

<b>DiStefano v County of Suffolk</b>
2020 NY Slip Op 34592(U)
June 1, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 615335-17
Judge: Denise F. Molia
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INDEX No. 615335-17

original

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

MOTION DATE: 05/08/19, 07/03/19
ADJ. DATE: 08/23/19
Mot. Seq. #002 - MD
Mot. Seq. #003 - MD

VIRGINIA DISTEFANO,
Plaintiff,
- against -

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COUNTY OF SUFFOLK, NEW YORK, SUFFOLK:
COUNTY JUDICIAL FACILITIES AGENCY,
SUFFOLK COUNTY DEPARTMENT OF
PUBLIC WORKS and LAWRENCE
VOIGTSBERGER, SUFFOLK COUNTY
COMMISSIONER OF JURORS,
Defendants.

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Laser Industries, Inc.

COUNTY OF SUFFOLK and SUFFOLK COUNTY:
DEPARTMENT OF PUBLIC WORKS,
Third-Party Plaintiff,
- against-

990 Stewart Avenue, Suite 400
Garden City, NY 11530

LASER INDUSTRIES, INC.,
Third-Party Defendant:

Upon the following papers (1) Order to Show Cause by the third-party defendant dated April 16, 2019, and

supporting papers; (2) Notice of Cross Motion by defendant/third-party plaintiff, dated June 3, 2019, and supporting papers; (3) Reply Affirmation by third-party defendant, dated June 14, 2019; (4) Affirmation in Opposition to Cross Motion by plaintiff, dated July 2, 2019, and supporting papers; (5) Reply Affirmation by defendant/third-party plaintiff, dated July 10, 2019, it is

**ORDERED** that the motion by the third-party defendant to dismiss the third-party complaint against them is denied (mot. seq. 002); and it is further

**ORDERED** the motion by defendants County of Suffolk and Suffolk County Department of Public Works seeking dismissal of the plaintiff's complaint against them (mot. seq. 003), is denied.

In the instant personal injury action, plaintiff Virginia DiStefano alleges that she fell when her left shoe became caught in a chip in the concrete curb as she was walking into the Cohalan Court Complex for her second day of Grand Jury duty. After interposing an Answer, the defendants County of Suffolk and Suffolk County Department of Public Works ("defendants/third-party plaintiffs") commenced a third-party action against third-party defendant, Laser Industries, Inc, asserting three causes of action; the first for breach of contract for failure to procure insurance for its performance of improvements to the courthouse complex at the site of the alleged incident; the second for breach of contract for failing or refusing to undertake the defense and indemnification of the plaintiff's claims and the third for common law indemnification and/or contribution. By way of Order to Show Cause, the third-party defendants now move to dismiss the action in lieu of an answer (mot. seq. 002).

The defendants/third-party plaintiffs then moved to dismiss the plaintiff's action against them based upon the fact that the County of Suffolk did not receive written notice of the alleged defective condition prior to the plaintiff's alleged injury as required by §C8-2A of the Suffolk County Charter (mot. seq. 003).

The Court first addresses the defendants' motion to dismiss the plaintiff's action against it (mot. seq. 003). "A municipality that has adopted a prior written notice statute cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (*Mahabir v Suffolk County Water Authority*, 130 AD3d 694, 11 NYS3d 863 [Mem][2d Dept 2015]). "Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (*Masotto v Village of Lindenhurst*, 100 AD3d 719, 955 NYS2d 86 [2d Dept 2012]). Preliminarily, the County defendants established that the prior written notice law still applied even if the County had a proprietary duty to maintain the sidewalk abutting the courthouse (*Gebhardt v Suffolk County*, 171 AD3d 708, 95 NYS3d 841 [Mem] [2d Dept 2019]; *see also, Wittorf v City of New York*, 23 NY3d 474, 480 [2014]). The County Defendants submitted evidence in the form of affidavits from County officials, demonstrating that no prior written notice of the alleged defect had been received (*see, Albano v Suffolk County Community College*, 66 AD3d 719, 887 NYS2d 200 [2d Dept 2009]; *Tramontano v County of Suffolk*, 239 AD2d 407, 658 NYS2d 342 [2d Dept 1997]).

Although the County defendants established, prima facie, that the plaintiff failed to comply with Suffolk County Charter §C8-2A, they failed to establish, prima facie, that they did not create the allegedly defective conditions which caused the plaintiff's fall through an affirmative act of negligence (*see, Creutzberger v County of Suffolk*, 140 AD3d 915, 33 NYS3d 438 [2d Dept 2016]; *McManus v Klein*, 136 AD3d 700, 24 NYS3d 205 [2d Dept 2015]; *Mahabir v Suffolk County Water Authority*, 130 AD3d 694, 11 NYS3d 863 [Mem][2d Dept 2015]). The pleadings and bill of particulars in the action

include allegations that the defendants (either directly or through their contractors, etc.) performed work on the handicapped ramp/apron involved in the incident, and affirmatively created the dangerous and defective condition. The County defendants' affidavits, however, are silent as to this issue (*cf. DeSalvio v Suffolk County Water Auth.*, 127 AD3d 804, 7 NYS3d 331 [2d Dept 2015]; *Lima v Village of Garden City*, 131 AD3d 947, 16 NYS3d 249 [2d Dept 2015]). Since the County Defendants failed to meet their initial burden as movants, it is not necessary to review the sufficiency of the plaintiff's opposition papers (*see, Creutzberger v County of Suffolk*, 140 AD3d 915, 33 NYS3d 438 [2d Dept 2016]; *Mahabir v Suffolk County Water Authority*, 130 AD3d 694, 11 NYS3d 863 [Mem][2d Dept 2015]).

Accordingly, the cross motion by the defendants seeking dismissal of the plaintiff's complaint against them (mot. seq. 003), is denied.

The Court next turns to the motion by the third-party defendant to dismiss the complaint asserted against it by the third-party plaintiffs (mot. seq. 002). The third-party defendant contends that the third-party plaintiffs admit that Laser Industries, Inc. procured liability insurance for the benefit of the third-party plaintiffs, and to the extent that the insurer may have failed to provide coverage to the third-party plaintiff, the third-party plaintiffs must raise that issue directly with the insurer.

To succeed on a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), the documentary evidence relied upon by the defendant must "conclusively establish a defense to the asserted claims as a matter of law" (*Guayara v Harry I. Katz, P.C.*, 83 AD3d 661, 920 NYS2d 401 [2d Dept 2011], *citing Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). When determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the standard is whether the pleading states a cause of action," and "the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]).

Here, the third-party defendant failed to conclusively establish its defense to the third-party plaintiff's claims. In the third-party complaint, the third-party plaintiff alleges that Laser Industries, Inc., as the Contractor, was required to secure the proper insurance for its performance of improvements to the Cohalan Courthouse Complex. The complaint attaches the Certificate of Liability listing the County of Suffolk as an Additional Insured. Laser Industries, Inc. argues that this is a concession or proof that it fulfilled its obligation to procure insurance and as such, the first cause of action asserted in the complaint should be dismissed. A Certificate of Liability Insurance stating that it "confers no rights upon the certificate holder," however, is insufficient to conclusively demonstrate the existence of the alleged insurance coverage (*see, Binyan Shel Chessed, Inc. v Goldberger Ins. Brokerage, Inc.*, 18 AD3d 590, 795 NYS2d 619 [2d Dept 2005]; *see also, Tribeca Broadway Associates, LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1<sup>st</sup> Dept 2004])["A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists"].

Additionally, with respect to the second and third causes of action, the third-party defendant fails to establish that it is not required to indemnify the third-party plaintiff. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Kennelly v Darlind Constr.*, 260 AD2d 443, 688 NYS2d 584 [2d Dept 1999] *quoting Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). The third-party defendant fails to sufficiently

address the effect of the indemnification provisions contained within the bid request<sup>1</sup> and also fails to eliminate questions of fact regarding the responsibility for the construction site, which give rise to the plaintiff's claim for common law indemnification (*see, Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 758 NYS2d 286 [1<sup>st</sup> Dept 2003]; *Kennely v Darlind Constr.*, 260 AD2d 443, 688 NYS2d 584 [2d Dept 1999]).

Accordingly, the motion by third-party defendant Laser Industries, Inc. seeking dismissal of the third-party complaint against it (mot. seq. 002), is denied.

Dated: June 1, 2020

Hon. Denise F. Mollia  
HON. DENISE F. MOLIA

RST

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION

<sup>1</sup> Specifically, section G.13 "Indemnification of the Owner and Engineer" states:

"A. Except for the Owner's and/or Engineer's own negligent acts, the Contractor shall pay and make good all losses and damages arising out of all causes connected with the Contract, and shall indemnify, defend and save harmless the Owner and Engineer from all claims, liability, and responsibility, of every nature and kind for losses, damages and injuries, which any person or persons may sustain or suffer by reason of or any way arising out of the Contract."

Additionally, "Exhibit A-Instruction to Bidders and General Specifications To Be Complied With Where Applicable" states:

"13A. Indemnification and Defense. The Contractor shall protect, indemnify and hold harmless the County, its officers, officials, employees, Contractors, agents, servants and other persons from and against all liabilities, fines, penalties, actions, damages, claims, demands, judgments, losses, costs, expenses, suits or actions and reasonable attorneys' fees, caused by the acts or omissions or the negligence of the Contractor incurred by the County, its officers, officials, employees, Contractors, agents, servants and other persons in any action or proceeding arising out of or in connection with the Contract."