Cruzate v Town of Islip
2016 NY Slip Op 30499(U)
March 11, 2016
Supreme Court, Suffolk County
Docket Number: 07-18196
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 07-18196
CAL. No. 15-00320OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. #007 - MG
#008 - MD

RUBEN CRUZATE and ROCIO CRUZATE,

Plaintiffs,

- against -

TOWN OF ISLIP,

Defendant.

GUERCIO & GUERCIO
Attorney for Plaintiffs
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Farmingdale, New York 11735

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TOWN OF ISLIP,

Third-Party Plaintiff,

-against-

SCHLEGEL CONSTRUCTION OF M.I., INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 37; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 38 - 45; 46 - 47; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Islip ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross motion by plaintiffs for an order pursuant to CPLR 3126 striking defendant's answer, or, in the alternative, imposing sanctions for spoliation of evidence is denied.

This action arises from an accident that allegedly occurred on May 12, 2006 at approximately 7:20 a.m. in the street in front of 609 Wilson Avenue, Central Islip, County of Suffolk. Plaintiff Ruben Cruzate alleges that the vehicle he was operating struck an object in the street, which was flooded with rain, causing injury to his head and left knee. It is alleged that the accident resulted from the negligence of defendant Town in installing and maintaining drainage basins at or near 609 Wilson Avenue. Plaintiff Rocio Cruzate seeks damages for medical expenses and loss of services.

Defendant Town now moves for summary judgment dismissing the complaint. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the deposition transcripts of the plaintiffs, of Peter Kletchka as a witness for the defendant Town, and of John Hillenbrand as a witness for the Town, records of complaints and responses thereto the affidavits of Thomas Owens, sworn to on April 1, 2015, of Robert A. Steele, P.E., sworn to on April 22, 2015, of Peter Kletchka, sworn to on January 14, 2013, and on August 9, 2011 and the affidavit of Teresa Bogart, sworn to on August 5, 2015. Plaintiff opposes the motion and cross-moves for an order striking defendant's answer, or, in the alternative, imposing sanctions for spoliation of evidence. In support of the motion, plaintiffs submit, *inter alia*, their attorney's affirmation, the transcript of plaintiff's deposition pursuant to General Municipal Law §50-h, discovery demands and responses, the affidavit of Jan Kalas, sworn to on June 26, 2015, and the affidavit of Christopher John Bresloff, P.E., affirmed on June 25, 2015.

Plaintiff testified twice in this matter. There are significant differences in his accounts of the events surrounding his alleged accident. At his deposition, pursuant to General Municipal Law §50-h, plaintiff testified that on May 12, 2006, he was working for his own company, My Cleaning Team. He was driving a Chevrolet Lumina van. It was bad weather and raining. That was the week that it rained all week. He was driving to pick up an employee at 609 Wilson Avenue, Central Islip. He had been there previously, once when there was flooding. He identified a picture of a storm drain as the object with which his vehicle came into contact. He had not previously taken any notice of the drain. He was driving no more than 30 m.p.h. He tried to get into the driveway, but there were two cars there. There was a dirt area to the right of the driveway. There were two cars parked there also, so he looked to pull into the far right. He was making a left turn into the area, when he struck the drain. He did not know it was a drain, now he knows that it was. The car hit something and came to a stop and did not continue. His head hit the steering wheel. His driver's side front tire exploded. He saw the employee he was picking up, Julissa, approaching and laughing. She said that he was not the first one and told him, in Spanish, that at the bottom is a drain. She said that it had happened to two other people. At his later deposition in this action, he testified that he approached the home at 609 Wilson Avenue, at approximately 7:20 a.m., intending to pick up an employee named Yulissi. It was raining heavily. It had been raining for maybe a week. He intended to pull into the paved driveway, but there were two cars in the driveway. He then decided to park in an unpaved area to the right of the driveway. There was already one car parked there. There was a pool of water covering Wilson Avenue from side to side. Plaintiff was heading southbound on Wilson Avenue, and brought his vehicle to a stop in the pool of water. Plaintiff then made a left turn, attempting to enter the driveway and struck something which made his vehicle come to a sudden stop. Plaintiff does not know how fast he was going prior to striking

the object. It was a heavy impact. His head struck the steering wheel. He got out of the truck to check and saw that the driver's side front tire had "exploded". Yulissi came out of the house laughing and told him that the same thing had happened to her brother and her cousin. He did not see any storm basins, drain basins or sewers during the entire incident. Upon being shown a picture of the site of the accident, he was asked to mark where the front of his vehicle was. Upon marking the photo, he stated that the area was covered with water so "this is a speculation". He never saw the sewer drain, before or after the accident. He never saw the drain until he returned to take pictures.

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 (***Alvarez v Prospect Hospital***, 68 NY2d 320 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 85 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. 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 [1980]).

As an initial matter the Court must address the admissibility of the affidavit of Teresa Bogardt, the executive assistant to the Town Clerk, which was submitted by defendant Town in its reply papers. Although a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply (*see* ***Arriola v City of New York***, 128 AD3d 747, 749 [2d Dept 2015]; ***Poole v MCPJF***, 127 AD3d 949, 950 [2d Dept 2015]; ***Tingling v C.I.N.H.R. Inc.***, 74 AD3d 954, 903 [2d Dept 2010], and generally, evidence submitted for the first time in reply papers should be disregarded by the court (*see e.g.* ***Adler v Suffolk County Water Auth.***, 306 AD2d 229, 230 [2d Dept 2003], exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers (*see* ***David v Chong Sun Lee***, 106 AD3d 1044, 1045 [2d Dept 2013]; ***Conte v Frelen Assoc., LLC***, 51 AD3d 620, 621 [2d Dept 2008]; ***Ryan Mgt. Corp. v Cataffo***, 262 AD2d 628 [2d Dept 1999], and/or when the other party is given an opportunity to respond to the reply papers (*see* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876 [2d Dept 2015]; ***Pennachio v Costco Wholesale Corp.***, 119 AD3d 662 [2d Dept 2014]; ***Zernitsky v Shurka***, 94 AD3d 875, 876 [2d Dept 2012]. Here, the plaintiffs' own reply affirmation discusses the Bogardt affidavit in some detail. As a result, the Court finds that the affidavit falls into one of the exceptions to the rule and will be considered for all purposes.

Pursuant to Town Law § 65-a and Town of Islip Code, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must be given prior written notice of the defect. § 47A-3 of the Town of Islip Code states, in relevant part:

> No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk,

insufficient to satisfy the statutory requirement (*see* ***Akcelik v Town of Islip***, 38 AD3d 483, 484 [2d Dept 2007]; ***Wilkie v Town of Huntington***, 29 AD3d 898 [2d Dept 2006]; ***Cenname v Town of Smithtown***, 303 AD2d 351 [2d Dept 2003]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Amabile v City of Buffalo***, *supra*; ***Wilkie v Town of Huntington***, *supra*; ***Cenname Town of Smithtown***, *supra*). Plaintiff also asserts that a search of the public works records dating back three years is insufficient. This claim is without merit (*see* ***Pallotta v City of New York***, 121 AD3d 656, 657 [2d Dept 2014] [2 year search sufficient]; ***Glaser v City of New York***, 79 AD3d 600 [1st Dept. 2010] [three year search sufficient]. The 2002 drainage project was completed in late 2002, so there is a 6 month gap in time beyond the three year search. However, the Town Clerk's search went well beyond five years and the records of telephonic complaints went back seven years. No complaints of a defect regarding the drain in question were found.

Defendant having established the lack of prior written notice, the burden shifts to plaintiffs to proffer evidence that one of the claimed exceptions to the written notice requirement applies (*see* ***Gagnon v City of Saratoga Springs***, 51 AD3d 1096 [3d Dept 2008]; ***Betzold v Town of Babylon***, 18 AD3d 787 [2d Dept 2005]; ***Brooks v Village of Horseheads***, 14 AD3d 756 [3d Dept 2005]). Plaintiff's most recent testimony at his examination before trial, reveals that he did not see the sewer drain, before or after the accident. The first time plaintiff saw the drain was when he returned to take pictures. Upon being shown a picture of the site of the accident, he was asked to mark where the front of his vehicle was. Upon marking the photo, he stated that the area was covered with water so "this is a speculation". Thus, plaintiff's own testimony is insufficient to create an issue of fact as to the Town's liability, there being no proof that the Town created the dangerous condition that allegedly caused his accident. It is noted that the plaintiff cannot use his prior, contradictory, testimony to create an issue of fact. Nor do the two affidavits submitted by plaintiffs' experts raise an issue of fact. Mr. Kalas speaks of chronic flooding at the area of the accident and Mr. Bresloff that the area suffered from storm drainage floods. However, the record establishes that between the installation of new storm drainage in the latter part of 2002 and the date of the accident in May 2006, there were no complaints of flooding, only complaints seeking to have the Town clean drainage basins, which was done. Both of the affidavits ignore the plaintiff's testimony that it was raining hard on the date of the accident, and that it had been raining for the entire week before. This is confirmed by the affidavits of Thomas Owens and Robert A. Steele, who report that 1.2 inches of rain fell that day, which added to prior rainfall, overwhelming the system. As noted by Commissioner Owens, this was the first time since the 2002 drainage work, that the Town became aware that there was a further flooding problem to address. Mr. Bresloff opined that the drain was installed at the low point of flooding, and, thus, was always covered with water. However, a photograph submitted by plaintiff (p. 2 of the memorandum of law) shows flooding in the area of the accident. Yet the drain is clearly visible and not covered by water. Both experts opine that the drain was installed too close to the driveway of 609 Wilson Avenue. Once again, photographs submitted by the plaintiff contradict (p. 2 of the memorandum of law) this assertion. The drain is well away from the actual concrete driveway. It is the gravel driveway and/or parking lot which impinges on the drainage basin which causes a problem. As installed, the drain was never meant to be driven over in the manner created by the homeowner's extension of the parking area. Because of the alteration of the area surrounding the drain, any opinion put forth by plaintiff's experts as to the condition of the drain when it was installed would be speculative at best, and insufficient to create an issue of fact. Plaintiffs have failed to raise an issue of fact as to the application of either of the exceptions to the prior written notice

requirement. The affirmative negligence exception "is limited to work by the City that immediately results in the existence of a dangerous condition" (*see* ***Yarborough v City of New York***, 10 NY3d 726 [2008]; ***Oboler v City of New York***, 8 NY3d 888, 889 [2007]). Herein, plaintiffs have failed to proffer evidence in admissible form sufficient to raise an issue of fact as to whether the Town's alleged negligence caused or immediately resulted in the existence of a dangerous condition (*see* ***Epperson v City of New York***, 133 AD3d 522 [1st Dept *2015*]; ***Yarborough v City of New York***, *supra*; ***Denio v City of New Rochelle***, 71 AD3d 717 [2d Dept 2010]; ***McCarthy v City of White Plains***, 54 AD3d 828 [2d Dept 2008]). Thus, plaintiffs having failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant either affirmatively created the condition causing plaintiff's accident or of a special use of the property, defendant Town is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra*; ***Forbes v City of New York***, *supra*).

Plaintiffs' cross motion for an order striking defendant's answer, or, in the alternative, imposing sanctions for spoliation of evidence is denied. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to'" prove its claim or defense (***Utica Mut. Ins. Co. v Berkoski Oil Co.***, 58 AD3d 717,718, quoting ***Lawson v Aspen Ford, Inc.***, 15 AD3d 628, 629 [2d Dept 2005]; *see*, *also*, ***Neve v City of New York***, 117 AD3d 1006, 1008 [2d Dept 2014]; ***Mendez v La Guacatala, Inc.***, 95 AD3d 1084[2d Dept 2012]). Plaintiffs have failed to produce evidence, only speculation, that defendant intentionally or negligently disposed of critical evidence or fatally compromised the movant's ability to prove his alleged claim.

Accordingly, the motion by defendant Town of Islip for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted. The cross motion by plaintiffs for an order pursuant to CPLR 3126 striking defendant's answer, or, in the alternative, imposing sanctions for spoliation of evidence is denied.

Dated: March 11, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION