Hartmann v Malenda
2021 NY Slip Op 33235(U)
May 7, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 614189/2017
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 614189/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2/24/2021
SUBMIT DATE 4/1/2021
Mot. Seq. # 03 - MG
Mot. Seq. # 04 - MG

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SUSAN HARTMANN,

Plaintiff,

-against-

CANDACE MALENDA, TOWN OF BROOKHAVEN, SUFFOLK COUNTY WATER AUTHORITY, LONG ISLAND POWER AUTHORITY, JOSEPH MALENDA, and EDGE USA INC.,

Defendants.

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 (#03) & 20 - 31 (#04) ; ~~Notice of Cross Motion and supporting papers~~ __; Answering Affidavits and supporting papers 32 - 36 (#04) ; Replying Affidavits and supporting papers 37 - 44 (#04) __; ~~Other __; (and after hearing counsel in support and opposed to the motion)~~ it is,

Defendant, Suffolk County Water Authority, hereinafter referred to as "SCWA", moves for an order granting summary judgment and dismissing the complaint and cross claims against it based upon its non involvement with the accident situs. Defendant, Town of Brookhaven, hereinafter referred to as "TOB", separately moves for an order granting summary judgment and dismissing the complaint and cross claims against it based upon its non involvement with the accident situs. The plaintiff opposes the motion of the TOB arguing that it previously filed a 3211(a) motion that was denied by Order dated March 6, 2019, (Pastoressa, J.).

The Court notes that the decision dated March 6, 2019, (Pastoressa, J.), specifically states that the TOB "may move for summary judgment after issue has been joined."

The plaintiff in this consolidated action seeks the recovery of damages for personal injuries allegedly sustained from a trip and fall accident that occurred on January 10, 2017, at approximately 6:30 p.m., when she fell in the parking lot located at 197 Main Street, Setauket, New York. The plaintiff testified, at her examination before trial, that she was coming from St. Charles Hospital, going westbound on 25A when she made a stop and parked in the rear parking lot of a Dunkin Donuts on 25A in Setauket to get a cup of coffee. She stated that in order to enter the rear parking lot of Dunkin Donuts, she had to turn off of 25A onto an unknown side road, and then she made a right turn into the parking lot behind the Dunkin Donuts and made a left into the first available space within that parking lot. She indicated that there was a curb to the left of where she parked and then dirt and snow. She testified that there was no snow on the surface of the parking lot but there was some on the grassy areas. After exiting her vehicle she took approximately five steps then her right leg fell into a hole where a cement "manhole cover" was dislodged. She stated that she believed the parking lot was a private parking lot.

Examinations before trial were also held for the Melenda defendants, TOB, SCWA and the Long Island Power Authority, hereinafter referred to as "LIPA". Marie Angelone testified on behalf of the TOB. She indicated that Rich Leute was the Highway General Supervisor for the TOB and that he went to the site of this accident and to see the cement cover. After Leute went to the location he advised Angelone that the cement cover was maintained by the landlord. Allan Kaleita testified on behalf of LIPA. He was a design planner employed by PSEG Long Island working under contract with LIPA. He testified that he went to the site of the accident and opened up the cement cover. He stated that

> I opened it up and it is just a big open pit. It looks like a dry well. And there is a pipe towards the bottom of that well and it looks like it's maybe a four or six-inch pipe and it is directing towards the Dunkin Donuts, I guess the building that it goes to. It looks like a dry well for that building. It is just a big 10/15 foot deep hole.

He further testified that there were no electric facilities in the hole whatsoever. He indicated that the pipe was "customer-owned equipment". Richard Reinfrank testified on behalf of the SCWA.

Reinfrank indicated that the "circular cement object" was "not Water Authority responsibility". When asked about what in a photo of the cement object led him to believe this, he answered "It is not a typical Water Authority apparatus... It is not a valve cover... It is not a curb box cover... It is not a meter vault cover."

Joseph Malenda testified that he bought the building where this incident occurred in 1976 and that it is titled under his wife defendant Candace Malenda's name. He visits the property several times a week and typically just drives by but sometimes he looks the place over "a little more closely to keep an eye on things". He stated that the concrete cap covers a dry well and that he had never had any work done on the dry well from when he purchased the property until January 10, 2017. He also testified that he had never made any complaints about the concrete cover to the TOB before this incident. He also indicated that he had never seen anyone from SCWA doing any work in the area of the cement cap.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The proponent of a summary judgment motion 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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.***, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

In support of these motions, both defendant SCWA and defendant TOB established, prima facie, that they were not responsible for the accident situs. Viewing the evidence in the light most favorable to the plaintiff (***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]), it is the conclusion of this Court that she failed to raise a triable issue of fact as to

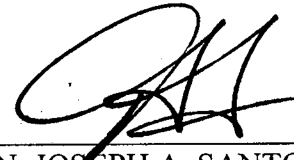
whether defendant SCWA or defendant TOB was responsible for the dislodged cement "manhole cover".

Based upon a review of the motion papers the Court concludes that defendant, SCWA, has made a prima facie showing of its entitlement to judgment as a matter of law. The plaintiff and co-defendants did not submit opposition to this prima facie showing. Accordingly, defendant SCWA's motion for summary judgment is granted and the complaint and any cross-claims of the co-defendants as to defendant SCWA are dismissed.

The Court similarly concludes that defendant, TOB, has made a prima facie showing of its entitlement to judgment as a matter of law. The co-defendants did not submit opposition to this prima facie showing. The plaintiff failed to raise a triable issue of fact regarding whether the TOB was responsible for the cement "manhole cover". The plaintiff's allegation that the summary judgment motion should be denied because the TOB previously moved pre-answer to dismiss pursuant to CPLR 3211(a) does not raise a triable issue of fact as to the TOB's possible liability for the accident and such prior motion does not preclude the TOB from making this motion. Accordingly, defendant TOB's motion for summary judgment is granted and the complaint and any cross-claims of the co-defendants as to defendant TOB are dismissed.

The foregoing shall constitute the decision and Order of this Court.

Dated: May 7, 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**