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SHORT FORM ORDER

INDEX No. 08-5166
CAL. No. 10-00680OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE (002) 9-19-10 (003) 9-15-10
ADJ. DATE 9-17-10
MNEMONIC: # 002 - MG
003 - MotD

NORMA SOMMER,

Plaintiff,

- against -

ASPLUNDH CONSTRUCTION CORP., and R&R BLACKTOP CORP.,

Defendants.

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Upon the following papers numbered 1 to 46 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 19 ; Notice of Cross-Motion and supporting papers (003) 20-32 ; Answering Affidavits and supporting papers 33-38; 39-41 ; Replying Affidavits and supporting papers 42-43; 44-46; Other _____; (~~and after hearing counsel in support and opposed to the motion~~)
are consolidated for determination and it is,

ORDERED that these motions are consolidated for purposes of this decision; and it is further

ORDERED that this motion (002) by the defendant, Asplundh Construction Corp. (hereinafter Asplundh), pursuant to CPLR §3212 for summary judgment dismissing the plaintiff's complaint and any and all cross-claims against Asplundh is granted, or, in the alternative, for summary judgment to Asplundh on its cross-claims for common law and contractual indemnification and for breach of contract against R&R Blacktop Corp (hereinafter R&R) is granted to the extent that the plaintiff's complaint and the cross-claim for indemnification asserted by R&R are dismissed with prejudice; and it is further

ORDERED that this motion (003) by the defendant, R&R, pursuant to CPLR §3212 for an order dismissing the plaintiff's complaint and any and all cross-claims against R&R is granted only to the extent that part of the motion which seeks dismissal of the cause of action for breach of contract asserted by Asplundh is granted and that cause of action is dismissed.

The amended complaint of this action arises from a trip and fall incident which occurred on

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September 28, 2006, at Half Hollow Hills School located at 25 Burrs Lane, Dix Hills, New York when the pedestrian plaintiff tripped on blacktop/asphalt pavement allegedly improperly laid and in defective condition. The plaintiff claims that Half Hollow School District (hereinafter School District) contracted with Asplundh to pave, repair, and install blacktop at the premises; that Asplundh and R&R entered into a contract to perform paving, repairing and installation of blacktop at the premises; and that the defendants created and caused a dangerous and defective condition upon which the plaintiff tripped.

In its amended answer, Asplundh has asserted a cross-claim against R&R for indemnification/contribution. Asplundh commenced a third-party action against R&R asserting causes of action based upon common law and contractual indemnification and breach of contract by R&R for R&R's failure to procure liability insurance inuring to the benefit of Asplundh.

R&R has presented a cross-claim wherein it seeks to be indemnified by Asplundh for Asplundh's apportioned degree of liability.

Asplundh seeks summary judgment dismissing the plaintiff's complaint because Asplundh bears no liability in this action as it hired the defendant R&R as an independent contractor to install blacktop on the subject premises, it did not inspect the work by R&R, and that the claimed defect is trivial and thus not actionable. Asplundh further seeks summary judgment on the breach of contract claim asserted against R&R based on R&R's failure to maintain general liability insurance relating to its work at the site and for summary judgment on its claim against R&R for common law and contractual liability.

R&R seeks summary judgment dismissing the plaintiff's complaint and any and all cross-claims asserted against it because the plaintiff's accident did not occur in the area where R&R performed its work, R&R did not cause or create the claimed defect and owed no duty to the plaintiff

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of their respective motions (002) and (003), Asplundh and R&R have submitted supporting papers.

Both defendants have submitted the transcripts of the examinations before trial (hereinafter EBT), of Robert Sommer, dated February 17, 2010, and Joseph Moccia on behalf of R&R, dated November 16, 2009. Neither one of these EBTs is in admissible form, pursuant to CPLR §3212, as they are not signed nor have the moving defendants submitted with said transcripts an affidavit pursuant to CPLR §3116.

The insurance policy procured by R&R from Merchants Mutual Insurance Company of Buffalo reveals that Asplundh is not named as an additional insured. However, at page 12, paragraph f., coverage is provided as the contract states "That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement." Such clause is not excluded in the exceptions listed.

The agreement, dated September 15, 2005, entered into between the defendants Asplundh and R&R provides at page 4 at paragraph V that "To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless the Owner and Contractor... from and against all claims, damages, losses (including but limited to ... personal injury and death...) and expenses... arising out of or in any way connected with the work performed by Subcontractor... ." Accordingly, the agreement encompasses contractual indemnification by R&R to Asplundh.

At her EBT, dated June 3, 2009, the plaintiff testified that she was employed as a bus driver with the School District since 1992, and reported to work at the subject premises at the driver's room. The buses were maintained there for the district and there was a parking facility and a garage. On the date of the accident when she arrived at the premises, she parked her car in her usual area in the parking lot maintained for employee's vehicles. She testified that her accident occurred in a separate transportation parking lot. She had just returned from a bus run, parked her bus and went into the (bus depot) building for about 5 minutes. She then left through the front door of the building to go to her car. After exiting the front door, she walked about 60 feet on the asphalt, looking straight ahead but not at the asphalt, when her left ankle gave out, rolled over, and she went forward and fell onto her right side. After she fell, she noticed the pavement was uneven with a "high and a low area" with about an inch height difference. She was not aware if at any time before the accident the area had been paved over or worked on. She saw no workers in the area for 6 months prior to the accident. She had not heard of any complaints concerning the area in which she fell. Her husband also worked as a bus driver at the same location. She testified that in February 2008, she tripped on uneven asphalt in her driveway and had to have surgery for a fractured right wrist. In June 2008, after returning to work, she tripped and fell at 25 Burrs Lane, on asphalt, slipping on an incline on the asphalt, fracturing her right elbow, and again required surgery.

In her affidavit submitted in opposition to the motion and cross-motion, the plaintiff states that after completing her morning shift, she parked her bus in its designated parking lot, walked through the depot office and then walked from the depot office towards the parking lot designated for the bus driver's personal cars. As she was walking on the driveway toward the parking lot to her car, she fell on uneven asphalt blacktop pavement. The area had at least a 1-1 3/4" differential in height, and was jagged and uneven.

Robert Sommer, in his affidavit submitted in opposition to the motion and cross-motion, stated that he had worked as a bus driver for the School District for approximately 15 years at the bus depot located at the 25 Burrs Lane premises. There were two driveways that faced south which fed into the main parking lot where the buses were parked, one running north of the building that led to a separate employee parking lot which was separated from the main driveway by a fence. He was not present when the accident occurred. He cited hearsay testimony from Peggy Barons, a co-worker who allegedly saw the plaintiff fall. However, no affidavit has been submitted from Peggy Barons. He stated that in the beginning of 2006, he saw workers doing patchwork in the north driveway with a truck and a small roller dump truck in the area where his wife fell. Prior to that work being done, there was no difference in elevation at the site.

Michael J. Harvey, at his EBT on September 22, 2009, testified on behalf of Asplundh that he had been employed by Asplundh as chief estimator and had bid on electrical, gas and civil projects for about 10 years. Prior to that he worked for R&R for about 3 years as a project manager for the owner, Robert Delfin (hereinafter Delfin). With regard to the 25 Burrs Lane location, on September 7, 2005, Asplundh put out a bid to the School District which accepted the bid for work. Asplundh then subcontracted the blacktop work with R&R. He identified a copy of the contract, dated September 15, 2005, with R&R which he stated was not signed by anyone on behalf of Asplundh. It was his practice to obtain a copy of the certificate of insurance from the subcontractor before commencement of the subcontractor's job. He believed the asphalt work was done in early 2006 by R&R, who then submitted the invoice for payment to Asplundh who in turn paid R&R. The School District paid Asplundh. There were 3 sites being paved, including Transportation at 25 Burrs Lane. At Transportation, the work consisted of "removing existing and place new 6,100 hundred square feet, place new, no removal, 11,470 square feet, saw cutting 630 lineal feet." Upon completion of the paving at Transportation, he did not inspect the work. He did, however, "a couple of weeks ago" before testifying, go to the location to see where the accident occurred. He did not know if any of the work by R&R involved the area where the plaintiff fell. After R&R completed the work at Transportation, he did not receive any calls or complaints from the School District about the work which was done. He did not believe the area where the plaintiff fell was part of the work by R&R as it "certainly doesn't look like new asphalt to me" but then acknowledged it was several years since the accident occurred.

In his affidavit, Delvin stated that sometime in 2005, R&R contracted to perform work at the School District at 25 Burrs Lane, at the site used as the district's school bus depot. The work performed by R&R was in a fenced area at the north end of the site. The south end of the site consisted of a shop area and already existing paved area. R&R did not perform work in this previously paved area in the southern portion of the site. The area where R&R performed its work was previously earth and gravel and was an existing parking lot. R&R performed fine grading of the area and added gravel and stone base to the site. The area was then paved with asphalt. Thereafter, the striping of the surface was performed by Appel Line Striping of East Northport pursuant to a subcontract agreement. At no time did R&R receive any complaint concerning the work it performed at the site. No modification was performed at the site after the work was completed. The work performed by R&R was performed in accordance with the specifications detailed by the School District. Delfin further stated that it was his understanding that the plaintiff's accident occurred in the area south of the fence, which was not the area where R&R was directed to perform its work.

Based upon the foregoing, Asplundh has established prima facie entitlement to summary

judgment dismissing the plaintiff's complaint and any cross-claims by R&R against it. Asplundh has established prima facie that it was awarded a bid from the School District as contractor for certain work and subcontracted with the defendant R&R for the asphalt work to be performed at the site. Asplundh conducted no asphalt work at the site, did not direct or control or inspect or approve the work performed by R&R whom it hired as an independent contractor for the job. The plaintiff and R&R have failed to raise any factual issues to preclude summary judgment.

Accordingly, motion (002) is granted. The plaintiff's complaint and the cross-claims asserted by R&R for indemnification against Asplundh are dismissed as a matter of law.

Based upon the foregoing, R&R has not demonstrated prima facie entitlement to summary judgment dismissing the plaintiff's complaint as the evidentiary submissions raise factual issues concerning whether the accident occurred on an area paved by or worked on by R&R. Although Delfin avers that R&R did not perform work in that area, Robert Sommer, the plaintiff's husband, avers that work was conducted by the same company (R&R) who paved the parking area. There have been no admissible evidentiary submissions which establish the exact areas worked on by R&R. Neither Delfin, nor anyone working on the site for R&R, has indicated specifications or measurements to demonstrate whether or not the area in which the plaintiff fell encompassed any of the work performed by R&R, and whether the area paved by R&R was cut into the area where the plaintiff claims to have fallen.

Accordingly, that part of motion (003) which seeks dismissal of the plaintiff's complaint against R & R is denied, and that part of the motion which seeks dismissal of the cause of action for breach of contract asserted by Asplundh is granted and that cause of action is dismissed.

Dated: JAN 14 2011

Peter Bocca
J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION