

Sheehan v County of Suffolk
2019 NY Slip Op 34690(U)
April 19, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 606210/2018
Judge: Martha L. Luft
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

AMENDED
DECISION AND ORDER

GERARD SHEEHAN, x

Plaintiff,

-against-

COUNTY OF SUFFOLK, TOWN OF
BABYLON, and LYDEL ASPHALT
CORP.,

Defendants.
_____ x

Mot. Seq. No.: 001 - MG
Orig. Return Date: 11/13/2018
Mot. Submit Date: 12/18/2018

Mot. Seq. No.: 002 - MG
Orig. Return Date: 11/13/2018
Mot. Submit Date: 12/18/2018

PLAINTIFF'S ATTORNEY

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Upon the e-filed documents numbered 29 through 43, it is

ORDERED, that defendant Lydel Asphalt Corp.'s ("Lydel") motion for summary judgment (mot seq 001) is granted and the complaint is dismissed insofar as it alleges claims against Lydel; and it is further

ORDERED, that plaintiff's unopposed motion to amend the summons and complaint to add Rosemar Contracting, Inc. ("Rosemar") as a defendant is granted; and it is further

ORDERED, that the caption hereby is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

GERARD W. SHEEHAN, X

Plaintiff,

-against-

COUNTY OF SUFFOLK, TOWN OF BABYLON and
ROSEMAR CONTRACTING, INC.

Defendants.
_____ X

; and it is further

ORDERED, that plaintiff is to file and serve a supplemental summons and amended verified complaint and such filing and service shall be effected within thirty (30) days of the date of service of this order with notice of entry; and it is further

ORDERED, that counsel for the plaintiff shall serve a copy of this order upon the County Clerk within thirty (30) days of the date of this order.

This is an action by plaintiff alleging personal injuries resulting from a "trip and fall" on a raised sewer drain on Cheltenham Road in West Babylon which had been milled in preparation for resurfacing. The complaint alleges that defendant Lydel had

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performed road work in the area which left the sewer drain raised from the surrounding road causing a tripping hazard.

Lydel has moved for summary judgment asserting that it is not a properly named as a defendant because its business is the retail sale of asphalt, that it merely sold asphalt to the road construction companies and did not perform any type of heavy construction work in the area. Lydel supports its motion with evidence in admissible form, including the affidavit of Lydel's president.

The plaintiff opposes the motion with an attorney's affirmation and documents obtained via a Freedom of Information Law ("FOIL") request to the Town of Babylon. The documents show correspondence between the Town of Babylon and Rosemar including a work order from the Town to Rosemar for road paving. Two of the documents are blurry receipts from Lydel to its customer, Rosemar. The receipts indicate a number of tons of a product "01 Type 6F Top" and the "job" as the "Town of Babylon."

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. *Id.* 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]. 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. *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987].

Here, Lydel established its *prima facie* entitlement to summary judgment. The burden then shifted to the plaintiff to come forward with evidence in admissible form that Lydel had some duty of care to the plaintiff. An affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d

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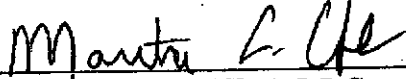
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595 [1980]; *Service v McCoy*, 131 AD3d 1038, 16 NYS3d 283 [2d Dept 2015]. The contention in the plaintiff's attorney's affirmation that discovery *may* reveal additional information is insufficient to defeat the motion. *Singh v. Avis Rent A Car System, Inc.*, 119 AD3d 768, 989 NYS2d 302 [2d Dept. 2014]. Further, the FOIL documents from the Town of Babylon are not in admissible form and do not show facts sufficient for a trial. Nevertheless, the FOIL documents, if they were admissible, tend to support Lydel's summary judgment motion by bolstering the contention that Lydel was merely a supplier of asphalt.

The plaintiff has moved for leave to amend the complaint to name Rosemar as a defendant. That unopposed motion is granted in accordance with the decretal paragraphs herein.

ENTER

Dated: April 19 2019
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION