

McKay v Finger Lakes Traffic Control LLC
2021 NY Slip Op 33371(U)
March 5, 2021
Supreme Court, Yates County
Docket Number: Index No. 2018-0129
Judge: Jason L. Cook
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At a Motion Term of The Supreme Court of the State of New York held in and for the Seventh Judicial District, in the County of Yates, Penn Yan, New York, heard on the 2nd day of February, 2021.

**PRESENT: HON. JASON L. COOK
ACTING SUPREME COURT JUSTICE**

STATE OF NEW YORK
SUPREME COURT: COUNTY OF YATES

Charles A. McKay

DECISION & ORDER

Plaintiff,

vs.

INDEX #2018-0129

Finger Lakes Traffic Control LLC,
Seneca Stone Corporation,
County of Yates,
Town of Benton

Defendants.

JASON L. COOK, AJSC

APPEARANCES: Matthew Kaiser, Esq.
Attorney for the Plaintiff

David Katz, Esq.
Attorney for the Defendant Finger Lakes Traffic Control LLC

Elizabeth K. Ognenovski, Esq.
Attorney for Defendant Seneca Stone Corporation

FINDINGS OF FACT

This matter arises from a single vehicle motorcycle accident occurring on a portion of road that was being re-paved near the intersection of State Route 14A and Clark Road in the Town of Benton, County of Yates, State of New York. The accident occurred at approximately 6:10 p.m. on October 17, 2017. Plaintiff commenced the proceeding with the service of a Summons and Complaint, dated November 28, 2017. Defendants Seneca Stone Corporation ("Seneca Stone") and Finger Lakes Traffic Control, LLC ("Finger Lakes") served Verified

Answers on or about July 25, 2019 and August 20, 2018 respectively. Defendants Seneca Stone and Finger Lakes filed cross-claims against each other as well as the other defendants in their respective Answers. Plaintiff discontinued the actions against Defendants Town of Benton and County of Yates on or about August 31, 2018.¹ Defendants Seneca Stone and Finger Lakes now move for summary judgment pursuant to CPLR §3212 seeking dismissal of Plaintiff's Complaint in its entirety. Defendant Seneca Stone also moves for summary judgment seeking dismissal of Finger Lakes cross-claim against it.

In support of its motion, Defendant Seneca Stone submits an affirmation, a memorandum of law, and the following exhibits: (1) the pleadings; (2) Plaintiff's stipulations of discontinuances against the Town of Benton and the State of New York; (3) Plaintiff's Bill of Particulars; (4) a New York State Department of Transportation ("NYSDOT") FOIL request for documents related to the relevant repaving project; (5) a Notice to Admit that Seneca Stone served on Finger Lakes; (6) Plaintiff's deposition testimony on September 17, 2019 and December 20, 2019; (7) James Dalrymple's deposition testimony; (8) Kevin Fruitt's deposition testimony; (9) NYSDOT standard specifications regarding repaving joints; (10) Joseph Orosz's deposition testimony; (11) Deputy Kyle Rayburn's deposition testimony; and (12) Sergeant Jeffery Rider's deposition testimony.

In support of its motion, Defendant Finger Lakes submits an affirmation, a memorandum of law, and the following exhibits: (1) the pleadings; (2) Plaintiff's Bill of Particulars; (3) Defendant Seneca Stone and Finger Lakes Bill of Particulars; (4) Plaintiff's deposition testimony on September 17, 2019 and December 20, 2019; (5) Plaintiff's 50(h) hearing testimony (6) James Dalrymple's deposition testimony; (8) Kevin Fruitt's deposition testimony; (7) NYSDOT standard specifications regarding repaving joints; (8) Joseph Orosz's deposition testimony; (9) Deputy Kyle Rayburn's deposition testimony; and (10) Sergeant Jeffery Rider's deposition testimony; (11) a previous agreement between Seneca Stone and Finger Lakes; (12) certain contractual documents between NYSDOT and Seneca Stone; (13) a certified police accident report dated October 17, 2017; (14) a Note of Issue allegedly filed by Plaintiff on February 18, 2020; (15) letter of enclosure of a Note of Issue allegedly filed by Plaintiff dated March 14, 2020; (16) the Court's Scheduling Order; and (17) other materials referenced in the expert affidavit of Steven Schneider.

In defense of its motion, Plaintiff submits an affirmation, a memorandum of law, and the following exhibits: (1) a letter dated March 17, 2020 between defendants Seneca Stone and Finger Lakes attorneys regarding indemnification; (2) an affidavit of David Plumlee; (3) an affidavit of Mike Wood; (4) an affidavit of Joe Marino; and (5) the 2003 Fourth Department Appellate Division case Schilling v. Malark, 302 A.D.2d 909.

Oral arguments before the Court were held virtually via Microsoft Teams on February 2, 2021.

¹ The status of Seneca Stone's and Finger Lakes' cross-claims against defendant's Town of Benton and County of Yates is unclear from the parties' papers; therefore is not discussed in the instant Decision.

CONCLUSIONS OF LAW

It is well settled that “the proponent of a motion for summary judgment is required to tender sufficient, competent, admissible evidence establishing a prima facie entitlement to judgment as a matter of law so as to demonstrate the absence of any material issue of fact” (Cole v. Stonefoot, 2 A.D.2d 871 [4th Dept. 2003], citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]).

As explained by the Court in Davidowitz v. Cazes, 157 A.D.2d 1014, 1016 [3rd Dept. 1990],

“Summary judgment is a drastic remedy, the procedural equivalent of a trial. Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]. Where there is doubt as to the existence of a triable issue or where the issue is arguable, summary judgment should not be granted. Stillman v. Twentieth Century Fox Corp., 3 N.Y.2d 395, 404 [1957]. Issue-finding rather than issue-determination is the key to the procedure.”

Likewise, “when considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every favorable inference from the record proof, without making any credibility determinations” (Black v. Kohl's Dept. Stores, Inc., 80 A.D.3d 958 [3rd Dept. 2011]; see also Barrow v. Dubois, 82 A.D.3d 1685; 1686 [4th Dept. 2011]).

The crux of Defendants’ motions for summary judgement is that neither Defendant owed Plaintiff a duty as a matter of law because Seneca Stone only had a contractual relationship with NYSDOT (see Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253 [2007]; Church v. Callanan Indus., 99 N.Y.2d 104 [2002]; Espinal v. Melville Snow Contrs., 98 N.Y.2d 136 [2002]. To establish a common law claim for negligence, a plaintiff must demonstrate: (1) a duty owed; (2) by the defendant to the plaintiff; (3) breach of that duty; and (4) the breach of that duty constituted a proximate cause of the injury (see Encyclopedia of New York Causes of Action: Elements & Defenses section 15-6:19 (N.Y.L.J. pub. 2017). “A finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party” (Espinal v. Melville Snow Contrs., supra at 138). “ [A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party ” (Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 257 [2007], quoting Espinal v. Melville Snow Contrs., supra at 138; see also Bono v. Halben's Tire City, Inc., 84 A.D.3d 1137 [2nd Dept. 2011]).

Exceptions to this general rule are: “(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely” (Stiver v. Good & Fair Carting & Moving, Inc., supra at 257 [internal quotation marks, brackets and citations omitted]; see Espinal v. Melville Snow Contrs., supra 140;

In the instant matter, the second exception is inapplicable under the circumstances of this case because there is no evidence demonstrating that plaintiff detrimentally relied on the performance of Defendants' duties under its contract with NYSDOT. Likewise, the third exception is also inapplicable here because it is undisputed that Defendants did not entirely displace NYSDOT's duty to maintain the highway in a reasonably safe condition.

Nevertheless, Defendants failed to make a prima facie showing as to whether either had launched a force or instrument of harm which created or exacerbated the alleged dangerous condition of the portion of the roadway under construction that caused plaintiff's accident. A material issue of fact remains in dispute whether proper signage was in place at the end of the construction day and whether the temporary pavement joints were within the contractual specifications, and whether either alleged error created the dangerous condition. Defendants rely on the deposition testimony of NYSDOT senior engineering technician Joseph Orosz who stated that he inspected the conditions every day during the construction and found that the work complied with such specifications. However, Plaintiff's expert, as well as other witness testimony suggest that the signage and pavement joint specification were not in compliance with state specifications. Therefore, there is clearly an issue of a disputed material issue of fact.

Defendants further argue that there is no evidence that their respective actions or inactions were the proximate cause of the subject accident. However, Defendants' experts and Plaintiff's expert strongly disagree as to whether either Defendants' actions or inactions created a condition that was the proximate cause the subject motorcycle accident. Defense expert Martin Gordon opined with a reasonable degree of engineering certainty that Plaintiff's high rate of speed in an active construction zone was the primary cause of the accident; whereas Plaintiff's expert Ernest J. Gailor opines that the defendants' failure to abide by NYSDOT specifications regarding signage and pavement joints were significant contributing factors to the accident. Thus, the ultimate issue of fact, the cause of the accident, remains in dispute. As the Court must accord the non-moving party the benefit of every favorable inference without making credibility determinations, summary judgment in the instant is inappropriate.

As to Finger Lakes motion for summary judgment seeking dismissal of Seneca Stone's cross-claims against it, the Court finds that Finger Lakes has failed to make a prima facie case that it is entitled to a judgment as a matter of law. The existence of whether a contract existed between the parties regarding the relevant construction on Route 14A is a material issue of fact that remains in dispute.

It is therefore,

ORDERED that Defendant Seneca Stone's motion for summary judgment dismissing the Complaint is hereby **denied**; and it is further

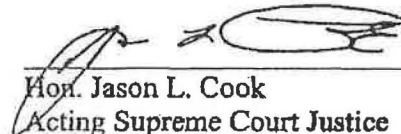
ORDERED that Defendant Finger Lakes motion for summary judgment dismissing the Complaint is hereby **denied**; and it is further

ORDERED that Defendant Finger Lakes motion for summary judgment dismissing Defendant Seneca Stone's cross-claims against it is hereby **denied**.

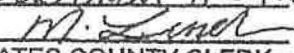
It is so ordered.

ENTER

Dated: *March 5,* 2021.



Hon. Jason L. Cook
Acting Supreme Court Justice

FILED & ENTERED
3-25-2021 11:59 AM


YATES COUNTY CLERK
DEPUTY