Alban-Davies v City of Rye
2021 NY Slip Op 33454(U)
April 8, 2021
Supreme Court, Westchester County
Docket Number: Index No. 65668/2018
Judge: Terry Jane Ruderman
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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

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JAMES D. ALBAN-DAVIES,

Plaintiff,

-against-

THE CITY OF RYE and CON-TECH CONSTRUCTION TECHOLOGY, INC.,

Defendants.

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DECISION and ORDER
Motion Sequence No.1
Index No. 65668/2018

RUDERMAN, J.

The following papers were considered in connection with the unopposed motion brought by defendants City of Rye and Con-Tech Construction Technology, Inc. for an order pursuant to CPLR 3212 dismissing the complaint or, in the alternative, for an order pursuant to CPLR 325(d) transferring this matter to the City of Rye Court because plaintiff's claimed damages are in the amount of $500:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - T and Memorandum of Law	1

Plaintiff James Alban-Davies commenced this action on October 1, 2018, based on his claim that on February 8, 2018, he was lawfully walking on the north side of Kirby Lane, in Rye, New York, approximately fifty (50) feet west of Kirby Lane's intersection with Van Renssalaer Road, when he fell into an unmarked excavation filled with viscous, unhardened concrete, sinking up to his chest without touching the bottom of the excavation. He states in his verified complaint that he was unable to extricate himself on his own, remaining stuck in the concrete for

20 minutes, and was only freed from the wet cement with the assistance of several others. He asserts that the roadway containing the hazardous condition is owned by the City of Rye, and that Con-Tech Construction Technology, Inc. was performing work at the site.

He filed a notice of claim with the City of Rye on April 23, 2018.

Discovery has taken place, and a note of issue has been filed. Defendants now move for summary judgment. Plaintiff has not filed opposition papers, although two adjournments of the motion were agreed-upon and so-ordered.

A motion for summary judgment, even where unopposed, requires a prima facie showing of a right to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In moving for summary judgment dismissing the complaint, defendants first argue that the hazardous condition was open and obvious, pointing out the presence of roadway plates, nearby cones, and a missing guardrail. They rely on the rule that "There is no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous" (*Graffino v City of New York*, 162 AD3d 990, 991 [2d Dept 2018] [internal quotation marks and citations omitted]).

However, notwithstanding the nearby presence of metal roadway plates, cones at other areas of the roadway, and a missing portion of guardrail, in view of plaintiff's deposition testimony, this Court cannot hold as a matter of law that the condition was not inherently dangerous. Specifically, plaintiff testified at his deposition that as he approached the area containing the hole filled with freshly poured cement, there were no cones marking the area in front of it; he also stated that the freshly-poured cement was similar in appearance to that of the rest of the roadway. In contrast to the piece of wire mesh that was held to not be inherently dangerous in *Greenstein v Realife Land Improvement, Inc.* (13 AD3d 338 [2d Dept 2004]),

plaintiff's description of the condition's deceptively benign appearance, combined with the fact that he sank so far into it when he stepped onto it, precludes a determination as a matter of law that the wet cement condition was not inherently dangerous.

The suggestion of defendant's counsel that the submitted photos depict a hole that was either "off" the roadway or on an area of the roadway that was not accessible to pedestrians, is a characterization of photographs, not an established fact. The testimony of Antonio Carino of Con-Tech, that the area in question was "out of the roadway" – which he said in order to provide a reason for the absence of a plate – failed to establish as a matter of law that the condition *as plaintiff claimed it existed at the time of his accident* was either not on the roadway or not open to pedestrians.

Importantly, plaintiff specifically testified that the photographs did not depict the appearance of the area as it existed at the time of his accident. Furthermore, the submitted photographs appear to reflect that there is no portion of Kirby Lane at that location which is not "roadway." To the extent defendants rely on the testimony of police officer Alex Whalen, at most it merely creates an issue of fact as to whether the cement-filled hole was surrounded by cones. Moreover, Whalen did not actually state, or confirm, at page 23 of his deposition testimony that there were five to six cones on each side of the hole; rather, counsel refers to a statement made in the officer's report, which does not appear to be included in the submissions.

The foregoing establishes that defendants are not entitled to summary judgment based on the claimed absence of an actionable condition.

Defendants next argue that plaintiff has failed to set forth any evidence that they owed any duty to him. However, in the absence of a showing that the City of Rye does not own the roadway in question as alleged, the defendant City's duty is properly based on the rule that "a

governmental body, be it the State, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty" (*Miller v County of Suffolk*, 163 AD3d 954, 957 [2d Dept 2018] [internal quotation marks and citations omitted]).

The submitted affidavit by the Road Foreman for Rye's Department of Public Works, relating that he "had been informed that Con-Tech was responsible for replacing a culvert and guardrails on Kirby Lane," but that he "did not have any involvement in how the site was maintained" is insufficient to establish the City's lack of any duty.

With regard to the contractor's duty, defendants cite *Church v Callanan Indus.* (99 NY2d 104 [2002]). There, the plaintiff was injured in a car accident on the New York State Thruway due in part to a subcontractor's failure to install new guiderailing, and sued the contractors. The claim was dismissed with the reasoning that breach of a contractual obligation is not sufficient to impose a tort duty toward noncontracting third parties, in the absence of any of the three exceptions discussed in *Espinal v Melville Snow Contrs., Inc.* (98 NY2d 136, 139-141 [2002]). Here, in contrast, the submissions permit an inference that the defendant contractor, while engaged in discharging its contractual obligation, created an unreasonable risk of harm to others, or increased that risk, which states one of the three exceptions set forth in *Espinal* (98 NY2d at 139, 141-142).

Defendants next contend that no actions or inactions by them were a proximate cause of plaintiff's accident. The recite the rule that "[w]here the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury" (*Rivera v City of New York*, 11 NY2d 856, 857 [1962]). They reason that since Con-Tech had stopped work at

the site an hour before plaintiff's accident, and there is no evidence as to whether the safety cones or barrels were moved during that hour, the question of proximate cause can be addressed as a matter of law. The rule about undisputed facts is inapplicable. Plaintiff's description of the events permit the inference that defendants' employees or representatives neglected to ensure the placement of barriers in front of the poured cement, and the question of whether that was done, or whether properly placed barriers were moved by others thereafter, present questions of fact that do not permit determination as a matter of law.

The issue of notice as raised by defendants fails to provide grounds for dismissal here. If the necessary placement of protective barriers was neglected by either or both defendants, this is not a passive situation of which plaintiff must prove that defendants had notice; it is an affirmative failure amounting to the creation of a dangerous condition, and notice is not an element of such a claim (*see Washington v City of New York*, 190 AD3d 1009 [2d Dept 2021]). Similarly, the City's prior written notice laws do not justify dismissal here; "[e]xceptions to the prior written notice requirement have been recognized where the municipality created the defect or hazard through an affirmative act of negligence" (*Cimino v County of Nassau*, 105 AD3d 883 [2d Dept 2013]).

Defendants' final contention, in the alternative, is that this matter should be transferred to Rye City Court pursuant to CPLR 325 (d). They observe that plaintiff acknowledged that he was not physically injured, and that he has continued to go about his daily activities. However, his verified complaint alleges that he suffered emotional/psychological injuries, and defendants have not demonstrated in their moving papers that such injuries are non-compensable. Accordingly, this branch of defendants' motion must also be denied.

Accordingly, it is hereby

ORDERED that defendants' motion seeking summary judgment dismissing the complaint or transfer of this action to Rye City Court pursuant to CPLR 325 (d) is denied, and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part of this Court on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
April 8, 2021

HON. TERRY JANE RUDERMAN, J.S.C.