

Methal v Village of Ardsley

2020 NY Slip Op 34832(U)

April 29, 2020

Supreme Court, Westchester County

Docket Number: Index No.: 66187/2017

Judge: Mary H. Smith

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

RACHAEL METHAL and STERLING SMITH,

Plaintiff(s),

- against -

DECISION & ORDER

Index No.: 66187/2017

VILLAGE OF ARDSLEY, JOHN J. ANNUNZIATA,
P.E., P.C., and FLAVIO LA ROCCA & SONS, INC.,

Defendant(s).

VILLAGE OF ARDSLEY,

Third-Party Plaintiff(s),

-against-

SUMMIT LAND SURVEYING P.C.,

Third-Party Defendant(s).

Defendant/Third-Party Plaintiff Village of Ardsley (Village) moves (Motion #1) for an order, granting it leave to serve an amended answer.

The Village moves (Motion #2) for an order, granting summary judgment on plaintiffs' third cause of action, on all of plaintiffs' causes of action to the extent that they seek monetary damages prior to April 7, 2017, and dismiss all cross-claims against the Village.

Defendant Flavio La Rocca & Sons, Inc. (Flavio) move (Motion #3) for an order, granting summary judgment, granting a spoliation sanction against plaintiffs and the Village, providing an adverse inference charge, and precluding the Village from testifying or proffering expert opinion as to the condition of the destroyed evidence at the time of its removal without notice to all parties.

Defendant John J. Annunziata, P.E., P.C. move (Motion #4) for summary judgment.

The following papers were read:

Notice of Motion (#1), Affirmation, Affidavit, and Exhibits (22)	1-25
Affirmation in Opposition, Affidavit, and Exhibits (4)	26-31
Affirmation in Opposition and Exhibits (4)	32-36
Affirmation in Reply and Exhibits (4)	37-41
Notice of Motion (#2), Affirmation, Exhibits (12), and Memo of Law	42-56
Affirmation in Opposition, Exhibits (15), and Memo of Law	57-73
Memo of Law in Reply	74
Notice of Motion (#3), Affirmation, Affidavit, Exhibits (10), and Memo of Law	75-88
Affirmation in Opposition, Affidavit, Exhibits (21), and Memo of Law	89-102
Affirmation in Opposition, Exhibits (16), and Memo of Law	103-20
Affirmation in Reply and Exhibit	121-22
Notice of Motion (#4), Affirmation, Statement, Affidavits (2), and Exhibits (14)	123-41
Memo of Law in Support	142
Affirmation in Opposition, Affidavit, Exhibits (21), and Memo of Law	143-67
Affirmation in Reply, Affidavit, and Exhibits (2)	168-71

By way of background, in 2012, plaintiffs purchased certain real property known as 11 McKinley Place, Ardsley, New York (Premises). In 2014, plaintiffs decided to improve the Premises by leveling the backyard and constructing a retaining wall (Retaining Wall) to support the additional soil. Plaintiffs hired Flavio to construct the Retaining Wall and retained Annunziata to engineer the Retaining Wall. Thereafter, Annunziata designed the Retaining Wall and its plans were approved by the Village. Flavio constructed the Retaining Wall in the summer of 2015. Subsequently, issues arose in the backyard of the Premises. On October 4, 2017, plaintiffs commenced this action with the filing of a summons and complaint. The complaint alleges that a storm drain pipe (Storm Drain Pipe), owned by the Village, and running underneath the backyard of the Premises, deteriorated and caused sinkholes and other damage in the backyard of the Premises. In addition, the complaint alleges that the construction of the Retaining Wall contributed to the subject deterioration. Subsequently, the parties engaged in discovery. On September 3, 2019, the parties filed a trial readiness stipulation and order, wherein the parties represented, among other things that discovery was complete and the case was ready for trial. On September 5, 2019, the Village filed the instant motion (Motion #1) to amend its answer to include two counterclaims against plaintiffs and an additional cross-claim against defendant Flavio La Rocca & Sons, Inc. (Flavio). Defendants have also moved (Motions ## 2, 3, & 4) for summary judgment. The Court addresses the motions in order.

The Village's Motion to Amend

In support of the motion, the Village cites to various testimony and especially the testimony of Lawrence Tomasso on May 22, 2019 and contends that it has become apparent that plaintiffs' and Flavio's negligence caused the condition (namely, the crushing of the Storm Drain Pipe), which lead to the damages to the Premises. The Village asserts that discovery is still outstanding and the date to file the note of issue has not been set and little, if any, additional discovery will be needed as a result of the amendments.

In opposition, plaintiffs contend, among other things, that the motion should be denied as prejudicial to plaintiffs. Specifically, plaintiffs note that, contrary to the Village's assertions, the parties filed a stipulation, agreeing that discovery was complete prior to the filing of the instant motion. Plaintiffs also assert that any delay is prejudicial as, until the issues are resolved, they are without the use of their backyard. In addition, plaintiffs contend that the application is frivolous and merits the imposition of sanctions.

In opposition, Flavio also contends, among other things, that the motion is based on information in the Village's possession from some time and, as a result, the motion appears to be an attempt to delay these proceedings.

Leave to amend pleadings should be freely given (*see* CPLR 3025 [b]). The determination whether to grant leave to amend a pleading resides in the sound discretion of the Court (*see Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]). In exercising its discretion, the Court "should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Haller v Lopane*, 305 AD2d 370 [2d Dept 2003]). As noted above, the Village stipulated that discovery was complete and ready for trial and then filed the instant motion, indicating that discovery was not complete and seeking to add additional claims, which would require additional discovery. In addition, by the Village's admission, the testimony that finally precipitated this motion was provided on May 22, 2019. To permit the Village to amend at this point would result in obvious prejudice to the other parties, as each would now, after the close of discovery, be compelled to reevaluate all of the discovery to date in light of these proposed new claims and engage in further discovery and potentially withdraw and remake or supplement the summary judgment motion papers as a result. The Village has provided an insufficient justification for its delay in making Motion #1 or the undue prejudice that it will visit on the other parties (*cf. Anonymous v Gleason*, 175 AD3d 614, 617 [2d Dept 2019]). Accordingly, Motion #1 is denied. Next, the Court considers the motions for summary judgment.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

The Village's Motion for Summary Judgment

The complaint alleges claims for trespass and negligent maintenance and negligent design of the Storm Drain Pipe against the Village (that is, the first, second, and third causes of action). The trespass claim alleges that the Village has the Storm Drain Pipe on the Premises without an easement and that the flow of water from the same has caused damage to the Premises. Regarding the claims for negligent maintenance and design, the complaint alleges that the Village negligently designed and negligently maintained the Storm Drain Pipe and that that negligence caused damage to the Premises.

In support of the motion, the Village contends that plaintiffs' claim for negligent design (that is, the third cause of action) is barred by the applicable statute of limitations. Specifically, the Village asserts that the claim accrued as early as the Spring 2015 or by May 2016 and thus the one year and ninety day statute of limitations set forth in General Municipal Law § 50-i expired sometime in August 2017. Regardless, the Village contends that there is no evidence that the Storm Drain Pipe was negligently designed. Next, the Village notes that this action was commenced on October 4, 2017 and, as a result, plaintiffs are barred from seeking any monetary damages arising from property damage that occurred prior to July 6, 2016, that is, the day that was one year and ninety days prior to October 4, 2017. The Village also argues that the first notice of claim is impermissibly vague and thus a nullity and, as a result, the second notice of claim limited the damages to those occurred after April 7, 2017. For the same reasons, the Village contends, no defendant may maintain a cross-claim that pre-dated April 7, 2017. Moreover, the Villages contends that Flavio's cross-claim for contribution must fail because plaintiffs' only cause of action against Flavio is for breach of contract and it is well settled that contribution is not available for loss resulting from a breach of contract.

The complaint also alleges that the first notice of claim was served on the Village on or about August 16, 2016 and that notice of claim provides, among other things, that "[f]or the past 2 months Plaintiffs have been trying to investigate the cause of the excessive flooding and subsequent property damage . . . [and] it has been determined that there is

excessive asphalt and debris in the [Storm Drain Pipe]. The extent of this condition cannot be determined without the cooperation and assistance of the Defendant as the [Storm Drain Pipe is] within the Defendant's exclusive control and domain." The complaint also alleges that a second notice of claim was served on the Village on or about July 6, 2017, which provides, among other things, that the claim arose on April 6, 2017 during rainstorms and that excess water from the Storm Drain Pipe was observed flooding portions of the Premises. The second notice of claim makes mention of plaintiffs' prior complaints to the Village about flooding and sinkholes, including the service of the first notice of claim.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to sue has expired" (*see O'Brien v County of Nassau*, 164 AD3d 684, 685 [2d Dept 2018], internal quotation marks omitted). Here, the Village has failed to establish, *prima facie*, when plaintiffs' claim accrued and thus has failed to establish that it is entitled to foreclose any recovery at this juncture. As noted above, the first notice of claim indicates that plaintiffs had difficulty identifying the cause of the flooding. Accordingly, the Village's motion for summary judgment based on statute of limitations is denied.

The Village's contention that plaintiffs' negligent design claim fails because there is no evidence to support this claim fails as it merely point to perceived gaps in plaintiffs' proof rather than establishing, *prima facie*, the lack of merit of the claim (*see Calderone v Town of Cortlandt*, 15 AD3d 602, 602 [2d Dept 2005]). Accordingly, the Village's motion for summary judgment as there is no evidence of negligent design is denied.

The Village's motion for summary judgment of Flavio's cross-claim, as the complaint only seeks damages from Flavio for breach of contract, is granted without opposition (*see Ruby Land Dev. Ltd. v Toussie*, 4 AD3d 518, 519 [2d Dept 2004]).

Flavio's Motion for Summary Judgment and Other Relief

The complaint alleges one claim against Flavio for breach of contract. The complaint further alleges that Flavio breached its contract with plaintiffs by improperly constructing the retaining wall and/or improperly placing fill or equipment on the Premises in a manner which has damaged the Storm Drain Pipe running underneath the Premises.

In support of the motion, Flavio contends that it is entitled to summary judgment. Flavio proffers various evidence to substantiate its claim that it took all proper precautions before constructing the Retaining Wall. Among other things, Flavio proffers an affidavit from the president of Flavio (that is, Flavio La Rocca). Mr. La Rocca avers that he advised plaintiffs to retain an engineer and provide the engineer with a survey so that s/he could properly create drawings for the Retaining Wall. Mr. La Rocca avers that plaintiffs hired Annunziata, who in turn prepared the drawings (Drawings), which were in turn provided

to Flavio to obtain the proper permits. Mr. La Rocca avers that the Drawings were submitted to the Village for approval and a building permit was issued. Mr. La Rocca avers that he was not aware of the Storm Drain Pipe prior to this litigation. Mr. La Rocca avers that Flavio contacted a company known as “Dig Safe,” which made markings in the front of the Premises, but none in the backyard. Mr. La Rocca proffers some internal notes, which purport to show that a call was made to “Dig Safe” was made on September 9, 2014. Mr. La Rocca avers that photographs were taken at the different stages to the project, which, he asserts, demonstrate compliance with the Drawings. Further, Mr. La Rocca notes that the Village’s building inspector (that is, Lawrence Tomasso) came to the Premises after the excavation and after the gravel base was in place and conducted a subbase inspection, which was approved and Flavio was paid for the work performed.

In opposition, plaintiffs and the Village note that various testimony from employees of the Village, including the building inspector (that is, Lawrence Tomasso) conflicts with Flavio’s version of events. In particular, plaintiffs note that there is testimony that an excavation of the Storm Drain Pipe in 2017 revealed the presence of “extra” fill and a large rock on top of the Storm Drain Pipe, that a six foot section of the Retaining Wall had been constructed on top of the Storm Drain Pipe, and that the Storm Drain was crushed underneath. Plaintiffs and the Village also assert that there is a question of fact about whether Flavio called “Dig Safe,” as required by applicable law (that is, General Business Law § 764 and 16 NYCRR §753). The Village notes that, although Flavio’s evidence purports to show a call to “Dig Safe” in September 2014, the excavation did not take place until the Spring of 2015. The Village then notes that 16 NYCRR § 753-1.1 requires the “notice shall be served at least two but not more than 10 working days . . . before the commencement of the excavation” As such, the Village contends, Flavio did not comply with the applicable statutory requirements.

Viewing the evidence in the light most favorable to the non-moving parties, plaintiffs and the Village have succeeded in establishing the existence of a material issue of fact as to whether Flavio complied with the requirements of General Business Law § 764 and 16 NYCRR §753. Accordingly, Flavio’s motion for summary judgment is denied. Next, the Court considers the remaining relief sought by Flavio.

In addition to summary judgment, Flavio also moves for sanctions as a result of the removal and disposal of a portion of the allegedly damaged Storm Drain Pipe during an excavation in 2018 without notifying Flavio or providing it with an opportunity to inspect it. As such, Flavio contends, the Village should be precluded from testifying about or procuring an expert to testify about the condition of the Storm Drain Pipe on the day of its removal and further an adverse inference charge should be issued regarding the same.

“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” (*Lentini v Weschler*, 120 AD3d 1200,

1201 [2d Dept 2014], internal quotation marks omitted). At this juncture, Flavio has failed to prove that the disposal of a portion of the Storm Drain Pipe in 2018 “fatally compromised its ability to prove” its defense. Accordingly, Flavio’s motion for an order of preclusion or an adverse inference is denied without prejudice.

Annunziata’s Motion for Summary Judgment

The complaint alleges claims for breach of contract and negligent design against Annunziata (that is, the third and fourth causes of action). The breach of contract claim alleges that plaintiffs entered into an agreement with Annunziata whereby he would design and receive approvals for construction of the Retaining Wall and installation of fill in the backyard of the Premises. It is also alleged that Annunziata breached the agreement by designing the Retaining Wall in a way that caused damage to the Storm Drain Pipe. The negligent design claim alleges that Annunziata failed to perform his work in accordance with the standard of professional care usually exercised by professionals in the community.

In support of the motion, Annunziata proffers various evidence, including an expert affidavit. Based hereon, Annunziata asserts that the evidence demonstrates that the Village was not aware of the Storm Drain Pipe located under the backyard of the Premises at any time during the design or construction of the Retaining Wall and only became aware of the Storm Drain Pipe in the Spring of 2016. Annunziata also notes that he consulted the Village and was informed that there were no Village or other systems in the backyard of the Premises and thus no issues concerning the placement of the Retaining Wall. Annunziata’s also proffer an affidavit from Herbert Weinstein, an engineer. Mr. Weinstein avers that he reviewed, among other things, Annunziata’s proposal, designs, the Village work permit application, other files in Annunziata’s files, including a survey of the Premises and pre-design photographs of the Premises, along with the deposition testimony related to the project. Based thereon, Mr. Weinstein opines that Annunziata’s services were not deficient in any manner and were performed in accordance with the professional care usually exercised by professionals in the community.

In opposition, plaintiffs proffer, among other things, the expert affidavit of Kevin Draganchuk, P.E. Mr. Draganchuk avers that he reviewed much of the same evidence, which Mr. Weinstein reviewed, including the survey of the Premises. Mr. Draganchuk opines that Annunziata deviated from the professional care usually exercised by professionals in the community by failing to conduct a complete and proper physical inspection of the Premises, failing to appreciate the existing conditions of the Premises as reflected on the survey, failing to properly investigate the existence of underground pipes on the Premises despite evidence of such pipes, and failing to consider underground pipes in the design for the Retaining Wall.

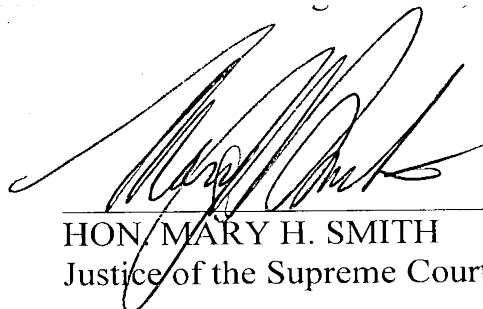
It is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d

594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] ["Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury."]). Accordingly, Annunziata's motion (Motion #4) is denied.

CONCLUSION

This matter is referred to the Settlement Conference Part in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York. The parties will be notified when the date and time of the conference is scheduled.

Dated: April 29, 2020
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court