SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. MARVIN E. SEGAL

Justice

SHORT FORM ORDER

AMENDED

IAS PART 8

RUTH FRANK and HAROLD M. FRANK,

NASSAU COUNTY

INDEX No. 31168/97
MOTION DATE:5/1/00
MOTION No. 03,04

Plaintiff(s),

-against-

OLD WESTBURY COUNTRY CLUB, INC., CCC PAVING CORP., JOHN NICKONOVITZ d/b/a PARKLINE STRIPING CO. and PARK-LINE THE STRIPING CO., INC.

Defendant(s).

Upon the following papers read on these motions for an order pursuant to CPLR §3212;

Notice of Motion/ Order to Show Cause..... X
Notice of Cross Motion..... X
Affirmation in Opp. (4)..... X
Replies (2)..... X
Surreply..... X
Memorandum of Law..... it is

ORDERED, that the motions are decided as follows:

This is an action for damages for personal injuries allegedly sustained by the plaintiff Ruth Frank (plaintiff) on August 13, 1996 when her vehicle collided with a tree on a private roadway located on the grounds of The Old Westbury Country Club, Inc. (Old Westbury). The plaintiff contends that it was raining at the time of the accident; that she felt her vehicle drive over

an oil slick on the road; and that her vehicle went out of control. Paragraphs 9, 10 and 11 of the Amended Verified Complaint allege that the defendant CCC Paving Corporation (CCC) AND John Nickonovitz and Parkline Striping Company (Parkline defendants) performed work at the accident site which caused the roadway to become slippery, slick and otherwise dangerous. The plaintiff's Amended Bill of Particulars also alleges that the defendants failed to close the road and failed to warn users of the road that the road was slippery, slick and dangerous.

CCC and the Parkline defendants now move for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint and all cross claims.

In or about August 1996, CCC was retained by Old Westbury to repair and reseal the roadway in issue. For two days, CCC ripped up seven or eight damaged areas, cut the edges, put down blacktop, compacted it and hot oiled the edges. The resealing and road stripe painting work was contracted out by CCC to Parkline. CCC contends that 1) it only performed asphalt work 2) it did not perform any repairs at the site of the accident 3) it completed its work more than a week before Parkline commenced work and 4) it had no control over the resealing of the roadway by Parkline. Parkline contends through the deposition testimony of its manager John A. Nickonovitz that 1) it could only reseal the roadway on Mondays when Old Westbury was closed; 2) it resealed the site of the accident, on a Monday, eight days before the accident 3) the roadway was sealed with a sealant called Weather Seal Coat which

dried in no more than 24 hours 4) on the day before the accident the resealed roadway was "dry and new". Parkline contends that the Weather Seal Coat did not cause the roadway to become slippery, slick or otherwise dangerous.

The defendant Old Westbury and the plaintiff have opposed the motions for summary judgment. With regard to the CCC motion, Old Westbury points out that CCC inspected Parkline's work on several occasions. With regard to Parkline's motion, Old Westbury points out that 1) Parkline did resealing work at Old Westbury the day before the accident 2) Mr. Nickonovitz's statement that no work was done near the site of plaintiff's accident on the day before the accident is self-serving and not corroborated 3) Parkline failed, until the service of a reply affirmation, to produce a work diary 4) there is testimony in the deposition record to the effect that rain prevents the sealant from drying, causes the sealant to wash away, and creates a slippery condition and 5) there is desposition testimony to the effect that the resealing process partially or totally covered over yellow markings denoting speed bumps, which were present eight days before the accident but were not present on the day of the accident.

The plaintiff has submitted the affidavit of Stanley H. Fein, a licensed engineer. Mr. Fein's affidavit concludes that 1) sealant was applied to the site of the accident on the day prior to the accident 2) the sealant mixture did not contain enough cement which caused the roadway to become slick 3) certified weather reports show that .04 inches of rain fell less than 12 hours after

the sealant was applied, and that .70 inches of rain fell less than 24 hours after the sealant was applied causing the roadway to become slick. Finally, Mr. Fein states that the skid marks plaintiff left at the accident site went through the sealant into the asphalt because the asphalt had been applied in a substandard manner.

Plaintiff has also submitted the pretrial deposition testimony of an Old Westbury employee Mr. Schumann, and a non-party witness, Mr. Chappel. Mr. Schumann's deposition testimony contradicted the testimony of Mr. Nickonovitz that the resealing was done eight days before the accident, and supported plaintiff's contention that the location was resealed the day prior to the accident. Mr. Chappel reported to Old Westbury's Greens Superintendent on the morning of plaintiff's accident, that his vehicle "did a 360" as soon as he turned onto the roadway in issue, despite the fact that his vehicle has anti-lock brakes and he was traveling 10 to 15 miles per hour.

The defendant CCC has established prima facie entitlement to summary judgment dismissing the complaint and all cross claims as against said defendant. Neither Old Westbury nor the plaintiff has made a showing sufficient to create any genuine question of fact. There has been no showing of any negligence by CCC. Plaintiff's expert's one line, conclusory statement to the effect that the asphalt was applied in a substandard manner is clearly insufficient to defeat CCC's application for summary judgment (see,

Amatulli v. Dehli Constr. Corp., 77 NY2d 525, 533; Zuckerman v. City of NY, 49 Y2d 557, 562).

This is not an action commenced by an injured worker who seeks to impose strict liability against a general contractor pursuant to Labor Law §240 or 241. In order for the plaintiff in this action to obtain a judgment against CCC, the plaintiff must demonstrate that CCC was actively negligent and breached some duty of care it owed to the plaintiff.

Periodic inspection of a subcontractor's work by a general contractor for the purpose of seeing that the work is being performed does not constitute control over the manner in which the subcontractor performs its work sufficient to impose liability upon the general contractor for negligent acts of the subcontractor (see, Milewski v. Caiola, 236 AD2d 320; Grant v. Dutchess Timberlands, 214 AD2d 904; Paterson v Hennessy, 206 AD2d 919; Curtis v. 37th Street Assocs., 198 AD2d 621).

Here, the only proof in the record is that a CCC employee observed Parkline's work on one or two occasions.

With regard to the application of the sealant, Parkline conceded through the deposition testimony of John Nickonovitz, that CCC did not direct either the manner of the work or the choice of sealant. Mr. Nickonovitz's self serving statement that CCC could have directed the choice of sealant does not constitute a showing of control sufficient to impose liability on CCC for Parkline's acts. Further, plaintiff's expert does not find

negligence in the choice of sealant, but rather in the manner in which it was mixed.

Accordingly, the complaint and all cross claims are dismissed as against CCC.

Old Westbury and the plaintiff have, however, demonstrated that there are genuine issues of fact as to whether or not Parkline was negligent. Old Westbury and plaintiff have shown that 1) precipitation delays the drying of the road sealant utilized by Parkline 2) until the sealant is dry it makes a roadway slick and slippery 3) there was precipitation within 12 hours and 24 hours of work performed by Parkline on the day preceding and the day of the plaintiff's accident and 4) there is evidence that Parkline sealed the roadway where plaintiff's accident occurred on the day before the accident. Old Westbury and plaintiff have demonstrated that there are issues of fact as to whether or not Parkline was negligent in the application of the sealant and in failing to close the roadway and or post warnings.

Accordingly, Parkline's motion for summary judgment dismissing the complaint and cross claims against Parkline is denied.

DATED: May 18, 2000

/s/ HON. MARVIN E. SEGAL

J.S.C.

2frank.sfo