

Divens v Finger Lakes Gaming & Racing Assoc., Inc.
2015 NY Slip Op 31864(U)
October 8, 2015
Supreme Court, Steuben County
Docket Number: 2010-2018 CV
Judge: Marianne Furfure
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29, 2009, at approximately 10:00 p.m. Plaintiffs allege that when they came to the end of the walkway where it met the parking lot, Barbara Divens stepped onto what felt like a hole and fell into the parking lot. At the time plaintiff fell, the walkway was not lit, but there were lights in the parking lot. Defendant Finger Lakes Gaming and Racing Association, Inc. (Finger Lakes) had hired defendant, LP Ciminelli, Inc. (Ciminelli) to construct a new entrance to the casino in 2008. Ciminelli thereafter hired defendant Ramsey Constructors, Inc. (Ramsey) to install the temporary walkway based on a design Ciminelli had provided. Construction of the temporary walkway was completed prior to February 9, 2009. Plaintiffs allege that the defendants were negligent in creating the dangerous condition which caused her to fall, by creating an unsafe edge, failing to provide proper lighting or warning signs.

This matter initially came before the Court on Defendant Ramsey's motion to vacate the note of issue, strike the case from the trial calendar, and compel Co-Defendants Finger Lakes and Ciminelli to provide previously requested discovery. Ciminelli opposed Ramsey's motion and cross-moved to dismiss plaintiffs' complaint on the issue of liability or, in the alternative, for an order awarding Ciminelli both contractual and common law indemnification against Ramsey. Ramsey also cross-moved for dismissal of plaintiffs' complaint and Ciminelli's third-party complaint, and dismissal of any and all cross-claims filed against Ramsey on the grounds that plaintiff's claim is speculative; Ramsey owed no duty

to plaintiffs; did not create a dangerous or defective condition; and is not liable for any contractual or common law indemnification of Ciminelli. Plaintiffs opposed defendants' motions for dismissal of plaintiffs' complaint and opposed Ramsey's motion to vacate the note of issue and strike the case from the trial calendar to the extent that this relief conflicts with the Court's previously issued scheduling order.

DISMISSAL OF COMPLAINT

Defendants Ciminelli and Ramsey have moved for summary judgement dismissing the complaint on several grounds. Ciminelli claims the complaint must be dismissed, as plaintiffs have failed to establish any defective condition which caused plaintiff to fall, or that if there was a defect, it was trivial, and not actionable. Ciminelli also argues that, if there was a defective condition when plaintiff fell, it had no actual or constructive notice of the situation and therefore, cannot be held liable. Both Ciminelli and Ramsey argue that there is no proof that the condition of the sidewalk was the proximate cause of plaintiff's fall, as plaintiff did not see what caused her to fall, and that her claim is speculative and should be dismissed.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the proponent fails to make this showing, the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial (*Gonzalez v. 98 Mag Leasing Corporation*, 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, Id.). In reviewing a motion for summary judgment, the evidence must be considered in the light most favorable to the opponent and all reasonable inferences must be resolved in favor of the nonmoving party (*Derise v. Jaak 773, Inc.*, 2015 WL 1810560 [2nd Dept. 2015]; *Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]). A moving party has an affirmative duty to demonstrate the merits of its claims and cannot just point to gaps in the opposing party's proof (*Paternostro v. Advance Sanitation Inc.*, 126 AD3d 1376, 1377 [4th Dept. 2015]).

Whether or not a dangerous or defective condition exists on the property of another is generally a question of fact for the jury, as it generally depends on facts and circumstances unique to each case (*Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997]; *Lupa v. City of Oswego*, 117 AD3d 1418 [4th Dept. 2014]). In determining whether a defect is actionable, the Court must consider, not just the dimensions of the claimed defect, but the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury" (*Trincere v. County of Suffolk*, Id at 978; *Lupa v. City of Oswego*, Id at 1419]).

Defendant Ciminelli as the moving party, has the initial burden of establishing that there was no defective or dangerous condition or that the defect was trivial. In support of its motion, defendant relied on the testimony of employees of Ciminelli and Ramsey that the temporary walkway was laid in accordance with contract specifications and that none of the defendants had either noticed any defects or heard of any prior complaints. Ciminelli also submitted photographs of the area which it claims show no substantial change in elevation or gaps between the walkway and the parking lot where plaintiff fell. However, defendants also submitted the deposition testimony of the plaintiffs as to how and when the plaintiff fell. Plaintiff's husband testified that he notice a "lip" between the temporary walkway and the parking lot when he and his wife entered the casino in the daylight. Although neither plaintiff nor her husband saw what caused plaintiff to fall when they exited in the dark, plaintiff's husband returned the next day and observed a gap or hole two (2) to three (3) inches deep and three (3) to four (4) inches wide in the location when plaintiff fell. Plaintiff also testified that, although she did not see what caused her to fall, she felt the hole and fell forward into the parking lot. Her husband also produced photographs he took the following day which showed some crumbling asphalt and an irregular edge in the location where plaintiff fell. None of the photographs had any markings to show the depth or thickness of the area where the walkway met the parking lot.

Additionally, plaintiff testified that the walkway itself was not lit, but that the only light came from the light poles in the parking lot. Although she testified that she could see where she was walking, she did not know how far ahead she was able to see. Defendant did not submit any other evidence that the lighting in the area was adequate or that the lack of lighting did not contribute to defendant's fall. Taking into consideration the location and time of plaintiff's injury, together with the description of the condition of the walkway at the location and the photographs, there are sufficient questions of fact as to whether the walkway was in a defective or dangerous condition on the night plaintiff fell and whether the defect was trivial or a snare which preclude summary judgment (*Lupa v. City of Oswego, Id*; *Gafter v. Buffalo Medical Group, P.C.*, 85 AD3d 1605, 1605-1606 [4th Dept. 2011]; *Tully vs. Anderson's Frozen Custard*, 77 AD3d 1474 [4th Dept. 2010]; *Williams v. Patrick*, 30 AD3d 1059, 1060 [4th Dept. 2006]).

Defendants Ciminelli and Ramsey also claim that the cause of plaintiff's fall is speculative, as she was unable to identify what caused her fall, and did not see the defect before or after her fall. However, given her testimony concerning what she felt before the fall, her husband's testimony regarding what he observed earlier and the day after her fall and the photographs taken of the area, there is sufficient evidence to render any other possible cause of her fall sufficiently remote and to raise a question of fact on whether the condition of the walkway was the proximate cause of plaintiff's fall (*Paternostro v. Advance Sanitation, Inc.*

Id; *Dixon v. Superior Discounts & Custom Muffler*, 118 AD3d 1487 [4th Dept. 2014]; *Nolan vs. Onondaga County*, 61 AD3d 1431 [4th Dept. 2009]).

Ciminelli also argues that, even if an actionable defect existed, Ciminelli had no actual or constructive notice of the condition of the walkway and, thus, cannot be liable for plaintiff's injuries. "Along with owners of real property, a general contractor may be held liable in common-law negligence to a person injured while lawfully on the premises where renovation work is being performed if it is established that the general contractor had supervision and control of the general condition of the premises, and either created the unsafe condition or had actual or constructive knowledge of it" (*Murphy v. Kendig*, 295 AD2d 946, 947 [4th Dept. 2002]). Constructive notice can be established by submitting proof that the alleged defect was visible and apparent for a sufficient length of time prior to the accident to allow defendant to discover the problem and correct it (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Williams v. County of Erie*, 119 AD3d 1344, 1345 [4th Dept. 2014]).

In this case, Ciminelli presented proof that Ramsey constructed the walkway, and Ciminelli inspected and approved the completed project more than four (4) months prior to plaintiff's fall. There was also testimony that the walkway was substantially in the same condition as when it was completed. Ciminelli designed the walkway, oversaw its construction and determined whether walkway lighting was to be installed. Although Ciminelli employees claim they never

noticed any dangerous condition, plaintiff's evidence concerning the condition of the walkway on the night of the accident raises sufficient question of fact as to whether Ciminelli created the dangerous condition or should have been aware of it for a sufficient length of time prior to the accident to allow Ciminelli time to discover the problem and correct it (*Jacobsen v. Krumholz*, 41 AD3d 128 [1st Dept. 2007]; *Murphy v. Kendig*, Id.). Ciminelli's motion for summary judgment based on lack of actual or constructive notice of the alleged defective condition is denied.

Ramsey claims that all claims and third party claims against it must be dismissed because, if plaintiff's injuries were caused by a defective walkway, it was not a result of the manner in which Ramsey built the walkway, but rather as a result of a flaw in Ciminelli's design of the walkway. Ramsey claims that the plans and specifications for the walkway were provided to Ramsey by Ciminelli and that Ramsey built the walkway according to the plans provided. Ramsey argues that, when Ciminelli inspected, approved and paid Ramsey for the walkway project, Ciminelli acknowledged that Ramsey's work was done in accordance with the design specifications. Therefore, any defect in the walkway occurred as a result of a design flaw, rather than Ramsey's negligence. Additionally, Ramsey argues that it is not responsible for any injuries suffered by plaintiff, as it had no duty to her, only to Ciminelli under its contract.

Contractors who follow plans and specifications provided to them by design professionals and who exercise reasonable care and skill in the performance of their work are not responsible for injuries which occur as a result of defects in the plans and specifications provided by others (*Szatkowski v. Turner & Harrison*, 184 AD2d 504, 505 [2nd Dept. 1992]; *County of Westchester v. Welton Becket Assoc.*, 102 AD2d 34, 48 [2nd Dept. 1984]). However, a contracting party who fails to exercise reasonable care in performing its contractual obligation and, as a result, negligently creates a dangerous condition, “launche[s] a force or instrument of harm,” and is liable for injuries to non-contracting parties caused as a result (*Church v. Callahan Industries, Inc.*, 99 NY2d 104, 111 [2002]; *Siegl v. New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1704 [4th Dept. 2011] citing *Moch Co. v. Rensselaer Water Co.* 247 NY 160, 168 [1928]).

In support of its motion, Ramsey submitted deposition testimony of Carl York (York), Ciminelli’s Senior Project Manager; Richard Brongo (Brongo), the Director of Facilities for Finger Lakes; Steve Bourgoine (Burgoine), the Project Manager for Ramsey; and Kevin Chapman (Chapman), the Project Superintendent, who testified that Ramsey had no role in designing the walkway. They also testified that Ramsey built the walkway according to the specifications provided by Ciminelli, and none of these witnesses saw or was informed that there was a problem with the construction of the walkway. This evidence is sufficient to establish a prima facie case that Ramsey built the walkway according to the plans

and specifications provided to it, thereby relieving it of liability for plaintiff's injuries. The burden then shifted to Ciminelli and plaintiff to present evidence sufficient to raise a question of fact requiring a trial to resolve.

Plaintiff argues that the walkway was not installed according to the plans and specification provided by Ciminelli. Plaintiff submitted a copy of the relevant portion of the project manual for the project which required that "(w)here new paving work meets existing paving, care shall be taken to provide a neat and smooth transition in a neat and workmanlike manner." [Project Manual Section 2600, Part III, Section 3.02 (B)(9)]. Plaintiff maintains that Ramsey's negligence in the way it completed the edge of the walkway created a dangerous condition which caused plaintiff's injuries.

Ramsey contends that the project manual and plaintiff's claims based thereon should not be considered by the Court because plaintiff presented this information as an attachment to an unauthorized sur-reply. The Court may elect to ignore surreply papers that are submitted without the Court's permission (*Matter of Hudson Prop. Owners' Coalition, Inc. v. Slocum*, 92 AD3d 1198, 1200-1201 [3rd Dept. 2012]; *O'Connor v. Syracuse Univ.*, 66 AD3d 1187, 1190 [3rd Dept. 2009]). However, the Court also has the discretion to accept additional submissions when the opposing party has been given an opportunity to respond (*Park Country Club of Buffalo, Inc. v. Tower Ins. Co. of N.Y.*, 68 AD3d 1772, 1774 [4th Dept. 2009]). Here, the parties have had an opportunity to submit arguments

in support of their respective positions and to respond to arguments raised by opposing counsel. In addition, this project manual section was also raised in Ciminelli's opposition papers as Exhibit A to the Opposing Affidavit of Ciminelli's counsel. Ciminelli also argues that, if there was a defective condition, it was due to Ramsey's failure to install the walkway properly, rather than a project design flaw. Therefore, this Court will consider all of the parties' submissions in deciding this motion.

Plaintiff's photographs of the vicinity where plaintiff fell, coupled with the testimony of plaintiff and her husband concerning the condition of the walkway and the circumstances surrounding plaintiff's fall are sufficient to raise a question of fact whether Ramsey did exercise reasonable care in fulfilling its contractual obligations to provide a neat and smooth transition or whether Ramsey created a dangerous condition at the transition point by failing to properly join the walkway to the parking lot. Therefore, Ramsey's motion to dismiss the complaint and cross-claims on this basis is denied.

CIMINELLI'S CROSS-CLAIMS FOR INDEMNIFICATION

Ciminelli claims that, if a question of fact exists concerning the condition of the walkway, Ciminelli is entitled to contractual indemnification against Ramsey because the indemnity portion of the contract requires Ramsey to indemnify Ciminelli for accidents caused by Ramsey's work. Ramsey contends that the indemnity clause is void and unenforceable because the contract requires

Ramsey to indemnify Ciminelli for *any* party's negligence, including Ciminelli's own negligence, thereby rendering the indemnity clause void, pursuant to General Obligations Law (GOL) Section 5-322.1.

Ciminelli also claims that it is entitled to an order awarding it common law indemnification against Ramsey because, if the accident was caused by the negligent acts of anyone other than the plaintiff, Ramsey is responsible, as Ramsey alone created the allegedly hazardous area in which plaintiff fell.

GOL Section 5-322.1 provides that an agreement which purports to indemnify or hold harmless an owner or contractor from liability caused by, or resulting from, the negligence of the owner or contractor is void and unenforceable. Therefore, to the extent that the indemnity clause set forth in the subcontract between Ciminelli and Ramsey requires Ramsey to indemnify Ciminelli for Ciminelli's own negligence, that clause is void and unenforceable (*Charney v. LeChase Constr.*, 90 AD3d 1477, 1479 [4th Dept. 2011]). However, as the indemnity agreement allows for indemnification "to the fullest extent permitted by law," Ciminelli may still be entitled to indemnification for that portion of the damages attributable to Ramsay's negligence (*Brooks v. Judlau Contracting, Inc.*, 11 NY3d 204, 208-209 [2008]; *Bink v. F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2nd Dept. 2006]).

A party is entitled to common law indemnification, if it is vicariously liable only, with no proof of any negligence or active fault on its part (*McCarthy v. Turner*

Constr., Inc., 17 NY3d 369, 375 [2011]; *Genesee/Wyoming YMCA v. Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244-1245 [4th Dept. 2012]; *Carro v. Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277 [4th Dept. 2008]).

In this case, there are questions of fact whether the walkway was in a defective or dangerous condition, and, if so, which defendant was at fault. Therefore, any determination of whether Ramsey must provide contractual or common law indemnification is premature (*Charney v. LeChase Construction, Id* at 1479-1480). Consequently Ciminelli's motion is denied.

MOTION TO VACATE NOTE OF ISSUE

Ramsey filed a motion seeking to vacate the trial note of issue and compel Ciminelli to provide previously requested discovery. Plaintiffs oppose Ramsey's application to strike the note of issue, citing the scheduling order which required paper discovery to be completed by October 8, 2014, and the note of issue to be filed by December 8, 2014. Plaintiffs argue that no deviation from the scheduling order was permitted without Court approval and no such approval had been sought. Plaintiffs have no opposition to an order compelling Ciminelli to respond to Ramsey's discovery demands. Ciminelli opposes the motion claiming that Ramsey's discovery requests have been answered and that those requests which were not answered were overbroad and burdensome, or that Ramsey was not entitled to the information requested.

In determining whether a note of issue should be stricken, the Court may consider whether the parties had sufficient time within which to complete discovery and ready the case (*Ireland v. GEICO, Corp.*, AD3d 917 [3rd Dept. 2003]; *Plonka v. Millard Fillmore Emergency Physicians Servs., P.C.*, 9 AD3d 869, 870 [4th Dept. 2004]). In this case, plaintiffs' action was commenced on December 1, 2010. Ramsey was originally added as a third-party defendant, but was subsequently added as a defendant on January 10, 2013. Ramsey did not serve any discovery demands until March 24, 2014. The Court issued a scheduling order on September 12, 2014, which required, *inter alia*, all paper discovery to be completed by October 8, 2014. The scheduling order also provided that Court approval was necessary to deviate from the requirements of the order. Ramsey sent Ciminelli a Second Notice to Produce dated November 11, 2014, over one (1) month after discovery was to be complete, but did not ask for Court approval to do so. Ciminelli responded to the request on January 22, 2015.

The record supports a finding that Ramsey had one year and nine months to engage in discovery before the Court's October 8, 2014, deadline. After the discovery deadline set in the scheduling order, Ramsey filed a discovery request which it seeks to enforce in this motion, without asking for Court approval. Under all of the circumstances set forth above, Ramsey's motion to strike the note of issue, remove the case from the court calendar and compel Ciminelli to respond

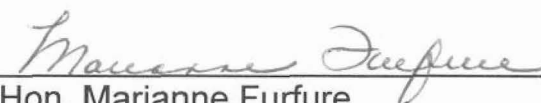
to its discovery demand is denied, as Ramsey has not made a showing that it had insufficient time to engage in discovery, nor did it offer an explanation for its failure to seek Court approval to request discovery after the October 8, 2014, deadline. Even if the court were to entertain Ramsey's motion to compel at this late date, the demands are overbroad or request information within its control or not relevant to the issues in dispute. Therefore, Ramsey's motion to strike the note of issue, remove the case from the court calendar and compel Ciminelli to respond to discover requests is denied.

Any requests for attorney's fees and costs is denied.

Plaintiff's counsel to submit order.

Dated: October 8, 2015.

ENTER:


Hon. Marianne Furfure
Acting Supreme Court Justice