

Epstein v County of Nassau
2025 NY Slip Op 35562(U)
January 31, 2025
Supreme Court, Nassau County
Docket Number: Index No. 615044/2022
Judge: Rhonda E. Fischer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - CIVIL TERM PART 46

Present: HON. RHONDA E. FISCHER
Acting Justice of the Supreme Court

MICHELLE EPSTEIN,

Plaintiff,

INDEX NO: 615044/2022

-against-

MOTION SEQ. NOS. 001 & 002
XXX

COUNTY OF NASSAU, TOWN OF OYSTER BAY,
and THE LANDTEK GROUP, INC.

Defendant(s).

TOWN OF OYSTER BAY,

Third-Party Plaintiff,

-against-

THE LANDTEK GROUP, INC.,

Third-Party Defendant(s).

The following papers were read on these motions:
NYSCEF Nos. 39-86

Defendant / Third-Party Plaintiff Town of Oyster Bay (the "Town") moves (seq. 001) for an Order: A. granting the Town summary judgment, pursuant to CPLR § 3212; and B. granting the Town such other and further relief as this Court may deem just and proper, including costs, disbursements, and reasonable attorney's fees.

Defendant The Landtek Group, Inc. (hereinafter "Landtek") moves (seq. 002) for an Order: (1) pursuant to CPLR § 3212 granting The Landtek Group, Inc.'s, motion for summary judgment dismissing plaintiff's Amended Complaint against it with prejudice, (2) dismissing any and all cross-claims against it, (3) dismissing the Third-Party Complaint; and (4) any such other and further relief as this Court may deem just and proper.

Plaintiff files opposition to both motions.

The motions are consolidated for the purpose of disposition herein.

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This action was commenced by the filing of a Summons and Complaint on November 1, 2022. Plaintiff alleges that on October 12, 2021, she was walking near her home and lost her footing on a depressed section of the roadway in front of 3 Miller Boulevard, Syosset, in the Town of Oyster Bay, County of Nassau. Plaintiff alleges that she stumbled forward four-to-five steps fracturing her right ankle.

On November 8, 2023, plaintiff amended her complaint to add The LandTek Group, Inc. as a direct defendant. This amendment occurred after the deposition testimony revealed that in 2012, the Town contracted with Landtek to perform work at the incident location. Under the 2012 contract, Landtek was assigned to repair the sidewalk and curb at 3 Miller Boulevard, and conduct asphalt restoration to the sidewalk/curb at the incident location.

On October 31, 2023, a third party Summons and Complaint was filed impleading The Landtek Group, Inc. as a Third-Party Defendant.

On December 16, 2022, a Notice of Discontinuance was filed as against the County of Nassau.

The parties certified the case for trial on February 29, 2024, and the Note of Issue was filed on May 17, 2024.

In its motion, the Town argues that the lack of prior written notice of the alleged defect is fatal to plaintiff's cause of action against the Town; and plaintiff has failed to tender any competent evidence showing that the Town caused or created the subject condition, an exception to the prior written notice law.

In support of its motion the Town submits, *inter alia*, an affidavit of Kenneth J. Bishop ("Bishop"), employed as an Engineering Aide I for the Town, and an affidavit of Cindy Maloney ("Maloney"), employed by the Office of the Town Clerk, both of whom affirm that the Town did not receive any written notice of the alleged defect prior to the incident after a search of the relevant records. Bishop also affirms that there is no documentation indicating that the Town or its contractors performed work at the location within the preceding five years prior to the incident. Therefore, the Town argues that it did not cause or create the defective condition.

Landtek argues in its motion that it fulfilled its contractual obligations under the requirements of the contract with the Town in 2012, and therefore owed no duty to plaintiff; and under *Espinal*, Landtek owed no duty of care to plaintiff. Specifically, Landtek argues that it did not launch a force or instrument of harm, which is evidenced by the lack of prior complaints over the approximate ten years between the date the work was completed and the date of incident. Additionally, plaintiff did not detrimentally rely on Landtek's continued performance of its duties under the contract, and the

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contract did not displace the landowner's duty to maintain the premises. After Landtek performed under the contract, the Town inspected the area to ensure completeness and satisfaction. Landtek had no duty to return to the location pursuant to the contract, and after the work was completed, the Town did not seek any further action by Landtek.

In opposition to the Town's motion, plaintiff argues that the Town has failed to establish that it did not create the condition. In support, it submits the deposition testimony of Bishop and Joel Fonseca ("Fonseca"), employed as Project Manager at Landtek. The deposition testimony reveals that Landtek's work at the location involved curb work, saw cutting and asphalt replacement in 2012. Plaintiff argues that the Town has failed to meet its burden to show that its construction at 3 Miller Boulevard did not cause or create the 10-foot cut in the asphalt that caused the accident because the Town failed to set forth evidence of, among other things, post-construction inspections, how the asphalt was cut and replaced, or other particulars about how the work was performed. Plaintiff further alleges in the Complaint as amended, *inter alia*, that Landtek and the Town caused the roadway to remain in a hazardous condition and created a nuisance or trap.

In opposition to Landtek's motion, plaintiff argues that Landtek failed to meet its burden to show that the construction which cut, removed, and replaced the asphalt at 3 Miller Boulevard was performed with reasonable care such that it did not launch a force or instrument of harm because Landtek did not produce any witnesses, documents, or direct evidence establishing that the work was, among other things, done properly without defects.

Applicable Law and Discussion

It is well established that the proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *see also, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). The evidence will be construed in a light most favorable to the one moved against. *See Weiss v. Garfield*, 21 A.D.2d 156 (3rd Dept. 1964). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.* 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*see also, Andre v. Pomeroy*, 35 N.Y.2d 361 (1974)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See, Zuckerman, supra*.

New York State Town Law § 65-a(1) states as follows: "No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town

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superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of. . . .”

The Town of Oyster Bay Code (the “Town Code”) section 160-1(A) provides, in relevant part, that: “No civil action shall be maintained against the Town of Oyster Bay for injuries or damages to persons or property sustained by reason of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out-of-repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, out-of-repair, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually served upon the Town Clerk, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defective, out-of-repair, unsafe, dangerous or obstructed condition complained of. Under no circumstances shall the Town of Oyster Bay be liable for injuries or damages caused to persons or property due to the defective, out-of-repair, unsafe, dangerous or obstructed conditions of Town streets, highways, bridges, culverts, sidewalks or crosswalks in the absence of prior written notice, to the Town Clerk or the Commissioner of Highways, of the existence of such condition.”

Where a municipality has enacted a prior notification law and is alleged to be liable for personal injuries sustained as a result of a defective condition, the municipality establishes a defense as a matter of law by demonstrating that it did not receive prior written notice of the defective condition. *Smith v. City of New York*, 210 A.D.3d 53, 55 (2nd Dept. 2022). Upon such a showing by the municipality, the burden then shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule, i.e., that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality. *See Yarborough v. City of New York*, 10 N.Y.3d 726 (2008), citing *Amabile v City of Buffalo*, 93 N.Y.2d 471, 474 (1999).

The affirmative negligence exception “is limited to work by the [defendant] that immediately results in the existence of a dangerous condition.” *Diaz v. City of New York*, 56 A.D.3d 599 (2nd Dept. 2008) quoting *Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007); *see Yarborough v City of New York*, 10 N.Y.3d 726 (2008); *Marshall v. City of New York*, 52 A.D.3d 586 (2nd Dept. 2008); *Bielecki v. City of New York*, 14 A.D.3d 301 (1st Dept. 2005).

It is the plaintiff’s burden to set forth evidence demonstrating that the defendant was negligent in creating a defective condition, or failing to correct a defect after becoming aware that it exists. In order to set forth a *prima facie* case of negligence, plaintiff must establish the existence of a duty of a defendant to plaintiff, a breach of such duty, and that the breach was a substantial cause of the resulting foreseeable injury. *See Merino v. New York City Transit Authority*, 218 A.D.2d 451 (1st Dept 1996); *Gordon v. City of New York*, 70 NY2d 839 (1987).

A finding of negligence must be based on the breach of a duty. Therefore, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. *See Espinal v. Melville Sinow Contractors Inc.*, 98 N.Y.2d 136 (2002). Generally, a contractual

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obligation, standing alone, will not give rise to tort liability in favor of a third party. *See Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 (1990). However, under certain circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract. *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d at 139, *citing Palka v. Servicemaster Management Servs. Corp.*, 83 N.Y.2d 579 (1994); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402 (1985). “[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, ‘launches a force or instrument of harm’ (*Moch*, 247 N.Y. at 168); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties (*see Eaves Brooks*, 76 N.Y.2d at 226) and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely (*see Palka*, 83 N.Y.2d at 589).” *See Espinal v. Melville Sinow Contractors Inc.*, 98 N.Y.2d at 140.

Here, the Town sets forth a defense as a matter of law by demonstrating through the affidavits of Bishop and Maloney that it did not receive prior written notice of any defective condition at the incident location. The evidence demonstrates that such work was performed approximately ten years prior to the incident, the Town inspected the work, nothing further was done, and no complaints were received as to defects at the location. There is also no evidence that a special use resulted in a special benefit to the locality.

In light of the circumstances herein, including that the work was done ten years prior, plaintiff has failed to raise any triable question of fact that the Town was negligent in creating a defective condition within the meaning of the exception of the notice requirement, which requires that the affirmative negligence of the Town has immediately resulted in the existence of a dangerous condition. *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008); *see also, Hussain v City of New York*, 179 A.D.3d 1046 (2nd Dept. 2020). And, plaintiff has not set forth any question of fact to establish anything other than general deterioration having taken place over the past ten years. Thus, the affirmative negligence exception is inapplicable. *McConnell v. County of Nassau*, 228 A.D.3d 649 (2nd Dept. 2024). Therefore, the Town may not be held liable.

As to Landtek, the Court finds that Landtek had no duty to plaintiff as it completed its contractual obligations it owed to the Town almost ten years prior to the incident and had no continuing duty to maintain the area or return to it. Landtek has therefore established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff’s complaint as against it. *See Corniel v. CCA Civil-Halmar Intl., LLC*, 215 A.D.3d 731 (2nd Dept. 2023). In opposition to Landtek’s motion, plaintiff has failed to demonstrate the existence of a triable issue of fact. Nor are any of the *Espinal* exceptions applicable. *See Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 140 (2002); *see also, Abney v. Meridian Props., LLC*, 222 A.D.3d 921 (2nd Dept. 2023).

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Accordingly, it is hereby

ORDERED, that defendant / third-party plaintiff Town of Oyster Bay's motion for summary judgment is GRANTED, and the case is dismissed as against defendant / third-party plaintiff Town of Oyster Bay; and it is further

ORDERED, that defendant / third-party plaintiff Town of Oyster Bay's motion for costs, disbursements, and reasonable attorney's fees is DENIED; and it is further

ORDERED, that defendant The Landtek Group, Inc.'s motion is GRANTED in its entirety, and the case is dismissed as against The Landtek Group, Inc.; and it is further

ORDERED, that all requests for relief not expressly addressed herein are DENIED.

This shall constitute the Decision and Order of the Court.

It is **SO ORDERED**.

Dated: January 31, 2025
Mineola, NY


HON. RHONDA E. FISCHER

ENTERED

Feb 06 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE