

Devito v Congress Bldg. Corp.
2021 NY Slip Op 33400(U)
June 30, 2021
Supreme Court, Westchester County
Docket Number: Index No. 60859/2019
Judge: Sam D. Walker
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To commence the statutory time 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 WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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PIETRO DEVITO,

Plaintiff,

DECISION & ORDER

Index No. 60859/2019

Motion Sequence 2 & 3

-against-

CONGRESS BUILDING CORP., CONSIGLI
CONSTRUCTION COMPANY, INC., CONSIGLI
CONSTRUCTION NY, LLC, CONGRESS-CONSIGLI
JOINT VENTURE, SHAWN'S LAWNS INC. and WHITE
PLAINS HEALTHCARE PROPERTIES I, LLC,

Defendants.
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The following papers were reviewed on a motion and cross-motion for summary judgment, pursuant to CPLR 3212:

- Notice of Motion/Affirmation/Affidavit/Exhibits A-V
- Affirmation in Opposition to Motion/Exhibits A-B
- Reply Affirmation/Exhibit A
- Notice of Cross-Motion/Affirmation/Exhibits A-R
- Affirmation in Opposition to Cross-Motion/Exhibits A-G
- Reply Affirmation/Exhibit A

Based upon the foregoing papers, it is hereby ordered that the motions are denied.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Pietro Devito ("Officer Devito/plaintiff"), commenced this action by filing a summons and complaint on July 22, 2019, alleging negligence and claims pursuant to New York General Municipal Law § 205-e and New York General

Obligations Law 11-106. The plaintiff alleges that on August 21, 2018, while operating his police motorcycle in the course of his duties as a police officer with the City of White Plains, he was injured at the intersection of Barker Avenue and Church Street, due to the presence of an improperly installed road plate and the absence of the necessary warnings regarding the road plate, in violation of the requirements of the Manual on Uniform Traffic Control Devices and the New York State Department Standard Specifications. The plaintiff's complaint alleges that White Plains Healthcare Properties I, LLC ("WPHC"), which owned the property located at 120 Church Street in White Plains, was constructing a new assisted living facility. WPHC hired Congres-Consigli Joint Venture ("CCJV") for general contracting and construction management services, and that entity subcontracted Shawn's Lawns, LLC ("Shawn's Lawns") to perform site excavation and utility connection work.

The plaintiff alleges that Shawn's Lawns excavated a portion of the roadway on Barker Avenue to enable it to connect the building sewer system to the main sewer line in the street and then installed two steel road plates over the opening so that vehicular traffic could use the roadway when work was not occurring. The plaintiff alleges that he was injured when his motorcycle raised off the ground due to the elevation differential between the plate and the existing roadway surface, the lack of proper asphalt tapering around the edge of the road plate, and the improper traffic signage at and around the location, which failed to warn of a bump at the location. Officer Devito alleges that as a result of the defendants' negligence and violation of controlling rules, regulations and industry standards in connection with the construction, he sustained

serious and permanent injuries, including having to undergo fusion surgery to his cervical spine.

On September 9, 2019, the defendants, Consigli Construction Company, Inc., Consigli Construction, NY, LLC, and Congress-Consigli Joint Venture ("Congress Consigli"), interposed an answer, with affirmative defenses, to include the plaintiff's culpable conduct. Congress Consigli subsequently amended their answer to include Congress Building Corp., defendant. The defendant, Shawn's Lawns, interposed its answer on September 18, 2019, also alleging affirmative defenses of culpable conduct and assumed risk. On October 31, 2019, the defendant, WPHC, interposed an answer with the same affirmative defenses as Congress-Consigli. The action was subsequently dismissed as against the defendant, Consigli Construction Company, Inc.

The plaintiff now files the instant motion seeking an order granting summary judgment on his claim under General Municipal Law § 205-e, which allows police officers to sue for injuries sustained in the line of duty as a result of any neglect. The plaintiff alleges that the facts in this case warrant summary judgment in his favor, since it is undisputed that, at the time of the incident, he was operating within the scope of his employment as a police officer and was injured due to the defendants' violation of New York State Department of Transportation Standard Specifications § 619-3.02A, in that, the pavement surface was not maintained in a condition as to permit the safe, comfortable passage of vehicles at the posted speed limit. The plaintiff further asserts that the defendants violated the requirements of Table 619.1 of the standards, in that, the asphalt taper was less than the 15:1 taper required, since it was in place for longer

than seven days and a bump warning sign was not posted in advance of the condition, so as to serve as a warning to oncoming motorists, including Officer Devito.

The plaintiff also contends that the defendants violated the applicable provisions of the Manual on Uniform Traffic Control Devices regulating temporary traffic control devices, which serve as warnings to motorists, specifically, Section 6F.16 and the related provisions, which require that a Bump sign be used to warn of a sharp depression in the profile of the road conditions.

The plaintiff proffered an expert, Kevin V. Gorman, P.E. ("Gorman"), who opined, within a reasonable degree of professional certainty, that the defendants violated the NYS Department of Transportation Standard Specifications § 619-3.02A, the Table 619.1 mandates and the applicable provisions of the Manual on Uniform Traffic Control Devices, by failing to provide a Bump sign and failing to provide adequate warning in advance of the steel road plate, as required by the regulatory standards, and that such violations were each a substantial factor in the happening of the alleged incident that caused Officer Devito's injuries.

In opposition, and in support of its cross-motion, the defendants argue that a police officer is not entitled to summary judgment on a personal injury action, based upon General Municipal Law § 205-e, where issues exist as to whether the incident resulted from the negligent non-compliance with a requirement found in a well-developed body of law and regulations that imposes clear duties. The defendants assert that Shawn's Lawns excavated the roadway at the intersection of Barker and Church Street and when not working, placed roadway plates over the excavation, which plates were one inch high and tapered asphalt to at least two feet from the leading and trailing

edges of the plates. The defendants argue that the photographs show that Shawn's Lawns placed signage, including "Road Plates Ahead" on the roadway before the construction site.

The defendants argue that contrary to sworn and uncontested testimony, Gorman opined that Shawn's Lawns tapered the roadway less than 15 inches, which did not comply with a regulation/Table that requires 15:1 ratio. However, he took no measurements, performed no computer generated analysis, but instead merely looked at a two-dimensional photograph, which had no frame of reference. The defendants further contend that the factual and expert evidence raises issues of fact and their own expert, Steven J. Edmond, P.E. ("Edmond"), attests that the codes and regulations cited by the plaintiff either provide mere guidance or are wholly inapplicable to the facts. He states that Shawn's Lawns complied with the regulations and codes, contending that Shawn's Lawns tapered the roadway as required under NYSHDM § 16.4.4.4A.

As per Edmond, the installation of a sanitary sewer connection in an existing municipal roadway, bridge or a reconstruction, is not a State Highway and therefore, the design criteria of the NYS Design Manual does not apply. He contends that it provides guidance to design professionals and is not directed at contractors. In support of the cross-motion, the defendants provide a detailed recitation of the excavation process used by Shawn's Lawns, the placement of the plates, and the placing of blacktop around the edges of the plates in order to feather out the difference in elevation. They state that the plates were inspected every day by Shawn's Lawn's superintendent, Peter Bueti ("Bueti"), to make sure they were safe and contend that according to Bueti, the feathering or tapering was in place on August 21, 2018, the day of the incident. The

defendants also assert that there was a Traffic Control Plan, which included signage and there was a sign on Barker Avenue approaching the site.

In reply, the plaintiff contends that he has submitted sufficient evidence to be awarded summary judgment and to defeat the defendants' cross-motion. The plaintiff argues that he has established the defendants' negligence through evidence of the improper installation and tapering of the road plates, as well as the improper signage leading up to the construction zone, and the logical inference to be drawn from that evidence. The plaintiff further argues that he has demonstrated that the defendants violated various specific provisions of the NYS Department of Transportation Standard Specifications and the Manual on Uniform Traffic Control Devices and these violations were a substantial factor in causing the incident.

The plaintiff asserts that the defendants' expert should be disregarded and state that the opinions contained in Gorman's supplemental affidavit refute the claims of the defendants' expert and further establish the plaintiff's entitlement to summary judgment. The plaintiff argues that Gorman's opinions are not speculative, but are based on the logical inferences to be drawn from the evidence and are properly before the Court.

The defendants also reply to the plaintiff's opposition to the cross-motion, arguing that Gorman's supplemental affidavit continues to rely upon speculation, inadmissible evidence and inapplicable traffic provisions to create an issue of fact, where none exists. The defendants' expert asserts that Gorman's conclusions are flawed and without factual foundation and states that the codes and regulations cited by the plaintiff provide mere guidance or are inapplicable to the facts. The defendants argue that there

was tapering and signage present and no statute, ordinance, or regulation was violated..

DISCUSSION

“[T]he 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 demonstrate the absence of any material issues of fact” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In other words, the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position.

‘General Municipal Law § 205-e contains a right of action allowing police officers to sue for injuries sustained in the line of duty “as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments”’ (*Gammons v City of New York*, 24 NY3d 562, 568 [2014] *quoting* General Municipal Law § 205-e[1]). “To make out a claim under section 205-e, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm” (*Byrne v Nicosia*, 104 AD3d 717, 719 [2d Dept 2013]).

In this case, the plaintiff's expert, Gorman, opines that the defendants violated NYS Department of Transportation Standard Specifications § 619-3.02A - Surface Condition, Debris Drainage and Dust Control, which states that:

The traveled way, sidewalks and pedestrian walkways shall be kept reasonably smooth and hard at all times, and shall be well drained and free of potholes, bumps, irregularities, and depressions that hold water. Except when construction operations necessitate disturbance of the normal surface, the Contractor shall maintain the pavement surface in such a condition as to permit the safe, comfortable passage of vehicles at the posted speed limit.

Further, Table 619.1 requires for a transverse bump of 1 to 6 inches, a 15:1 taper is required to be in place where the transverse bump is in place for longer than 7 days and the regulation requires that the transverse bumps be adequately sloped and a Bump warning sign be posted in advance of the condition. Gorman also opines that the defendants violated Section 6B.01 and Section 6F.16 of the Manual on Uniform Traffic Control Devices. Gorman also states that Section 2C.23 BUMP and DIP Signs are required to be used to give warning of a sharp rise or depression in the profile of the road conditions.

The defendants' expert, Edmond, contends that the NYS Department of Transportation Design Manual does not control the project and there was no vertical face resulting from the installation of the construction plates, therefore, no BUMP sign was required. He states that there is testimony from several witnesses that the construction plates were ramped sloped or tapered with asphalt. Edmond further opines that although the steel plate ahead signs were not required, the signs were present.

Upon review and bestowing the benefit of every reasonable inference to the party opposing the motions (*Boyce v. Vasquez*, 249 A.D.2d 724, 726 [3d Dept., 1998]), the

Court finds that there are issues of fact precluding a grant of summary judgment to both the plaintiff and the defendants. In opposing the plaintiff's motion, the defendants assert that the factual and expert evidence raise issues of fact. The plaintiff's testimony and the defendants' testimony create questions of fact as to the violations alleged and this is indeed a case of the battle of the experts, despite the defendants' assertion that it is not.

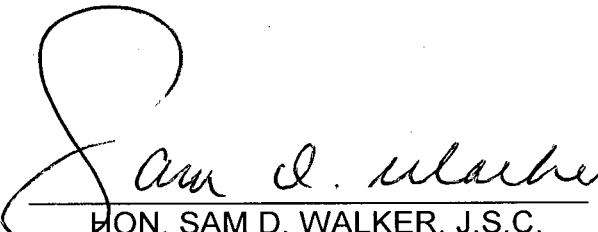
Accordingly, based on the foregoing, it is

ORDERED that the motions for summary judgment are denied.

The parties are directed to appear before the Settlement Conference Part on a date to be determined.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 30, 2021



HON. SAM D. WALKER, J.S.C.