

**Hill v Methodist Episcopal Socy. in the Town of
Pawling**

2020 NY Slip Op 34988(U)

November 30, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 2018-51606

Judge: Christi J. Acker

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day 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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X
JOANNE HILL, Deceased, by and through
GEORGE H. HILL, as Administrator of the Estate
of JOANNE HILL and GEORGE H. HILL,
Individually,

Plaintiffs,

-against-

THE METHODIST EPISCOPAL SOCIETY IN
THE TOWN OF PAWLING and PAWLING
UNITED METHODIST CHURCH,

Defendants.

-----X
THE METHODIST EPISCOPAL SOCIETY IN
THE TOWN OF PAWLING and PAWLING
UNITED METHODIST CHURCH,

Third-Party Plaintiffs,

-against-

STEVE MARTIN ENT INC.,

Third-Party Defendant.

-----X
STEVE MARTIN ENT INC.,

Second Third-Party Plaintiff,

-against-

NOEL HOLT d/b/a HOLT'S FIX-IT CO.,

Second Third-Party Defendant.

-----X
ACKER, J.S.C.

DECISION AND ORDER

Index No.: 2018-51606

The following papers numbered 1-34 were considered in connection with the following motions: (1) motion of Defendants/Third-Party Plaintiffs The Methodist Episcopal Society in the Town of Pawling and Pawling United Methodist Church (hereinafter "Defendants" or "PUMC") for an Order pursuant to CPLR 3212, granting summary judgment in favor of said Defendants and dismissing Plaintiff's Complaint on the ground that no triable issue of material fact exists and Plaintiff will not be able to establish a prima facie case against Defendants and (2) the motion of Third-Party Defendant/Second Third Party Plaintiff Steve Martin ENT Inc. (hereinafter "Martin") for an Order pursuant to CPLR 3212, granting Martin summary judgment and dismissal of the Third-Party Action for the claims therein which seek contribution and indemnification:

Defendants' Motion

Notice of Motion-Affirmation of Aaron G. Baily, Esq.-Exhibits A-I-
Memorandum of Law in Support1-12
Affirmation in Opposition of Andrew L. Spitz, Esq.-Exhibits A-B.....13-15
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Martin's Motion

Notice of Motion-Affirmation of Edward P. Souto, Esq.-Exhibits A-K.....17-29
Affirmation in Opposition of Aaron G. Baily, Esq.-Exhibits 1-330-33
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This action was commenced by Plaintiffs Joanne Hill and George Hill on or about May 31, 2018. Plaintiff Joanne Hill died in 2020 and by So-Ordered Stipulation dated November 13, 2020, the caption was amended to reflect the substitution of George Hill as Administrator of the Estate of Joanne Hill (hereinafter referred to as "Plaintiff Decedent"). It is alleged that on March 5, 2017, Plaintiff Decedent was injured when she tripped and fell in the south parking lot of the premises owned by Defendant PUMC.

On a motion for summary judgment, the proponent “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.” *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, “the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact.” *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

“In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party.” *Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept. 2015]. “While the ultimate burden of proof at trial will be borne by the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form.” *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. “On a summary judgment motion by a defendant, the defendant does not meet its initial burden by merely pointing to gaps in the plaintiff’s case; rather, it must affirmatively demonstrate the merit of its claim or defense.” *Id.* Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept. 2016].

Discussion

On the morning of March 5, 2017, Plaintiff Decedent was walking from the south parking lot of PUMC toward the left side door of the church. She was walking with beverages in each hand with her arms crossed, holding folders in a bag against her chest. As she was walking, she

stepped on something that “wasn’t solid” and proceeded to lose her balance. She sped up to try and regain her balance, but eventually fell into the foyer of the church building. Plaintiff Decedent described the ground in the area where she lost her balance as “rocky and bumpy.”

PUMC commenced a Third-Party action against Martin seeking contractual indemnification, as well as common-law contribution and indemnification. According to the Bill of Particulars in that matter, PUMC alleges that prior to Plaintiff Decedent’s accident, Martin had performed a remediation of an underground oil tank in the area where Plaintiff lost her balance. It is further alleged that Martin failed to properly grade the area where the digging was done, failed to carefully resurface the area and caused the area to remain in an unsafe, uneven condition. Thereafter, Martin commenced a Second Third-Party action against Noel Holt d/b/a Holt’s Fix-It Co (hereinafter “Holt”). It is alleged that Holt’s company, and not Martin, was responsible for the excavation and remediation of the subject oil tank.

Both PUMC and Martin move for summary judgment. PUMC argues that Plaintiff Decedent can only speculate as to the cause of her fall and that PUMC did not have actual or constructive notice of the alleged condition. In support of the motion, PUMC submits, *inter alia*, the Pleadings, the deposition transcripts of the Plaintiffs and Barney Noel Holt and photographs of the area. In opposition, Plaintiff submits the deposition transcript of Steve Martin and PUMC’s Bill of Particulars in the Third-Party action.

A “defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its *prima facie* showing of entitlement to

judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation [internal quotation marks and citation omitted].” *Grande v. Won Hee Lee*, 171 AD3d 877, 878 [2d Dept. 2019]. A plaintiff’s inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant’s negligence, if any, proximately caused the plaintiff’s injuries would be based on speculation. *Grande, supra*. PUMC argues that the cause of Plaintiff Decedent’s fall is completely speculative. The Court disagrees.

Plaintiff Decedent testified that she stepped on something unsteady which caused her to lose her balance. She also testified that the area in which she fell was rocky and bumpy and she thought it was a chunk of blacktop that caused her to lose her balance. PUMC asks the Court to accept this as speculation, however, PUMC fails to provide any evidence contrary to Plaintiff Decedent’s description of the area in question. In fact, the record is clear that the parking lot in which Plaintiff Decedent fell consisted of dirt, which contained fragments of stone and blacktop. Indeed, Holt described the area as “a decaying parking lot.” As such, Plaintiff Decedent has sufficiently identified the cause of her fall without engaging in speculation and PUMC’s motion on that ground is denied.

PUMC then argues that once it met its burden, Plaintiffs were required to raise a triable issue of fact showing that PUMC had either actual or constructive notice of the defect. However, PUMC’s motion papers are devoid of any argument establishing its *prima facie* entitlement to judgment on the issue of actual or constructive notice. “A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition.” *Gani v. Ave. R Sephardic Congregation*, 159 AD3d 873 [2d Dept. 2018]. A

defendant property owner, or a party in possession or control of real property, who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition, nor had actual or constructive notice of its existence. *Id.*

Significantly, PUMC does not provide any evidence or legal argument showing that it did not create the allegedly dangerous or defective condition, or that it did not have actual or constructive notice of its existence. Instead, PUMC argues that it is “impossible” for Plaintiff to raise an issue of fact as to actual or constructive notice. However, the initial burden is on PUMC to establish that it did not create the condition or that it lacked actual or constructive notice, not on Plaintiffs. *Vumbico, supra*, at 941.

Viewing the evidence submitted by PUMC in the light most favorable to Plaintiffs, as this Court must (*see Boulos, supra*), there are issues of fact as to whether PUMC created the condition at issue herein. The excavation of the oil tank in the area where Plaintiff Decedent fell was done by Holt’s company in 2016. Holt was on the Board of Trustees of the church at the time of the accident and testified that the Board was responsible for the maintenance and the grounds. The excavation work that his company did with respect to the oil tank was done as agent for the church and was “voluntary.” Holt also testified that prior to the excavation of the oil tank, the condition of the parking lot was of concern to the church because it was “decaying.” As Plaintiff fell in the area where the excavation was performed and it appears the condition of the parking lot was a concern to the Board before the fall, PUMC fails to establish that it did not create the condition or that it lacked actual or constructive notice of said condition. “Since the defendants failed to meet their initial burden as the movant, the burden never shifted to the

plaintiff to submit evidence sufficient to raise a triable issue of fact.” *Bisono v. Quinn*, 125 AD3d 704, 705 [2d Dept. 2015]. As such, PUMC’s motion is denied in its entirety.

Second Third-Party Defendant Martin has also moved for summary judgment. PUMC’s first cause of action seeks contribution based upon Martin’s alleged “fault, negligence, acts or omissions, want of care and/or breach of contract and breach of statute or rule.” According to PUMC’s Bill of Particulars, it is further alleged that Martin performed a remediation of an underground oil tank located in the area where Plaintiff Decedent fell and failed to properly grade or resurface the area, causing the area to remain in an unsafe, uneven condition.

“The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party.” *Curreri v. Heritage Prop. Inv. Tr., Inc.*, 48 AD3d 505, 507 [2d Dept. 2008]. Martin established its entitlement to judgment as a matter of law by showing that any liability of PUMC in this case would be based either on PUMC’s own wrongdoing and/or on vicarious liability as to work performed by Holt. *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 635 [2d Dept 2014]. Here, the record demonstrates that Martin did not perform the excavation work in the parking lot, nor did he perform any of the work refiling the oil tank and regrading the area. This work was performed exclusively by Second-Third Party Defendant Holt’s employees. Moreover, there is no evidence that Martin recommended or hired Holt’s company or that Martin controlled the work that was performed. As such, PUMC would not be held vicariously liable for any wrongdoing on the part of Martin and is therefore not entitled to contribution from Martin.

In opposition, PUMC argues that Martin personally supervised the excavation of the oil

tank and that he “ratified and approved” the area where Plaintiff Decedent fell. However, the record does not support these contentions. PUMC asserts that Holt testified that Martin personally supervised the excavation, yet the testimony cited indicates that Holt did not know if Martin was present when the digging was done and that Holt himself was not even present. Further, although PUMC purports to cite to testimony from Martin’s deposition transcript that the area “looked good” no such testimony appears at the citation. See ¶11, Bailey Affirmation in Opposition. Finally, PUMC’s arguments that Martin, as a principle, would be liable because Martin ratified an injury producing act is inapplicable as Holt was not a contractor hired by Martin. Cf. *Kormanyos v. Champlain Valley Fed. Sav. & Loan Ass’n of Plattsburgh*, 182 AD2d 1036, 1038 [3d Dept. 1992].

It is well settled that the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee. As such, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Desena, supra*, at 635. Here, Martin has demonstrated that the condition of the parking lot was either the result of PUMC’s own action or inaction or was due to the work performed by Holt; PUMC has not raised triable issues of fact in opposition. Accordingly, Martin is entitled to dismissal of PUMC’s common-law indemnity claim. *Hamed v. City of New York*, 186 AD3d 677 [2d Dept. 2020].

Martin has also established its entitlement to judgment as a matter of law dismissing PUMC’s common-law contribution cause of action by establishing, *prima facie*, that it was not responsible for the happening of the accident. *Desena, supra*, at 636. As discussed above, PUMC’s opposition does not raise an issue of fact as to Martin’s alleged culpability, entitling

Martin to the dismissal of Defendants' claims for common-law contribution. Finally, as no contract existed between PUMC and Martin for the remediation of the oil tank, Martin is also entitled to dismissal of PUMC's second cause of action for contractual defense and indemnification.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Therefore, it is hereby

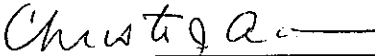
ORDERED that PUMC's motion for summary judgment is DENIED; and it is further

ORDERED that Third-Party Defendant's motion is GRANTED in its entirety and the Third-Party Complaint is dismissed in its entirety; and it is further

ORDERED that, as the parties have already been apprised, a virtual settlement conference is scheduled for December 2, 2020 at 2:00 pm via Teams.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
November 30, 2020



CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF