

Goldfien v County of Suffolk
2015 NY Slip Op 31060(U)
June 10, 2015
Supreme Court, Suffolk County
Docket Number: 12-23085
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-13-14 (001)
MOTION DATE 11-26-14 (002)
MOTION DATE 1-8-15 (003, 004 & 005)
ADJ. DATE 3-5-15
Mot. Seq. # 001-MG; CASEDISP #002-MG
#003-MG #004-MG #005-MG

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- against -

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COUNTY OF SUFFOLK, DF STONE
CONTRACTING LTD., SANDSTONE
TRUCKING CORP., NELSON & POPE, LLP
and VERIZON NEW YORK, INC.,

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Upon the following papers numbered 1 to 171 read on these motions summary judgment/dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1-18, 19-38, 58-83; Notice of Cross Motion and supporting papers, 39-57, 84-97; Answering Affidavits and supporting papers 98-111, 112-125, 126-136, 137-148, 149-157; Replying Affidavits and supporting papers 158-159, 160-16-, 162-163, 164-165, 166-167, 168-169; 170-171; Other mem. of law 172, 173; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Nelson and Pope, LLP (“N & P”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant DF Stone Contracting (“Stone”) for an order pursuant to CPLR 3211 and 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant County of Suffolk (“County”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant Verizon New York, Inc. (“Verizon”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant Sandstone Trucking Corp. (“Sandstone”) for an order pursuant to CPLR 3212 granting summary judgment dismissing the cross-claims of defendants County of Suffolk and Verizon New York, Inc. insofar as asserted against it is granted.

This action was brought by plaintiff to recover damages for personal injuries which allegedly occurred on November 3, 2011, at approximately 11:30 a.m. on Montauk Highway, near West Shore Road, Oakdale, in the Town of Islip, Suffolk County. Plaintiff alleges that he was struck by a falling overhead utility wire, while riding his motorcycle at that location, as a result of the negligence of the named defendants. The accident occurred in an area where there was an ongoing construction project.

Defendant N & P now moves for summary judgment dismissing the complaint and all cross-claims asserted against it. In support of the motion, it submits, *inter alia*, its attorney’s affirmation, the pleadings, a certified copy of a police report, portions of the transcripts of the depositions of Stanley J. Humin III as a witness for defendant County, of Sergio Neiva, as a non-party witness, of the deposition of Thomas Calo as a witness for defendant N & P, and of the deposition of William Thomas, as a witness for defendant Stone, a copy of a contract for engineering services between N & P and defendant County, a project manual for construction of sidewalks, roads for Capital project No. 5497 and the affidavit of Thomas Calo, sworn to on October 13, 2014. Defendant Stone also moves for summary judgment dismissing the complaint and all cross-claims asserted against it. In support of the motion, it submits, *inter alia*, its attorney’s affirmation, *the pleadings, a certified copy of a police report, the transcripts of the 50-h hearing and the deposition of*

plaintiff, the transcript of deposition of Stanley J. Humin III as a witness for defendant County, the transcripts of depositions of Mark Rowley as a witness for defendant Verizon, of William Thomas, as a witness for defendant Stone, of Sergio Neiva, as a non-party witness, and of Thomas Calo, as a witness for defendant N & P, a certified copy of the police report, and defendant N & P's daily work report for November 3, 2012. Defendant County cross-moves for summary judgment dismissing the complaint and any cross-claims and submits, *inter alia*, its attorney's affirmation, the pleadings, the deposition transcripts of the plaintiff, Sergio Neiva, Thomas Calo, Stanley J. Humin III and William Thomas, a copy of the contract between the County and defendant Stone for Capital Project 5497, the affidavit of Paul Morano, sworn to on December 12, 2014, and the affidavit of Stanley J. Humin III, sworn to December 15, 2014. Defendant Verizon also moves for summary judgment dismissing the complaint and all cross-claims and submits, *inter alia*, its attorney's affirmation, the pleadings, the deposition transcripts of the plaintiff, Mark Rowley, Sergio Neiva, Thomas Calo, Stanley J. Humin III and William Thomas, defendant N & P's daily work report for November 3, 2012 and two photographs. Defendant Sandstone moves to dismiss the cross-claims of defendants County and Verizon and submits, *inter alia*, its attorney's affirmation, the pleadings, plaintiff bills of particulars and a copy of a stipulation of discontinuance dated June 3, 2014. Plaintiff submitted opposition to all of the motions, except that of the defendant Sandstone.

Plaintiff testified that on the date of the accident he left his home in Bayside Queens, at approximately 10:00 a.m., on his motorcycle for a "destination ride" to Sayville, New York. The weather was clear and sunny and the roads were dry. While traveling eastbound on Montauk Highway he passed through the area where the accident would occur. When he arrived in Sayville, he stopped at a Starbucks for coffee. He was there for 15 to 20 minutes. He left Starbucks intending to drive home. He headed westbound on Montauk Highway. Traffic was light. Montauk Highway in this area is a two lane road, with one lane eastbound and one lane westbound. As he was proceeding westbound, he observed construction to his right. There were barrels and cones in the road, shifting traffic away from the construction. He was shifted to the left into the center of the westbound lane. The accident took place at approximately 11:30 a.m., just east of West Shore Road. At the time plaintiff estimated that he was traveling at 10 to 15 miles per hour. He observed power lines running north to south across the road. They were approximately 20 feet in height. He heard a voice from the construction area to look out or watch out for the pole. He was suddenly hit by a falling wire, which struck his chest and immediately went up to his neck. He held onto the motorcycle with his left hand. He grabbed at the wire tried to get it off his neck with his right hand while the motorcycle was still moving. The motorcycle went into the eastbound lane and crashed against the curb on that side of Montauk Highway, coming to a rest just before the intersection with West Shore Road. He fell off his motorcycle onto his right side. Plaintiff testified that he saw a dump truck as he entered the construction area at the approximate location where the accident occurred. The bed of the truck was raised and appeared to be raised at a height above the overhead wires. Right after the accident, he saw the name "Sandstone" on the truck.

Stanley J. Humin III testified as a witness for defendant County. He is employed by the County in the department of public works. He was familiar with a construction project known as Project 5947, a sidewalk reconstruction project taking place in various locations in Suffolk County. A portion of this project included sidewalk construction in the vicinity of West Shore Road and Montauk Highway in Oakdale. The project was awarded to defendant Stone and was overseen by a private consulting firm, Nelson & Pope.

Throughout the Oakdale location, there were utility poles and wires connected to those wires which ran through and between trees and branches. While construction was ongoing, the County compiled work reports documenting the daily work that was completed by the contractor. These were completed by N & P and sent to the County.

Thomas Calo testified as a witness for defendant N & P. He was employed by N & P as a construction inspector and was assigned as such to project 5497. He monitored defendant Stone's operations. He would arrive at the work site at approximately 7:00 a.m. and would speak to the foreman to find out what was planned for the day and then observe the work and make notes in his diary. He then prepared a daily work report at the end of each day. His daily work report for November 3, 2012 indicates that recycled concrete was placed and graded at the site and that there was one ten wheel dump truck in use at the site that date. It further indicates that the work crew received asphalt from the Posillico plant on that date, which was placed and compacted. Two tickets from Posillico were attached to the work report. The first indicates that the dump truck from the work site left the Posillico plant on the day of the accident at 8:00 a.m. and 35 seconds. The second indicates that the truck left Posillico a second time at 11:36 a.m. and 59 seconds. His report also contained four drawings, which depict the work done by defendant Stone on that day. After reviewing the drawings, he concluded that no work was done on the corner at or near the accident site on that day. Mr. Calo testified that it took the truck approximately 45 minutes to an hour to reach the work site from the plant. He was not on site when the accident occurred, as he was at lunch. He also was not back to the site before the police arrived, but he received a copy of the police report from the officer. He took lunch at approximately 12:00 and returned at about 12:45. He asked the site foreman, Sergio Neiva if the accident had anything to do with the construction work and was told no. He did not investigate the cause of the accident and never learned what caused the wire to come loose from the utility pole. When he returned from lunch, he saw the dump truck with its bed fully extended, facing the same direction as depicted in a photograph marked as exhibit "A" for identification.

Mark Rowley testified as a witness for defendant Verizon. He has worked for Verizon for 28 years. The wire which detached from the utility pole in connection with plaintiff's accident was a Verizon wire. The wire, called a "drop wire", goes from the north side of the street to the south side across Montauk Highway. The drop wire goes from a "serving terminal" at the pole and then from the pole to a residence or business. He testified that, whether the wire is a regular or drop wire, the objective is to securely fasten it so that it will not come off the pole. He said that the only scenario where a wire attached to a pole by a clamp can come off is if a car hits the pole or a truck hits the overhead wire. He checked Verizon records for reports of any accidents occurring in the area and found none. He also checked the records for complaints in this area and found none. He visited the accident site and determined that the pole in question did not appear to be cracked or compromised in any way. However, he had no specific information as to what caused this particular wire to become dislodged from the utility pole. When shown a photograph of the accident site containing a picture of the 10 wheel dump truck with its bed fully raised, he rendered an opinion, based upon the photograph and his experience, that the accident was caused by the truck bed striking the overhead wire. Normally, if a truck hits a wire it is going to come down right away. He further testified that the wire would probably come off the house to which it was attached first, before coming off the pole.

William Thomas testified that he is the sole stockholder and vice-president of Sandstone. Based upon the daily work reports of Thomas Calo for November 3, 2012, he testified that Stone employees were on the site that day installing asphalt and utilizing a 10 wheel dump truck driven by Dennis Manning. Having been shown a photograph of the accident site, he stated it depicted the 10 wheel dump truck with its bed fully raised. He further testified that asphalt deliveries were made to the site on the day of the accident. The first would have arrived at approximately 8:45 a.m. and the second, based upon a 45 minute travel time and a departure from Posillico at 11:36 a.m. would have arrived between 12:15 p.m. and 12:30 p.m. The asphalt work for the day was completed.

Sergio Neiva testified as a non-party witness. He was defendant Stone's foreman for Project 5497. On a daily basis, his crew worked from 7:00 a.m. until 3:30 p.m. He remembered the plaintiff's accident. When the accident occurred, he was right next to the motorcycle. He was eating his lunch and saw the wire come down rapidly as plaintiff was passing through in the westbound direction. The accident occurred before the intersection of West Shore Road and Montauk Highway. The wire struck the plaintiff in the chest, then his neck, and knocked him off his motorcycle. It came down very quickly. On the day of the accident there was just one truck, defendant Sandstone's working at the site. At the time of the accident, the 10 wheel dump truck was not there. He did not see any of their equipment strike the pole from which the wire fell. After he arrived at work, the dump truck delivered a load of recycled concrete (this part of Mr. Neiva testimony is incorrect to the extent that records and other testimony have established that it was asphalt that was delivered that day). The dump truck unloaded its first delivery of material approximately 100' west of where the accident occurred. He testified that concrete was delivered to the site daily. The two companies, Star and Gecko, would come, pour concrete and then leave. The trucks are approximately 11' tall. One of these companies delivered prior to the accident and unloaded concrete in front of the utility pole where the wire became dislodged. He gave a statement to the police officer who arrived on the scene after the accident.

A certified copy of the police accident report has been submitted on the motion. It states that the accident occurred at 11:44 a.m. Four witness statements are attached to the report. Although they differ in some details, all of the witnesses observed the wire come down very quickly and only moments before it struck the plaintiff.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by

the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *Millman v Citibank, N.A.*, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]).

Defendant N & P has established its prima facie entitlement to summary judgment dismissing the complaint and all cross claims. N & P was retained by the defendant County to provide inspection services for the project. Both the contract for the project and the affidavit of Stanley J. Humin confirm that the contractor defendant Stone was responsible for the manner in which work was carried out at the accident site, as well as for traffic safety. Nor is there any evidence in the record of any negligent act or any knowledge of a dangerous condition by this defendant which caused the accident that lead to plaintiff's injuries. In fact, plaintiff has failed to establish what caused the wire to fall and injure the plaintiff. Furthermore, mere speculation about causation is not adequate to sustain a cause of action for negligence (*Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; *Louman v Town of Greenburgh*, 60 AD3d 915, 876 NYS2d 112 [2d Dept 2009]).

Defendants Stone and Sandstone have each established their entitlement to summary judgment. The submitted evidence reveals defendant Stone was a contractor with the County for installation of sidewalks at the accident site. Defendant Sandstone provided its only asset, a 10 wheel dump truck to haul concrete and asphalt to or from the work site. Stone had a crew of six workers at the site, with Sergio Neiva as their foreman. Thomas Calo's report indicate's that there was only one ten wheel dump truck in use at the site that date. It further indicates that the work crew received asphalt from the Posillico plant on that date, which was placed and compacted. Two tickets from Posillico were attached to the work report. The first indicates that the dump truck from the work site left the Posillico plant on the day of the accident at 8:00 a.m. and 35 seconds. The second indicates that the truck left Posillico a second time at 11:36 a.m. and 59 seconds. The work crew ate lunch at approximately 11:30 p.m. Two witnesses (Calo and William Thomas) testified that the trip to or from the Posillico plant took approximately 45 minutes, and thus, the dump truck could not have returned to the site until sometime between 12:15 and 12:30 p.m. Based upon the testimony of the plaintiff and the certified police report, the accident occurred sometime between 11:30 and 11:45 a.m. By that time, N & P employee Calo had left for lunch and did not return until after the accident. The testimony of the foreman Neiva confirms that the dump truck was not on the site. He further stated that none of Stone's equipment ever struck the pole from which the wire fell. All of the witness statements in the police report observed the wire come down very quickly and only moments before it struck the plaintiff.

Thus, the evidence in the record conclusively establishes that the 10 wheel dump truck owned by the defendant Sandstone was not on the site at the time the accident occurred and had not been there for more than an hour prior to the accident. In light of this, the Sandstone dump truck could not have been the cause of the accident, and Sandstone is entitled to summary judgment dismissing the remaining cross-claims.

Defendant Stone has established that the 10 wheel dump truck used on the site was not there when the accident occurred. In fact, no work was ongoing at the site at the time of the accident, since the work crew was at lunch. The crew's foreman, Sergio Neiva testified that none of the crew's equipment struck the pole from which the wire fell. In response, the plaintiff has submitted a photograph of the accident site containing a picture of the 10 wheel dump truck with its bed fully raised near the pole from which the wire fell. However, the record is clear that the photograph was not taken until some time after the accident occurred. Plaintiff's testimony alleges that he saw a dump truck as he entered the construction area at the approximate location where the accident occurred. The bed of the truck was raised and appeared to be raised at a height above the overhead wires. Right after the accident, he saw the name "Sandstone" on the truck. While the determination of a witness' credibility is, in general, within the province of the trier of fact, it is also recognized that when evaluating testimony, a court should not discard common sense (*Sexstone v Amato*, 8 AD3d 1116, 778 NYS2d 635 [4th Dept 2004]; *Loughlin v City of New York*, 186 AD2d 176, 587 NYS2d 732 [2d Dept 1992]). Given that plaintiff's testimony is contradicted by both testimonial and documentary evidence, the Court finds plaintiff's testimony to be incredible as a matter of law, not supported by the other witnesses or evidence submitted on this motion, and, as such, insufficient to raise an issue of fact (see *Espinal v Trezechahn*, 1065 Avenue of the Americas, LLC, 94 AD3d 611, 942 NYS2d 519 [1st Dept 2012]; *Cruz v Port Authority of New York*, 243 AD2d 251, 664 NYS2d 514 [1st Dept 1997]; *Phillips v Katzman*, 90 AD3d 436, 933 NYS2d 859 [1st Dept 2011]). As a result, defendant Stone is entitled to summary judgment dismissing the complaint and any cross-claims insofar as asserted against.

Defendant County has also established its entitlement to summary judgment. When a property owner moves for summary judgment in a premises liability action, it bears the burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition that caused the accident (see *Sheehan v J.J. Stevens & Co., Inc.*, 39 AD3d 622, 833 NYS2d 237 [2d Dept 2007]; *Solomon v Loszynski*, 21 AD3d 366, 800 NYS2d 46 [2d Dept 2005]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *McMahon v Gold*, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]). The affidavit of Paul Morano states that he is employed by the County as an assistant civil engineer in the department of public works. As part of his duties, he investigates claims against the County by searching the records of the department to ascertain whether the County owns, maintains or controls a given structure. He states that he made a diligent search of the County's records and found that the County does not own, maintain or control the pole at the site of the accident, and further, that the County had received no complaints pertaining to any defect or dangerous condition at the accident site prior to November 3, 2012. The record herein further establishes that the accident occurred suddenly and without warning, and, thus, there is no question as to whether there was constructive notice sufficient to give time to discover it and remedy any alleged defect. Accordingly, defendant County is entitled to summary judgment dismissing the complaint and any cross-claims insofar as asserted against.

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Finally, defendant Verizon has established its entitlement to summary judgment by showing that it had neither actual or constructive notice of any alleged defect with regard to its pole and wire. Through the testimony of its employee Mark Rowley, who has worked for the company for 28 years, Verizon established that a search of the records revealed no prior complaints about any defect or dangerous condition of the pole from which the wire fell, injuring the plaintiff. In addition, Mr. Rowley inspected the pole after the accident and found that there was no visible and apparent defect on the pole, thus establishing that Verizon did not have constructive notice of any alleged defect (*see Dragotta v Walmart, Inc.*, 39 AD3d 800, 800–801, 835 NYS2d 352 [2d Dept 2007]; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 A.D.3d 857, 858, 789 N.Y.S.2d 782 [4th Dept 2005]; *see also Pesol v Family Dollar Stores of New York, Inc.*, 107 AD3d 1436, 965 NYS2d 903 [4th Dept 2013]). When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed (*see Schubert–Fanning v Stop & Shop Supermarket Co., LLC*, 118 AD3d 862, 863–864, 988 NYS2d 245 [2d Dept 2014]; *Schnell v Fitzgerald*, 95 AD3d 1295, 945 NYS2d 390 [2d Dept 2012]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]).

In response, plaintiff attempts to invoke the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur permits a jury to infer negligence, based upon circumstantial evidence, from the mere occurrence of an event where the injury is of a character which would not ordinarily occur in the absence of negligence (*Abbott v New Rochelle Hosp. Med. Ctr.*, 141 AD2d 589, 590, 529 NYS2d 352 [2d Dept 1988]; *see Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784 [1986]). To establish a prima facie case based upon the doctrine of res ipsa loquitur, a plaintiff is required to show that the event was of a kind which ordinarily does not occur absent someone's negligence; that it was caused by an agency or instrumentality within the exclusive control of the defendant; and that it was not due to any voluntary action or contribution on the part of the plaintiff (*see Brumberg v Cipriani USA, Inc.*, 110 AD3d 1198, 973 NYS2d 401 [2d Dept 2013]; *Montalvo v Mumpus Restorations, Inc.*, 76 AD3d 516, 905 NYS2d 659 [2d Dept 2010]; *Kichorowsky v Kennedy Houses Owners, Inc.*, 31 AD3d 502, 818 NYS2d 266 [2d Dept 2006]). Here, plaintiff failed to establish that Verizon had exclusive control of the wire or the pole to which it was attached, based upon plaintiff's allegation that the County's contractor, Stone, also had the ability to access the wire which caused plaintiff's injuries. In view of the foregoing, Verizon is entitled to summary judgment dismissing the complaint and any cross-claims insofar as asserted against.

Dated: June 10, 2015


 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION