but is exclusively used for vehicle access to the High School (*cf.* ***Ruffino v New York City Tr. Auth.***, 55 AD3d 817, 865 NYS2d 667 [2d Dept 2008]). Thus, unavailing is the School District's argument that it is not responsible for maintaining the subject speed bump.

Further, the School District has also failed to establish, prima facie, its entitlement to judgment as a matter of law, as a triable issue of fact exists as to whether the accident site was adequately lit and whether the speed bump was open and obvious and not inherently dangerous (*see* ***Russo v Incorporated Vill. of Atlantic Beach***, 119 AD3d 764, 989 NYS2d 320 [2d Dept 2014]; ***Grizzell v JQ Assocs., LLC***, 110 AD3d 762, 973 NYS2d 268 [2d Dept 2013]; ***Zhuo Zheng Chen v City of N.Y.***, 106 AD3d 1081, 966 NYS2d 177 [2d Dept 2013]). Although the School District, is charged with a duty to provide those coming onto its property with a reasonably safe means of ingress and egress, there is no duty on its part "to warn against an open and obvious condition, such as a speed bump, that is readily observable by those employing the reasonable use of their senses and is not inherently dangerous" (***Brande v City of White Plains***, 107 AD3d 926, 927, 966 NYS2d 911 [2d Dept 2013]; *see* ***Conneally v Diocese of Rockville Centre***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Russo v Incorporated Vill. of Atlantic Beach***, *supra*; ***Zhuo Zheng Chen v City of N.Y.***, *supra*). The question of whether a condition is open and obvious depends on the circumstances of each case and is generally a question for the jury (*see* ***Russo v Incorporated Vill. of Atlantic Beach***, *supra*; ***Grizzell v JQ Assocs., LLC***, *supra*; ***Zhuo Zheng Chen v City of N.Y.***, *supra*). The duty includes an obligation to provide adequate lighting (***Conneally v Diocese of Rockville Centre***, *supra*; ***Shirman v New York City Tr. Auth.***, 264 AD2d 832, 695 NYS2d 582 [2d Dept 1999]). Thus, a condition that is ordinarily readily observable may be rendered a trap for the unwary where the condition is obscured or there is inadequate illumination (*see* ***Russo v Incorporated Vill. of Atlantic Beach***, *supra*; ***Grizzell v JQ Assocs., LLC***, *supra*; ***Zhuo Zheng Chen v City of N.Y.***, *supra*).

The proffered photographs, stipulated by the injured plaintiff to be an accurate portrayal of the scene at the time of her accident, except that, as conceded by the School District, the lighting conditions are different, are insufficient to make out a prima facie case. The photographs were taken during daylight hours; the accident occurred at night. Additionally, the photographs clearly reveal that only half of the speed bump was painted yellow and the other half appears to be the same color as the driveway/roadway. Moreover, the half that is painted yellow is cracked and broken and the paint is faded and chipped. Therefore, this court cannot determine on the instant motion that at the time of the plaintiff's accident at approximately 6:30 PM in November, the speed bump was open and obvious and not inherently dangerous as a matter of law (*cf.* ***Rivera v City of New York***, 57 AD3d 281, 870 NYS2d 241 [1st Dept 2008]; ***Zimkind v Costco Wholesale Corp.***, 12 AD3d 593, 785 NYS2d 108 [2d Dept

2004]).

Moreover, accepting the injured plaintiffs' contentions regarding the inadequate lighting as true and resolving all inferences from the pleadings, affidavits and evidence submitted in the manner most favorable to the plaintiffs as opponents of the motion, a triable issue of fact exists as to whether the School District breached its duty to adequately illuminate the area where the accident occurred, and whether its alleged failure to adequately illuminate the area proximately caused the accident (*see* ***Conneally v Diocese of Rockville Centre***, *supra*). Thus, the School District having failed to meet its initial burden, the court need not consider the sufficiency of the plaintiffs' opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is also noted that the School District's argument that the injured plaintiff had a pre-existing, degenerative, non-traumatic knee problem is not pertinent. This is a premises liability case which does not require proof of a threshold injury to survive summary judgment (*see e.g.* ***Richards v Passarelli***, 77 AD3d 905, 910 NYS2d 500 [2d Dept 2010]; ***Bright v Village of Great Neck Estates***, 54 AD3d 704, 863 NYS2d 752 [2d Dept 2008]).

Turning to the motion by KPI, when the personal injury issue concerns a contractor hired to perform work, the contractor is liable to the entity that hired it, but generally does not owe a duty of care, and is not liable in tort or for breach of contract for injuries sustained by a third-party, unless one of three exceptions apply (***Espinal v Melville Snow Contrs., Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]). The three exceptions are: "(1) where the contracting party, in failing to exercise reasonable care in performance of [its] duties, 'launches a force or instrument of harm'[citation omitted]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citation omitted]) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Espinal v Melville Snow Contrs.***, *supra* at 140; *see* ***Church v Callanan***, 99 NY2d 104, 752 NYS2d 254 [2002]). Under the first exception, the contractor who creates or exacerbates a dangerous condition is said to have "launched" it (***Espinal v Melville Snow Contrs.***, *supra* at 142-143; ***Haracz v Cee Jay, Inc.***, 74 AD3d 1145, 1146, 903 NYS2d 515 [2d Dept 2010]). Under the third exception, the contractor may be "held liable for failing to make conditions safer for the injured party" (***Church v Callanan Indus.***, *supra* at 112). Thus, the threshold and dispositive query is whether KPI owed the plaintiff a duty of care, a question of law for the court to decide (*see* ***Church v Callanan Indus.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*).

KPI has made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to the plaintiffs (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Peluso v ERM***, 63 AD3d 1025, 881 NYS2d 489 [2d Dept 2009]). There is no evidence that KPI breached its contractual obligation when reconstructing Falcon Place or the speed bump completed in September 2008, or that it assumed a continuing duty to return to remedy any defect that eventually developed (*see* ***Peluso v ERM***, *supra*). Moreover, according to KPI's president, the Town inspected and approved KPI's work after it was completed. Therefore, it cannot be concluded that KPI's roadwork "rose to the requisite standard of creating a dangerous condition so as to 'launch a force or instrument of harm'" (***Luby v Rotterdam Sq., LP***, 47 AD3d 1053, 1055, 850 NYS2d 252 [3d Dept 2008], quoting

Espinal v Melville Snow Contrs., *supra* at 141; ***Martinez v White Cottage Enters.***, 2 AD3d 506, 507-508. 768 NYS2d 500 [2d Dept 2003]).

Furthermore, there is no evidence that the injured plaintiff tripped and fell because she detrimentally relied on the continued performance of KPI's contractual duties (*see* ***Church v Callanan Indus.***, *supra*; ***Martinez v White Cottage Enters.***, *supra*). Likewise, this case does not fall within the third exception as KPI did not have a comprehensive contract to assume the School District's obligations to provide visitors to the High School property with a reasonably safe place to walk (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Backiel v Citibank***, 299 AD2d 504 [2d Dept 2002]; ***Arabian v Benenson***, 284 AD2d 422, 726 NYS2d 447 [2d Dept 2001]; *cf* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]). Therefore, having made its prima facie case, the burden shifts to the plaintiffs to raise an issue of fact. They have failed to do so.

Accordingly, the motion by KPI is granted and the motion by the School District is denied.

Dated: April 13, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**