

Collins v St. Mary's RC CH

2023 NY Slip Op 31403(U)

April 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 500441/2017

Judge: Wayne P. Saitta

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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 27th day of April, 2023.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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FIDELA COLLINS,

Plaintiff,

Index No. 500441/2017

-against-

ST. MARY’S RC CH, PHOENIX SUTT. STREET, INC.,
VICTORIA CONSULTING & DEVELOPMENT LLC and
PHOENIX SUTTON STR. INC.,

DECISION AND ORDER
MS #7, #8, and #9

Defendants.

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The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits

(Affirmations) Annexed 172-174, 184, 186-188, 200, 201-202, 223

Answering Affidavit (Affirmation) 230, 235, 261, 264, 269-270, 273-274, 238, 243, 250, 254,
265, 268, 245, 248, 256, 259, 271, 275-276

Reply Affidavit (Affirmation) 280, 283, 285-286, 288, 277-279, 290

Supplemental Affidavit (Affirmation) _____

Pleadings – Exhibits 175-183, 231-233, 262-263, 281, 189-199, 239-241, 251-253, 266-267, 203-
221, 246, 257-258, 291-292

Stipulations – Minutes _____

Filed Papers _____

This action arises from an accident in which a wood panel fell off the top of a sidewalk shed and hit Plaintiff while she was picking up her son from school at the St. Peter Catholic Academy School Building located at 8401 23rd Avenue, Brooklyn, NY (the Premises).

Defendant ST. MARY'S RC CH (Defendant ST. MARY'S) owned the Premises.

Defendant ST. MARY'S contracted Defendant VICTORIA CONSULTING & DEVELOPMENT LLC (Defendant VICTORIA) to perform exterior masonry restoration work at the Premises.

Defendant VICTORIA contracted Defendant PHOENIX SUTT. STREET, INC. (Defendant PHOENIX STREET) to install and remove a heavy-duty sidewalk bridge at the Premises.

Defendant PHOENIX SUTTON STR. INC. (Defendant PHOENIX SUTTON) delivered pipe scaffolding frames to the Premises.

Defendant ST. MARY'S moves for an Order granting summary judgment dismissing all claims, cross-claims, and counterclaims as against it and granting it summary judgment on its cross-claims against co-Defendants.

Defendant VICTORIA moves for an Order granting summary judgment dismissing all claims and cross-claims as against it and granting it summary judgment on its cross-claims against the defendant PHOENIX STREET.

Plaintiff moves for an Order granting summary judgment against the Defendants as to liability and dismissing the affirmative defenses of Plaintiff's comparative negligence.

On the day of the accident, Defendant PHOENIX STREET employees were dismantling the sidewalk shed at the side entrance of the school. Defendant ST. MARY'S instructed PHOENIX STREET to stop work from about 1:00pm to 2:30pm to allow parents to pick up students at the side entrance. PHOENIX STREET employees sat in their car during this time period. Plaintiff alleges that as she was picking up her son from school at the Premises, a wood panel fell from the top of the shed and hit her and knocked her down.

ST. MARY'S motion to Dismiss Complaint

Defendant ST. MARY'S seeks summary judgment dismissing Plaintiff's complaint on two grounds. First, that Plaintiff is unable to state what caused her accident. Second, that it did not create or have knowledge of the condition which brought about Plaintiff's accident.

While Plaintiff did not see the panel from the sidewalk bridge strike her in the back of the head, she did see the wood panel from the sidewalk shed on the ground after she was struck. Freddy Gomez, an employee of the school, also stated that he saw the Plaintiff laying on the ground with her eyes closed and the scaffold workers showed him a panel from the sidewalk shed that had fallen.

A violation issued by the New York City Department of Building noted that a panel had fallen from the sidewalk shed.

This is sufficient circumstantial evidence to make out a prima facie case that it was the fallen panel from the sidewalk shed that struck Plaintiff.

In opposition, ST. MARY's has offered no evidence to contest that fact that the wood panel struck Plaintiff.

Further, Defendant ST. MARY's has not met its burden for summary judgment of demonstrating that it was not negligent.

As a landowner, Defendant ST. MARY's "owed a nondelegable duty of reasonable care to pedestrians" (*Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 552 [1st Dept 2012]).

It was Defendant ST. MARY'S decision to allow parents to pick up their children from this entrance. There is a question of fact whether Defendant ST. MARY's was negligent in requiring the contractors to stop work and permitting parents to pick up their children at the side entrance while the shed was partially dismantled.

Defendant ST. MARY's had notice that the sidewalk shed was only partially dismantled when it had parents pick up their children at the side entrance. Defendant ST. MARY's had a duty to ensure that the condition of the sidewalk shed was safe before it dismissed students through the side entrance. Defendant ST. MARY's provided no evidence as to whether they inspected the condition of the partially dismantled shed.

Thus, Defendant ST. MARY's has not met its burden of showing that it did not have constructive notice of the condition of the panel that fell.

By reason of the foregoing, that portion of Defendant ST. MARY's motion for summary judgment dismissing Plaintiff's complaint against it must be denied.

VICTORIA'S motion to Dismiss the Complaint

Defendant VICTORIA seeks summary judgment dismissing Plaintiff's complaint arguing that that it did not owe Plaintiff a duty of care and that it did not have actual or constructive notice.

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'; (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" (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Pursuant to its contract with Defendant ST. MARY's, Defendant VICTORIA assumed the duty to protect the public from dangers arising from the work. The contract states in pertinent part:

18. PROTECTION OF PUBLIC: The CONTRACTOR shall provide and maintain all legal and necessary guards, sidewalk bridges, passage ways, sidewalks, fences, lights warning signs, and other items during the excavation and construction of the work to fully protect all persons from loss, damage or injury to their persons or property and to secure the convenience of the public.

44. SCAFFOLDING: The CONTRACTOR shall furnish, erect and remove all scaffolding, sidewalk bridges and other temporary conveniences as required by him for the proper installation of his work. All such furnishing, erecting and removal of scaffolding shall be in compliance with all Federal, State and Local government rules, regulations, ordinances and laws.

The language of the contract demonstrates that Defendant VICTORIA had assumed overall responsibility to maintain the work site in a safe condition (see *Ryan v. Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551).

In *Ryan*, the Appellate Division First Department upheld the denial of summary judgment to a project manager in a case where a pedestrian was injured when a sidewalk bridge collapsed. The Appellate Division rejected the project manager's argument that it had no duty to the Plaintiff, holding that the language of the Construction Management Agreement showed that the project manager had overall responsibility to maintain safety at the work site (*id.* at 552).

Further, Dariusz Knapik, Principal of Defendant VICTORIA, admitted in his deposition that VICTORIA's foreman, Wilson Rodriguez, was responsible for inspecting the sidewalk bridge.

For these reasons, Defendant VICTORIA's motion dismissing Plaintiff's complaint against it must be denied.

Plaintiff's motion

Plaintiff seeks summary judgment as against all Defendants and dismissal of the affirmative defense of Plaintiff's comparative negligence.

Plaintiff's Claims against PHOENIX STREET

Plaintiff argues that she is entitled to summary judgment against Defendant PHOENIX STREET as it launched the force of harm by leaving the panel of the scaffold that fell in an unsecured state when it stopped working to allow for student pick up.

Plaintiff relies on the doctrine of *res ipsa loquitur* to establish that the panel would not have fallen in the absence of negligence on the part of Defendant PHOENIX STREET.

“To establish a prima facie case of negligence in support of a *res ipsa loquitur* charge, plaintiff must establish three elements: ‘[1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; [2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and [3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff’” (*James v. Wormuth*, 21 NY3d 540, 546 [2013], quoting *Kambat v. St. Francis Hosp.*, 89 NY2d 489 [1997]).

Here, Plaintiff has established the three elements. First, a panel does not ordinarily fall from a sidewalk shed unless it is not properly secured to the frame. Second, the panel was in the exclusive control of Defendant PHOENIX STREET during the process of dismantling it. Third, there is no evidence that Plaintiff did anything that contributed to causing her accident.

The Court must next decide whether it is proper to grant summary judgment, in this case, based on the doctrine of *res ipsa loquitur*.

“[O]nly in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment . . . That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable (*Morejon v. Rais Const. Co.*, 7 NY3d 203, 209 [2006]).

Here, there is testimony from Freddy Gomez, an employee of the school, that the panel that fell was not secured to the deck of the shed.

Gomez stated in an affidavit,

“I looked at the plywood panel and saw that it was the end piece, only framed on one side with 3' x . 4' lumber, and did not have the blue metal tube that is supposed to attach the panel to the floor of the sidewalk bridge. The construction workers had not finished their work before the parents came to pick-up the children at the school exit and this plywood panel that was part of the sidewalk bridge wall was not secure and fell.”

Defendants have provided no evidence to contradict Gomez’s testimony that the fallen panel did not have the blue metal tube that attaches the panel to the deck. They adduced no evidence that the panel that fell was secured to the deck at the point in time that the PHOENIX STREET workers stopped work for student dismissal.

Instead, Defendants assert that the panel fell because of high winds (*see Lofstad v S & R Fisheries Inc.*, 45 AD3d739 [2d Dept 2007]). However, Defendants produced only hearsay statements concerning the wind.

Gomez also stated that the construction workers claimed that winds caused the subject panel to fall. However, while Gomez cites the claim of the construction workers, he does not state that there were high winds.

Dariusz Knapik, Principal of Defendant VICTORIA, testified that his foreman told him that he had been told by PHOENIX STREET employees that on the day of Plaintiff’s accident there was very heavy wind that pulled the plywood from the shed which hit Plaintiff.

Defendants have presented no testimony from the workers at the site or anyone with personal knowledge concerning the wind at that time of the accident.

Significantly, as Defendants have not offered any evidence to contradict Gomez’s testimony about the panel being left unsecured, if a high wind did exist at the time the

workers left the panel in that condition, that would be further evidence of negligence rather than an intervening cause.

Given the absence of evidence to contradict the testimony that the panel that fell was only partially secured when PHOENIX STREET's workers stopped work, the Plaintiff has met her burden for summary judgment.

Plaintiff's Claims against ST. MARY's

Plaintiff's claims against Defendant ST. MARY's have two bases. First, that as the owner of the premises it is liable because the partially secured panel was a dangerous condition. Second, that it was negligent in having parents pick up students from the doors under the area where the sidewalk shed was partially dismantled.

As regards to the claims based on premises liability, Plaintiff's papers submitted in support of her motion have not demonstrated that Defendant ST. MARY's had either actual or constructive notice of the condition.

As regards to Defendant ST. MARY's decision to have students picked up from the doors under the sidewalk shed that was being dismantled, whether that decision was negligent turns on the question whether Defendant ST. MARY's knew that the condition of the shed was unsafe or should have ascertained that the shed was safe before allowing students to be picked up from the area.

As what Defendant ST. MARY's knew or should have known about the condition of the panel of the sidewalk shed at the time the students were released, is at this point unresolved, the granting of summary judgment against it would be inappropriate.

Plaintiff's Claims against VICTORIA

While, as discussed above, Defendant VICTORIA had a duty to safeguard the public from the work, it is not clear at this point whether the VICTORIA foreman had actual or constructive knowledge of the condition of the wood panel at the time PHOENIX STREET workers stopped work to allow for student pickup.

As there are questions of fact as to Defendant VICTORIA's notice of the condition of the panel, that portion of Plaintiff's motion for summary judgment against Defendant VICTORIA must be denied.

Plaintiff's Claims against PHOENIX SUTTON

It is not contested that Defendant PHOENIX SUTTON did not control, supervise, or have any role in the dismantling of the sidewalk shed. It had merely delivered the pipe scaffolding frames to the Premises. Therefore, that portion of Plaintiff's motion for summary judgment as against Defendant PHOENIX SUTTON must be denied.

Cross-Claims against ST. MARY's for common law indemnification

Defendant ST. MARY's seeks summary judgment dismissing the cross-claims of co-Defendants for common law indemnification and contribution. As discussed above, there are still questions of fact as to whether Defendant ST. MARY's had constructive notice of the condition of the wood panel and whether Defendant ST. MARY's was negligent in releasing the students from the entrance under the partially dismantled sidewalk shed. As such, dismissing the cross-claims for common law indemnification and contribution against it is not warranted.

Cross-Claims against ST. MARY's for contractual indemnification

Defendant ST. MARY's is entitled to summary judgment dismissing the cross-claims against it for contractual indemnification as none of the co-defendants produced a contract that required Defendant ST. MARY's to indemnify them.

ST. MARY's Claims for Indemnification

Although Defendant ST. MARY's moved for summary judgment on its cross-claims against the co-Defendants, the answer submitted by Defendant ST. MARY's does not set forth specific cross-claims against the co-Defendants. Therefore, that part of Defendant ST. MARY's motion must be denied.

Cross-claims against VICTORIA for Indemnification

Defendant VICTORIA seeks dismissal of co-Defendants ST. MARY's and PHOENIX STREET's common law indemnification and contribution cross-claims, and of Defendant PHOENIX STREET's cross-claim for contractual indemnification.

The answer filed by Defendant ST. MARY's does not assert a cross-claim for indemnification against Defendant VICTORIA. Therefore, that portion of Defendant VICTORIA's motion to dismiss any cross-claims by Defendant ST. MARY's for indemnification from VICTORIA is moot.

Defendant PHOENIX STREET's cross-claim against Defendant VICTORIA for contractual indemnification must be dismissed as they failed to produce any agreement requiring VICTORIA to indemnify them.

As it has not yet been determined whether Defendant VICTORIA was negligent, there is no basis to dismiss Defendant PHOENIX STREET's cross-claim against Defendant VICTORIA for contribution.

Defendant PHOENIX SUTTON's cross-claim against Defendant VICTORIA for contractual indemnification must also be dismissed as they failed to produce any agreement requiring VICTORIA to indemnify them.

As it has not yet been determined whether Defendant VICTORIA was negligent there is no basis to dismiss Defendant PHOENIX SUTTON's cross-claim against Defendant VICTORIA for common law indemnification and contribution.

VICTORIA's Claims for Indemnification

Defendant VICTORIA also seeks summary judgment on its cross-claims for common law indemnification against Defendant PHOENIX STREET.

As discussed above, Knapik, admitted that VICTORIA's foreman, Wilson Rodriguez, was responsible for inspecting the sidewalk bridge and pursuant to its contract with Defendant ST. MARY's, VICTORIA was responsible for public safety. There remain questions as to whether Defendant VICTORIA should have known about the condition of the panel at the time the dismantling was halted to allow for the dismissal and pick up of students. Thus, Defendant VICTORIA has not demonstrated that it was free from negligence, which precludes granting it summary judgment on its cross-claim for indemnification from Defendant PHOENIX STREET.

VICTORIA's cross-claim against PHOENIX STREET for contribution

As it has been determined that Defendant PHOENIX STREET was negligent, Defendant VICTORIA is entitled to contribution from PHOENIX STREET in the event VICTORIA is found liable to Plaintiff. The amount of such contribution would have to be set after the trier of fact apportions liability for the accident.

WHEREFORE, it is ORDERED that that portion of Plaintiff's motion for summary judgment against Defendant PHOENIX STREET as to liability is granted; and it is further

ORDERED that that portion of Plaintiff's motion for summary judgment against Defendant ST. MARY's is denied; and it is further

ORDERED that that portion of Plaintiff's motion for summary judgment against Defendant VICTORIA is denied; and it is further

ORDERED that that portion of Plaintiff's motion for summary judgment as against Defendant PHOENIX SUTTON is denied; and it is further

ORDERED that that portion of Plaintiff's motion to dismiss the affirmative defenses of culpable conduct on the part of the Plaintiff asserted by Defendants ST. MARY's, VICTORIA, PHOENIX STREET and PHOENIX SUTTON is granted; and it is further

ORDERED that that portion of Defendant ST. MARY's motion for summary judgment dismissing Plaintiff's complaint is denied; and it is further

ORDERED that that portion of Defendant ST. MARY's motion for summary judgment dismissing the cross-claims of co-Defendants for common law indemnification and contribution is denied; and it is further

ORDERED that that portion of Defendant ST. MARY's motion for summary judgment dismissing co-Defendants cross-claims against it for contractual indemnification is granted; and it is further

ORDERED that that portion of Defendant ST. MARY's motion for summary judgment on its cross-claims against co-Defendants is denied; and it is further

ORDERED that Defendant VICTORIA's motion dismissing Plaintiff's complaint against it is denied; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment dismissing the cross-claims of co-Defendant ST. MARY's for contractual indemnification and common law indemnification and contribution is denied as moot; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment dismissing the cross-claims of co-Defendant PHOENIX STREET for contractual indemnification is granted; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment dismissing the cross-claims of co-Defendant PHOENIX STREET for common law indemnification and contribution is denied; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment dismissing the cross-claims of co-Defendant PHOENIX SUTTON for contractual indemnification is granted; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment dismissing the cross-claims of co-Defendant PHOENIX SUTTON for common law indemnification and contribution is denied; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment on its cross-claim for common law indemnification from co-Defendant PHOENIX STREET is denied; and it is further

ORDERED that that portion of Defendant VICTORIA's motion for summary judgment on its cross-claim for contribution from co-Defendant PHOENIX STREET is granted in the event VICTORIA is found liable to Plaintiff.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.