SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x

HARRY McCUBBIN

Plaintiff,

-against-

BETHPAGE UNION FREE SCHOOL DISTRICT, SUFFOLK PAVING CORP., THC REALTY DEVELOPMENT L.P., SCHOOL CONSTRUCTION CONSULTANTS, INC. and LUCCHESI ENGINEERING INC.,

Defendants.

----------x

TRIAL PART: 19
NASSAU COUNTY

INDEX NO: 7022/07

MOTION SEQ. NO: 4-9

SUBMIT DATE: 8/6/09

The following papers having been read on this motion:

Notice of Motion..... 1,2
Cross-Motions.....3,4,5
Opposition..... 6-13
Partial Opposition.....14-17
Reply..... 18-29

Motion (seq. No. 4) and cross-motion (seq. No. 8) by the Bethpage Union Free School District (Bethpage) for an order pursuant to CPLR 3212 granting summary judgment to Bethpage dismissing the complaint and all cross-claims against Bethpage is granted. Motion (seq. No. 5) by the defendant Suffolk Paving Corp. (Suffolk) for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint as against defendant Suffolk and dismissing all cross-claims against defendant Suffolk; cross-motion (seq. No. 6) by the attorneys for defendant Lucchesi Engineering, P.C. (Lucchesi) for an order pursuant to CPLR 3212 granting defendant Lucchesi summary judgment and dismissing all claims and cross-claims asserted against defendant Lucchesi, and for the defendants THC Realty Development, L.P. (THC Realty) and Suffolk to indemnify and defend Lucchesi; cross-motion (seq. No. 7) by the attorneys for the defendant School Construction Consultants, Inc. (SCC) for an order pursuant to CPLR 3212 granting defendant SCC summary judgment dismissing plaintiff's complaint and all cross-claims, and for an order requiring plaintiff

and defendants THC Realty and Suffolk to indemnify SCC and pay for its costs and expenses in defending the claim, and, for contractual indemnification in defending the claims by the plaintiff and defendants THC Realty Development, L.P. and Suffolk Paving Corp. are determined as hereinafter set forth. Cross-motion (seq. No. 9) by the attorneys for the defendant THC Realty for an order pursuant to CPLR 3212 granting summary judgment in favor of THC Realty dismissing plaintiff's complaint and all cross-claims against THC Realty or, in the alternative, for an order vacating the order of this court which vacated plaintiff's April 9, 2009 default and restored this matter to the Court's calendar and granting summary judgment to THC on its indemnification claims against, Suffolk is denied.

This is an action for personal injuries. Plaintiff alleges that while walking his dog at the subject parking lot adjacent to the subject catch basin at the JFK Middle School in Bethpage, N.Y., the plaintiff's foot went through the asphalt resulting in serious injuries.

Plaintiff alleges he was employed at the subject premises as an independent consultant working for SCC at the time of the renovation and paving of the parking lot. The parking lot had been paved the previous summer in or about September, 2003. Defendant Bethpage was the owner of the property where the accident occurred. Plaintiff's accident involved a storm drain located near the fenced-in construction site at the east end of the parking lot. The gravamen of plaintiff's claim is that the brick wall that formed part of the catch basin was in a dangerous condition and should have been repaired or replaced in some fashion when the paving of the subject property was done. Defendant THC was the prime contractor responsible for the site work including the paving of the parking lot at JFK Middle School pursuant to THC's written agreement with the Bethpage. Suffolk was a subcontractor to THC. Suffolk was actually responsible for the paving of the parking lot. Defendant SCC was the construction manager of the subject project. Defendant Lucchesi served as the engineer during the renovation and prepared design plans and specifications for the project.

Plaintiff asserts that he was walking westerly at the north end of the parking lot approximately four feet south of the concrete curb. As he approached the catch basin, he stepped on the asphalt surface next to the south side of the catch basin. He claims the pavement failed under his weight and he fell into a void space next to the catch basin and sustained injuries. Plaintiff asserts the inspection, repair and maintenance of the catch basin prior to the paving was the responsibility of each of the defendants. Each of the defendants has separately moved to dismiss the complaint and

the cross-claims as against it. Plaintiff contends that the defendants were negligent in failing to maintain, repair and/or inspect the catch basin prior to the paving.

Bethpage asserts it had no actual notice of the condition of the catch basin. Further, Bethpage contends that since the catch basin was covered by a grate that obscured the inside of the drain it had no constructive notice of the condition.

In opposition to the motions, the attorney for the plaintiff has submitted an engineer's report performed by John Garretto, P.E. According to plaintiff's expert a study of the cross-section of the sub-base, the base course, and the asphalt materials showed the following on June 19, 2004 (Affidavit and report of John Garretto, P.E., Exhibit B, Plaintiff's Affirmation in Opposition):

1. Sub-base - New sub-base material was not installed.
2. Base course - New base course material was not installed.
3. Asphalt - Approximately one-inch of asphaltic mix was placed over the original pavement material.

It is clear that contract drawing jfkC-4a requires removal of an 8' x 10' section around the catch basin, including the asphalt, base course and sub-base. A note next to the catch basin on this drawing says "PROP. STABILIZED SUB-BASE AND BASE COURSE."

Detail No. 6 on contract drawing No. cbC-9 is entitled "Pavement Section @ Parking Lot and Road Areas" shows the standard cross-section of materials to be installed under the contract. The detail requires "6" Stabilized Soil Sub-Base," which is followed by "4" Recycled Base Course" and topped by "2" Wearing Course (N.Y.S.D.O.T. Type 6F)."

The contractor failed to fulfill the terms of the contract. He did not follow the contract drawings. The accident would not have occurred if the contractor installed the work in compliance with the contract drawings.

> As in [sic] indication of the contractors neglect in following the plans, I reviewed two other area drains at the south side of the parking lot near the JFK school. According to contract drawing jfkC-4a, the two drains in the parking lot are required to have concrete collars.
>
> The circular area drain at the west side of the lot has a note on the drawing "Prop. Concrete Collar." A note at the rectangular drain at the east side of the lot states "Prop. Precast Concrete Collar."
>
> The contractor did not install the concrete collars. Also, it is doubtful if he replaced the subbase and base materials at these two drains.

Further, plaintiff's expert opined that with a reasonable degree of engineering certainty the contractor was negligent in the installation of the work.

1. The contractor failed to uncover a deteriorating sub-surface condition of longstanding at the catch basin.
2. The contractor did not install the required sub-base and base course material at the catch basin.
3. Removal of an 8' x 10' paved section at the catch basin, including the sub-base and base course materials as required by the contract, would have revealed the unsafe sub-surface void space.
4. The sub-base and base course materials are pre-existing prior to the start of this contract. These materials should have been removed under the contract.
5. The new asphalt topping is easily identifiable over the existing original asphalt surface.

Bethpage has the burden of proving it did not create the defective condition or have actual or constructive notice of its existence. To give rise to constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. When a defect is latent and would not be discoverable on a reasonable inspection constructive notice may be imputed. Defendant Bethpage established its entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the defect that caused the pavement to collapse. *See Applegate v Long Island*

Power Authority, 53 AD3d 515, 516 (internal citations omitted). The opinion of the plaintiff's expert that the contractor failed to uncover a deteriorating sub-surface condition of longstanding duration at the catch basin was not sufficient to raise an issue of fact as to defendant Bethpage. *See Crawford v Jefferson House Associates LLC*, 57 AD3d 822. The plaintiffs' expert opinion goes to the work performed under the specifications of the contract, and does not meet the burden of proof of notice to Bethpage. There is no evidence before this Court that Bethpage was aware of any defective condition prior to the incident so as to raise Bethpage's obligation to replace and/or maintain the catch basin. Further, Suffolk's expert statement that "[t]he apparent failure of the catch basin adjacent to the accident location and the formation of a sink hole adjacent to the catch basin were caused by forces during the approximate eight months between the time the paving work in the parking lot was completed and the date of the accident" supports Bethpage's argument that the alleged defect, if any, that caused the accident was put in motion eight months before the accident, negating the argument of a longstanding condition of which Bethpage had constructive notice (Affidavit of Louis Schwartz, Jr., P.E. sworn to May 18, 2009, Exhibit A to Suffolk's Affirmation in Opposition).

Bethpage has shown good cause for the delay and a satisfactory explanation for the untimeliness of its motion against Suffolk. Bethpage's initial timely motion (seq. No. 4) clearly and specifically stated the relief sought was summary judgment dismissing the plaintiff's action against Bethpage and dismissing all cross-claims, or in the alternative for defense and indemnification against the co-defendants. There was an error in the Affirmation in Support of the original timely motion, in that although the relief sought in the Notice of Motion was dismissal of all cross claims or indemnification against all defendants, the Affirmation in Support contained no specific allegations against Suffolk. As soon as Bethpage realized the error, the motion (seq. No. 8) against Suffolk was served and filed. Motion (seq. No. 8) against Suffolk is a supplement to the original motion (seq. No. 4) and a clarification of same. The Court agrees with Bethpage that the timely service of motion (seq. No. 4) with an incomplete supporting affirmation and the expeditious correction of same, warrant that Bethpage's motion against Suffolk (seq. No. 8) be heard as part of the original timely motion (seq. No. 4). There is no prejudice to Suffolk, as the relief sought in the timely motion was in fact stated to be dismissal of all cross claims or indemnification against all defendants. Suffolk was certainly put on notice that Bethpage was seeking relief against it.

Moreover, the other co-defendants were seeking the same relief from Suffolk.

Defendant Suffolk Paving performed the work in the parking lot. Suffolk Paving's president Louis Vecchia testified that one of his laborers, during preparatory work, advised him that one of the catch basins was old and some of the cement between the bricks framing the catch basin was either failing or very loose. Mr. Vecchia testified he advised Gheorghe of THC, who allegedly spoke to SCC about it. Mr. Vecchia of Suffolk Paving alleges he advised Mr. Vasilescu of THC Realty that the subject catch basin should be reconstructed pursuant to a change order. Mr. Vasilescu refuted Mr. Vecchia's claims stating that Mr. Vecchia never asked him whether THC Realty would approve a change order with regard to the installation of a new catch basin in the subject parking lot prior to the completion of paving. There is a question of fact as to whether a failure by Suffolk Paving to properly perform its work at the premises caused or contributed to plaintiff's accident. Bethpage's application for an order dismissing the complaint and all cross-claims against defendant Bethpage is granted.

The cross-motion by the attorneys for defendant THC Realty dismissing plaintiff's complaint and all cross-claims as against THC Realty is denied. First, the Court rejects THC Realty's argument that its motion is timely. There is not one iota of proof to substantiate THC Realty's allegation that the putative default by the plaintiff at the TAP Calendar Call on June 15, 2009 was a nullity as determined by Justice Cozzens. Nevertheless, this Court considered THC Realty's arguments for summary judgment and denies the application on the merits. Among the other issues there is a question of fact as to whether Suffolk notified defendant THC Realty of the alleged dangerous condition regarding a possible rebuilding of the subject catch basin prior to plaintiff's injury.

Lucchesi Engineering, P.C. submitted its cross-motion for summary judgment approximately two weeks after the deadline imposed by the Court. The excuse for the late filing was that settlement discussions were pending and Lucchesi thought it was economically prudent to hold off making a motion for summary judgment. The within action involves five (5) defendant, each of whom have made motions for summary judgment. Adjournments on consent were made on a number of occasions at the request of the respective parties. The motions were finally submitted on July 6, 2009, over four months after the original return date. There is no prejudice to the parties by permitting Lucchesi to file its cross-motion. In the Reply Affirmation dated May 11, 2009, Lucchesi's attorney opines that while the plaintiff and the co-defendants allege Lucchesi was

negligent in the performance of its services, in their respective opposition to Lucchesi's motion for summary judgment they ignored the controlling law requiring them to submit an affidavit from an expert competent to testify to evidentiary facts which would support their claims citing *530 E. 89 Corp. v Unger*, 43 NY2d 776 and *Zweng v DeBellis & Semmen*, 22 AD3d 845. The attorney for defendant Suffolk, along with his Affirmation in Opposition dated June 15, 2009, submitted an Affidavit from Suffolk's expert in which the expert opined that there was no evidence Suffolk deviated from the plans and specifications provided by THC, nor was there evidence that Suffolk performed its work in a negligent manner. Suffolk's expert stated (Louis Schwartz, Jr., P.E., sworn to May 18, 2009, Exhibit A to Suffolk's Affirmation in Opposition):

- The catch basin structure adjacent to the accident location should have been inspected by Lucchesi prior to drafting plans and specifications for the work to be performed, especially in light of the obvious age of the catch basin structure (and the fact that a different catch basin was to be replaced in the parking lot).

- Had Suffolk performed its work in a negligent manner and/or deviated from the plans and specification provided by THC, SCC should have made notations about the work in its daily reports and/or stopped the work and/or reported the problems to Suffolk, THC, Lucchesi and Bethpage.

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583), the court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply Inc.*, 8 AD3d 655; *Greco v Posillico, supra; Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *Glover v City of New York*, 298 AD2d 428; *Perez v Exel Logistics*, 278 AD2d 213.

"As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *Fromme v Lamour*, 292 AD2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614.

The plaintiff and defendants Suffolk, THC, Lucchesi and SCC have each raised issues of fact

as to the others' negligence precluding the granting of summary judgment in favor of Suffolk, THC, Lucchesi or SCC.

SCC seeks indemnification from the plaintiff. SCC asserts that since the plaintiff was an employee of his own sole proprietorship he is required to defend and indemnify SCC regardless of whether he was negligent. Although there is defense and indemnification language in the contract between SCC and the plaintiff, whether SCC rather than the plaintiff specifically controlled and limited the plaintiff's job duties at the construction site raise issues of fact that may preclude the granting of summary judgment in favor of SCC against the plaintiff as to the defense and indemnification of SCC by the plaintiff. Moreover, the issues as to the defense and indemnification of the remaining defendants should await the determination of the liability, if any, of the remaining parties, and is therefore referred to the trial court.

Bethpage Union Free School District shall be deleted as a party defendant.

This constitutes the decision and order of this Court.

ENTER

DATED: August 24. 2009

/S/

HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiff
LAW OFFICES OF JOSEPH J. PERRINI, III
2876 Merrick Road
Bellmore, New York 11710

Attorneys for Defendants
MULHOLLAND, MINION & ROE
374 Hillside Avenue
Williston Park, New York 11596

SHAUB AHMUTY CITRIN & SPRATT, LLP
1983 Marcus Avenue
Lake Success, New York 11042-1056
(516) 488-3300

Attorneys for Defendants
RIVKIN RADLER,LLP
EAB Plaza
Uniondale, New York 11556-0926

KENNEDY & GILLEN
1050 Franklin Avenue, Suite 103
Garden City, New York 11530

CHARLES R. PIERCE, JR., P.C.
32 Woodbury Road
Huntington, New York 11742