

Flores v BCC II, LLC
2020 NY Slip Op 32810(U)
August 26, 2020
Supreme Court, New York County
Docket Number: 150559/2016
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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ROSARIO FLORES,

Plaintiff,

- v -

BCC II, LLC, BI-COUNTY CONCRETE CORPORATION

Defendant.

-----X

INDEX NO. 150559/2016

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 89, 90, 91, 92, 97, 98, 99, 100, 101, 104, 106, 107, 110

were read on this motion to/for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 93, 94, 95, 96, 102, 103, 105, 108, 109, 111

were read on this motion to/for JUDGMENT – SUMMARY.

Upon the foregoing documents, it is

Defendant BCC-II, LLC’s (“BCC”) motion [#002] for summary judgment is denied.

Defendant Bi-County Concrete Corporation’s (“Bi-County”) motion [#003] for summary judgment is granted.

On July 25, 2015, at approximately 3:00 p.m., plaintiff Rosario Flores was injured when she tripped while walking through a parking lot and fell in a depression adjacent to a manhole cover located at 72-15 25th Avenue, Queens, New York (the “premises”). This occurred just before plaintiff reached a concrete driveway exit between the asphalt parking lot and 25th Avenue (the “apron”). BCC owns the parking lot and buildings within the premises. Bloomenfeld Development Group (“BDG”) owns BCC and serves as the managing agent of the premises. BCC hired Bi-County pursuant to a contract in April 2015 to replace the premises’ sidewalk, trench drain and apron. The work took place between May 3 and 8, 2015.

The contract between BCC and Bi-County outlined Bi-County's scope of work, the first line of which stated that Bi-County was to "remove existing parking lot apron, trench drain and curb." Gregory Cote, owner of Bi-County, confirmed this responsibility and further testified at his deposition that asphalt work was not part of the contract (asphalt was a different trade). Mr. Cote testified that Bi-County went two inches beyond the concrete apron onto the asphalt parking lot to frame the new concrete (there were four inches between where Bi-County's work ended and the manhole cover). When Bi-County finished the job, they filled in the exposed area between the concrete and manhole cover with dirt. Thereafter, according to Mr. Cote, it was BDG's that leveled and finished off any asphalt work (i.e. patchwork) adjacent to the concrete areas in which Bi-County had performed their work. This was consistent with standard procedure, as the companies had previously worked with one another.

Michael Dumelle, property manager for BDG, was responsible for supervising BDG's maintenance of the premises. Mr. Dumelle testified at his deposition that the asphalt adjacent to the manhole cover was level upon completion of Bi-County's work, and remained level for several months, but asphalt damage is "expected" whenever concrete is removed. Accordingly, BDG's patchwork extended 24 inches onto the asphalt parking lot (including the manhole cover). Mr. Dumelle stated that he conducted inspections of the lot every seven to fifteen days after the patchwork was completed, during which time he observed the area without depressions. Mr. Dumelle testified that he thought the depression developed over a short period of time, as he had seen these depressions develop in one to two days. BDG also knew that the premises were susceptible to depressions because it was built over a landfill. Dumelle and Michael Classi, Dumelle's supervisor, did not notify Bi-County following plaintiff's fall, as they didn't think Bi-County's work was responsible.

In Motion #002, BCC moves for summary judgment dismissing plaintiff's complaint, as well as seeking indemnification on its cross-claim against Bi-County. BCC argues that they did not have notice of the condition surrounding the manhole cover and Bi-County is required to indemnify BCC for issues related to Bi-County's work. In Motion #003, Bi-County moves for summary judgment dismissing plaintiff's complaint and BCC's cross-claim against Bi-County. In addition to not having notice of the depression, Bi-County argues that they did not owe a duty of care to the plaintiff and are not required to indemnify BCC. In response to BCC's motion, plaintiff argues that BCC created the condition when Bi-County opened the area, as well as caused the condition when BDG negligently conducted the patchwork. She further argues that even if BCC didn't cause or create the condition, BCC had notice of the condition. In regard to Bi-County, plaintiff argues Bi-County "set the wheels in motion" when they opened the asphalt near the manhole cover.

Summary judgment is a drastic remedy which should not be granted where there exists a triable issue of fact (*Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]; *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party (*Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must establish a *prima facie* showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion makes a *prima facie* showing, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the moving party has demonstrated its *prima facie* showing, the burden then shifts to the non-moving party to demonstrate by admissible

evidence the existence of a triable issue of fact necessitating a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez* at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For premises liability a plaintiff must demonstrate (1) a duty owed to the defendant by the plaintiff; (2) a breach thereof; and (3) an injury that is a proximate result therefrom (*Solomon v City of New York*, 66 NY2d 1026 [1985]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325 [1981]; *citing* Prosser, Torts § 30, at 143 [4th ed]). Moreover, the plaintiff must demonstrate the defendant either created the condition causing the accident, or had actual or constructive notice of the condition (*Uhlich v Can. Dry Bottling Co. of New York*, 305 AD2d 107 [1st Dept 2003]; *citing Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002], *Frank v Time Equities*, 292 AD2d 186 [1st Dept 2002]). A defendant's burden on summary judgment in a premises liability case is to establish that it did not have a duty to plaintiff or that it did not create the condition, or have actual or constructive notice of the condition (*Gordon v Museum of Natural History*, 67 NY2d 836 [1986])[“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it”]).

BCC argues that they did not have actual or constructive notice of the depression and therefore cannot be liable. They point to Mr. Dumelle's frequent inspections, his statement that he was not aware of any depression and that this particular depression happened too quickly to constitute constructive notice. However, Mr. Dumelle testified he inspected the premises every seven to fifteen days and was not able to state for certain when his last inspection took place prior to the accident. Moreover, Mr. Dumelle acknowledged that the premises were built over a landfill and there had been sinkholes in the area. Mr. Dumelle stated that it was not uncommon for these

settlements to develop over a short period of time: “I have walked properties on a Tuesday, seen an even pavement, and come back on a Thursday and there is a sinkhole, two days later.”

Although Mr. Dumelle did not have personal knowledge of the condition, the fact that his last inspection may have been fifteen days prior raises a question of fact as to constructive knowledge, particularly with his prior knowledge of sinkholes appearing fast (*see Mullin v 100 Church LLC*, 12 AD3d 263 [1st Dept 2004][holding that a genuine issue of material fact as to a recurring condition precludes summary judgment]). Accordingly, BCC’s motion for summary judgment is denied.

With respect to Bi-County, a contractual obligation in and of itself will generally not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *citing Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220 [1990]). *Espinal* outlined three exceptions in which a party who enters into a contract to render services may have assumed a duty of care (and potentially be liable) to non-contracting third parties: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal* at 140).

Here, Bi-County has met its *prima facie* showing of entitlement to judgment as a matter of law, and BCC and the plaintiff have not demonstrated that there is a triable issue of fact. Two of the *Espinal* exceptions do not apply in the instant case. First, the plaintiff did not detrimentally rely on the continued performance of Bi-County’s duties. The incident occurred months after Bi-County’s work was complete, at which point their contractual duties had ended. The plaintiff was also not aware of Bi-County’s role until after the incident. Second, Bi-County’s contract was not

so “comprehensive and exclusive” as to entirely displace BCC’s duty. BCC was responsible for maintaining the parking lot, and Bi-County did not assume a duty to maintain the premises when they signed the contract. Indeed, the spot where plaintiff tripped and fell was maintained by BCC and the asphalt top where she tripped was finished by BCC.

Bi-County also did not launch a force or instrument of harm as BCC and plaintiff’s arguments relating to launching are grounded in speculation (*see Timmins v Tishman Const. Corp.*, 9 AD3d 62, 69 [1st Dept 2004][finding that such opinions, based on speculation, conjecture and without an evidentiary basis, are inadequate to create an issue of fact]; *see also Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011]; *Cason-Payano v Damiano*, 58 AD3d 472 [1st Dept 2009]). Specifically, plaintiff argues that Bi-County launched a force or instrument of harm when they opened the asphalt near the manhole cover. However, the claim that Bi-County’s work impacted the location where the plaintiff fell months later is speculative (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-61 [2007][“[plaintiffs] argue, nevertheless, that Aero’s failure to salt or sand the area of snow it plowed left open the possibility that the mounds of snow may have melted and refrozen . . . thus creating or exacerbating a dangerous condition. This argument is without merit”]).

Here, there is no competent evidence that Bi-County’s work undermined the spot where the plaintiff fell or that Bi-County performed work in the location of plaintiff’s fall. Mr. Cote testified that Bi-County went two inches beyond the concrete apron to form the concrete, and there was still space between the end of Bi-County’s work and the manhole cover. Bi-County’s sole involvement with the area immediately adjacent to the apron was filling the open holes with dirt at the conclusion of their work. This protocol of filling the exposed area with dirt was conducted

to eliminate tripping hazards until BDG could perform the patchwork, and was not included in Bi-County's contract.

Therefore, plaintiff's argument as to the connection between Bi-County's scope of work and the depression which caused the plaintiff's injury is too speculative to establish a triable issue of fact (*see Jones v Consol. Edison Co. of New York, Inc.*, 95 AD3d 659, 661 [1st Dept 2012])[“Because plaintiff failed to submit evidence establishing a connection between Nico's work and the defect that caused her accident, Nico should have been granted summary judgment”]; *citing Robinson v City of New York*, 18 AD3d 255, 256 [1st Dept 2005][“The speculative assertions by plaintiff are insufficient to raise a question of fact about whether the repair and excavation work performed by these defendants many months prior in the curb lanes, away from the location of plaintiff's fall . . . caused her injuries”]).

BCC's argument that a triable issue of fact was raised by Mr. Dumelle's contention that Bi-County, not BCC, performed the removal and replacement of the asphalt adjacent to the manhole cover, is without merit. Not only is not really disputed that Bi-County did not perform any asphalt work and the contract did not include asphalt work; but Mr. Dumelle testified at his deposition that BDG conducted the patchwork 24 inches onto the asphalt (after Bi-County's work was completed).

Finally, Bi-County's motion for summary judgment dismissing BCC's cross-claim for indemnification is granted. For common law indemnification, BCC has failed to demonstrate that Bi-County owed a duty of care to the plaintiff or breached their duty. Regarding contractual indemnification, the parties' contract requires Bi-County to indemnify BCC “from any and all liability, claims, demands, suits and actions . . . for death, bodily injury or property damage . . . brought against arising out of or as a result of any direct or indirect willful or negligent act or

omission of the contract . . .” However, BCC has failed to raise a triable issue that the plaintiff’s injury was either a result of Bi-County’s actions or that Bi-County breached their contract (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955 [2d Dept 2016]). Here, as Bi-County has met its *prima faice* burden of demonstrating that it was not responsible for the accident, and no party has raised any issues of fact to rebut this evidence, Bi-County’s motion for summary judgment on BCC’s indemnification claim must also be granted. For the above reasons, it is hereby

ORDERED that BCC’s motion for summary judgment as against plaintiff is denied; and it is further

ORDERED that Bi-County’s motion for summary judgment as against both plaintiff and BCC is granted, all claims and cross-claims as against Bi-County are dismissed, and the Clerk is directed to enter judgment accordingly.



8/26/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE