Horowitz v Beth Moses Cemetery Corp.
2020 NY Slip Op 35112(U)
May 13, 2020
Supreme Court, Nassau County
Docket Number: Index No. 600336/2018
Judge: Jack L. Libert

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 20
NASSAU COUNTY

CHANSIE HOROWITZ,

Plaintiff,

-against-

MOTION # 02, 03, 04
INDEX # 600336/2018
MOTION SUBMITTED:
MARCH 10, 2020

BETH MOSES CEMETERY CORPORATION, RADON CONSTRUCTION CORP. and JERRY CARDULLO IRON WORKS, INC.,

Defendants.

RADON CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

SIVILLI LANDSCAPE CONTRACTING CORP. d/b/a SIVILLI CONTRACTING CORP.,

Third-Party Defendant.

BETH MOSES CEMETERY CORPORATION,

Second Third-Party Plaintiff,

-against-

SIVILLI LANDSCAPE CONTRACTING CORP. d/b/a SIVILLI CONTRACTING CORP.,

Second Third-Party Defendant.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1, 2, 3
Cross Motion/Answering Affidavits.....4, 5, 6, 7
Reply Affidavits.....8, 9, 10

Pursuant to CPLR 3212, defendants Beth Moses Cemetery Corporation and Radon Construction, Inc. move for summary judgment dismissing the complaint as to them (Motion #2); defendant Cardullo Iron Works, Inc. moves for summary judgment dismissing the complaint as to it (Motion #3); and third party defendant Sivilli Landscape Contracting Corp. moves for summary judgment dismissing the complaint as to it (Motion #4).

This action arises out of personal injuries that plaintiff alleges occurred when she tripped and fell on a pedestrian ramp leading up to the restroom at Beth Moses Cemetery. Plaintiff alleges that the fall was caused by a bluestone cap on a concrete wall adjacent to the ramp. According to plaintiff on January 31, 2016 she was walking up the ramp to the restroom. Near the bottom of the ramp she felt her foot strike an object. Shortly after that she tripped on a piece of bluestone on the sidewalk. The wall is capped with bluestone and according to plaintiff, one of the sections in the immediate vicinity of the fall was not attached to the wall and appeared to be the piece on the ground that caused her fall . The restroom area was undergoing renovation work and parts of the area were roped off with yellow tape. There were no warning signs or tape in the ramp area.

Sivilli was a subcontractor hired by Cardullo to perform the masonry work including installation of the ramp area and wall adjacent to it. Cardullo was also Radon's subcontractor and was hired to install an iron rail along the wall. The rail had not been installed at the time of the incident.

Beth Moses and Radon

Beth Moses is the owner of the property where the incident occurred. Radon is the general contractor that was performing the restroom area renovation. The renovation work was complete save for the installation of a n iron railing to be attached to the wall adjacent to the ramp where plaintiff fell. Beth Moses and Radon assert this matter is not actionable because: (1) the bluestone cap on the side wall of the ramp was not "a dangerous condition inasmuch as it was an open and obvious condition that was readily apparent"; and (2) even if the condition is considered dangerous, there is no evidence Beth Moses or Radon created the condition or had notice of it.

In support of their position that the condition is not actionable because it was open, obvious and therefore not dangerous Beth Moses and Radon rely on *Ramos v Cooper Inv'rs, Inc.*, 49 AD3d 623 (2d Dept 2008); *Colao v Cmty. Programs Ctr. of Long Island, Inc.*, 29 AD3d723 (2d Dept 2006). Both of these cases involved tripping over curbs, which in both cases were readily observable. by the plaintiff. Plaintiffs also cite a number of cases in which the plaintiff allegedly tripped over wheel stops[1]. These cases are all inapplicable to the case at bar. Both the sidewalk curbs and wheel stops are fixed objects, always in the same place and easily visible. A fallen capstone may or may not be readily visible. The fact that like the wheel stops, the capstone was a different color than the concrete may be a consideration in whether the hazard was open and obvious, but that is an issue of fact.

next argue In support of the position they that they did not create the condition or have notice of it, Beth Moses and Radon offer the affidavit of John J. Nolan, III a vice president of Beth Moses. Nolan avers that as part of his duties he oversees general maintenance of the grounds, including the area in question. He asserts that he was not aware of any defects in the bluestone cap of the wall and never received any complaints or notice about a defective condition with the wall. He asserts that a visual inspection of the wall would not reaveal whether or not the capstone was properly affixed. Radon's president, Craig Plansker testified that although Radon contracted with Beth Moses to do the restroom area renovation, Radon subcontracted out one hundred per cent of the job.

A plaintiff in a slip and fall case must demonstrate that defendant created or had actual or constructive notice of the defective condition which allegedly caused him to fall (*Gonzalez v. Jenel Management Corp.*, 11 AD3d 656 [2"d Dept. 2004]). To constitute constructive notice, the defect must be

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[1] The cases cited: *Bogaty v Bluestone Realty NY, Inc.*, 145 AD3d 752 (2d Dept 2016); *Lacerra v CVS Pharmacy,* 143 AD3d 674 (2d Dept 2016); *Miller v Costco Wholesale Corp.*, 125 AD3d 828 (2d Dept 2015) ; *Bellini vGypsy Magic Enters., Inc.*, 112 AD3d 867 (2d Dept 2013); *Gallub v Popei's Clam Bar, Ltd., of Deer Park*, 98 AD3d 559 (2d Dept 2012); and *Cardia v Willchester Holdings, LLC*, 35 AD3d 336 (2d Dept 2006).

visible and apparent and it must have existed for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 Ii986]). Proof of a general awareness that a dangerous condition may be present is not sufficient to establish notice of the particular condition which caused plaintiff to fall (*Piacquadio v. Recine Realty Corp*., 84 NY2d 967 ,969 [1994]).

There is no evidence to suggest that Beth Moses or Radon had actual notice of the condition. With respect to constructive notice there are a number of issues of fact, such as whether a visual inspection would have revealed the defect with the capstone, whether Beth Moses or Radon performed sufficient inspections of the area under construction, and whether it was appropriate for the restroom area to be open. (During most of the construction, the entire restroom area was closed and portable toilets were used).

There is also an issue of vicarious liability. In *Thomassen v J & K Diner152,* A.D.2d 421, 549 N.Y.S.2d 416 (2nd Department, 1989) the Second Department reversed a verdict based upon the trial courts instruction that owners were not vicariously responsible for the acts of their contractor. "We are of the opinion that the doctrine of respondeat superior renders the owners of places of public assembly subject to vicarious liability for the negligence of their independent general contractors even if the construction has been completed and possession of the premises has been turned over to the property owners...Essentially, the jury should have been instructed that, if they found that the independent contractor Marathon was negligent in the construction of the staircase, then the defendants Corinis and J & K Diner, Inc., were vicariously liable (see, Restatement [Second] of Torts § 422)." (*Id. 423, 426*).

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2nd Dept. 1989]). A party moving for summary judgment must make a *prima facie* showing proving the absence of any material issue of fact (*see Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 [1985]). A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment by affirmatively demonstrating the merit of its defense, rather than by merely pointing out gaps in plaintiff's case (*see Alizio v. Feldman*, 82

AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. V. Nestor*, 6 AD3d 409, 410 [2d Dept 2004]).

The court considering the [summary judgment] motion must accept the opponent's contentions as true and resolve all inferences in the manner most favorable to the opponent (*see Giraldo v. Twins Ambulettes Serv.*, Inc., 96 AD3d 903 [2nd Dept 2012]). Beth Moses and Radon have pointed out many gaps in plaintiff's case; but resolving all inferences in favor of plaintiff, they have not proven *prima facie* entitlement to summary judgment. The motions of Beth Moses and Radon for summary judgment are denied.

Silvilli

Silvilli argues that it is entitled to summary judgment under same rationale proffered by Beth Moses and Radon: that the alleged hazard was open and obvious and that it had no notice on it. For the same reasons outlined above that argument is rejected.

Silvilli also argues that it is entitled to summary judgment under the doctrine set for the in *Espinal v Melville Snow Contrs.*,98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120, 2002 N.Y. Slip Op. 04465.

In *Espinal,* the Court held:

> [W]e have recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract... (see *Palka,*[*Palka v Servicemaster Mgt. Servs. Corp.*]. 83 NY2d at 586; *Strauss v Belle Realty Co.*, 65 NY2d 399, 402)."... [there are] three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Moch*,[*Moch Co. v Rensselaer Water Co.*] 247 NY at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks* [*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*]., 76 NY2d at 226) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka*, 83 NY2d at 589).

It is undisputed that Silvilli did not "displace the alleged duty" of either Beth Moses or Radon to properly construct and maintain safely the restroom area undergoing renovation. Since Silsilli did not displace the duty of Radon and Beth Moses, there is no issue of reliance.. So the situations described in numbers (2) and (3) in *Espinal, (supra)* are inapplicable to Silvilli. With respect to whether Silvilli launched an instrument of harm [exception number (1)] defendant Silvilli submitted the testimony of Joseph Silvilli.

The undisputed portion of his testimony is that the company performed the construction of the masonry wall under a contract with Radon; the work was performed in accordance with the architect's specifications; a bluestone cap was placed upon the top of the wall and affixed with mortar; and the company received no complaints about any of its work until the instant litigation. In dispute is Silvillis' testimony that the bluestone was firmly affixed and and that brushing against the bluestone with a foot would not dislodge it. Based upon Mr. Silvilli's testimony, his company did not "launch a force or instrument at harm." This is sufficient to establish a *prima facie* case for entitlement to summary judgment.

Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980]).

Plaintiff testified that while walking on the ramp alongside the wall her foot brushed the bluestone cap and dislodged it. She then tripped over it. There are issues of fact concerning whether plaintiff's foot dislodged the stone and whether it was properly affixed to the wall. . Defendants point out that there are contradictions in plaintiff's deposition testimony concerning whether the stone was dislodged by her foot or was already on the ground. Again this assertion points out gaps in the plaintiff's case, but is not enough to warrant summary judgment. The issue of plaintiff's credibility can only be determined by the trier of fact. Plaintiff's testimony is sufficient to overcome Silvillis's *prima facie* showing as to whether the alleged negligence of Silvilli created the instrument of harm. Silvillis' motion for summary judgment is denied.

Cardullo

Cardullo was hired to install an iron railing alongside the masonry wall. At the time of plaintiff's fall the railing had not been installed. Nothing in plaintiff's affirmation in opposition to Cardullo's motion addresses the Cardullo motion. The affirmation addresses only the issues concerning Beth Moses, Radon and Silvilli. So in essence the Cardullo motion is unopposed. Even if it were not unopposed the motion is based upon admissible undisputed evidence. Cardullo's motion for summary judgment is granted.

It is

ORDERED, that the motion of defendants Beth Moses Cemetery Corporation and Radon Construction, Inc. for summary judgment dismissing the complaint as to them (Motion #2) is denied; and it is further

ORDERED, that the motion of defendant Sivilli Landscape Contracting Corp. for summary judgment dismissing the complaint as to it (Motion #4) is denied; and it is further

ORDERED, that the motion of defendant Cardullo Iron Works, Inc for summary judgment dismissing the complaint as to it (Motion #3) is granted.

A virtual status conference in this matter is scheduled for June 11, 2020 at 10:30 AM. Counsel will receive by email a Skype for Business invitation, with directions for participating in ther conference.

E N T E R

DATED: May 13, 2020

Jack L. Libert

HON. JACK L. LIBERT
J. S. C.

ENTERED
May 18 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE