

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: December 31, 2021)

JENNIFER FOURNIER :

v. :

JAMES J. LOMBARDI, III, et al :

C.A. No. PC-2017-1482

AND :

CARDI CORPORATION :

v. :

CONCRETE CUTTING CORP. :

d/b/a CUT-RITE CONCRETE :

CUTTING CORP. :

DECISION

LANPHEAR, J. This case came on for hearing on Third Party Defendant Concrete Cutting Corp.’s Motion for Summary Judgment on December 7, 2021.

I

Facts

The Complaint alleges that Jennifer Fournier fell as she walked across Sabin Street in Providence on October 8, 2014. She claims that she twisted her ankle and landed on her right knee as there “was a saw cut in the asphalt that caused a diamond-shaped section of asphalt to break apart leaving a hole in the crosswalk. . .” Compl. ¶ 9.

In her First Amended Complaint, Ms. Fournier initiated suit against the City of Providence and Cardi Corporation (Cardi), a contractor for a project in the area. Cardi responded and then filed a Third Party Complaint against subcontractor Concrete Cutting Corporation (Cutting) for

contribution, indemnification, and breach of contract. Cutting, a third party defendant, moved for summary judgment in August 2021 and opposition memoranda were then submitted.

II

Analysis

A. Issues of Material Fact

Cutting asserted at hearing that the summary judgment was appropriate as it was uncontroverted that Cutting had not made the cut on Sabin Street. The Court was taken aback by this as it did not recall this fact having been established by Cutting or pressed in Cutting's memorandum. Whether this material fact was in dispute was critical, so the Court reserved ruling to review the filings again. On review, the Court finds that the absence of fact had **not** been established, indeed the absence of this issue of material fact had not been raised.

At hearing, Cutting's counsel referred to several specific pages of its memorandum, including page 8¹. In its memorandum for Summary Judgment of August 17, 2021, Cutting set forth "Facts." Cutting's Mem. 2-3. It never suggested that Cutting did not make the cut in question within that section—quite the contrary. Cutting declared "Cutting performed work in accordance with the contract" and "[t]hese cuts were performed . . ." *Id.* at 3. There are a host of exhibits attached to the memorandum, but no affidavit of facts. There are 203 pages of depositions attached, but none are specifically cited for the claim that Cutting did not make the cuts in question.²

¹ Page eight of Cutting's August 17, 2021 memorandum makes no reference to whether or not Cutting made the cuts.

² Moving parties should specifically reference source material for dispositive motions and not leave the courts to sift through extensive depositions and supporting materials. As our high court has declared, "[w]e decline to scour the record to identify facts in support of the plaintiff's broad claims, and we will not give life to arguments that the plaintiff has failed to develop on his own." *McMahon v. Deutsche Bank National Trust Co.*, 131 A.3d 175, 176 (R.I. 2016).

Of course, Cutting must establish that there was no issue of material fact that Cutting did not make the cuts in question to secure a grant of summary judgment on this issue. The moving party “bears the initial burden of establishing the absence of a genuine issue of fact.” *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (citation omitted). Not only did Cutting not assert or establish that claim in its motion—the other parties established that Cutting made the cuts.³

When confronted with this issue at hearing, the Court allowed for supplemental memoranda within strict time limits. A memorandum was submitted by Cutting alleging (for the first time) that the opposing party had failed to show issues of fact. Cutting had failed to demonstrate the absence of an issue of fact in its original memorandum and now the opposing party had run out of time to respond. Further, Cutting’s reply memorandum makes allegations without support. For example, on page two of the reply memorandum of December 13, 2021, it claims “Defendant Cutting has denied that it made the diamond-shaped cut...”

The Court has reviewed the depositions as referenced. Perhaps the closest reference to the issue is from Mr. Mello’s deposition:

“Answer: No. It looks like somebody made some cuts there.

“Question. And do you know who –

“Answer. No.

“Question. – would have done that? Was that something one of your workers would have done?”

³ Plaintiff’s October 21, 2021 memorandum in opposition to the Motion for Summary Judgment states, “[r]egardless of which employee actually made the saw cuts, it is undisputed that Concrete Cutting made the parallel saw cuts on Sabin Street.” (Pl.’s Mem. 3.) The Plaintiff specifically references Exhibit D at 43. This page reflects that Bento Moreira, the Cardi foreperson for the project, testified at his deposition as follows:

“Q. Who cut these lines?

“A. [Cutting.]” (Ex. D, Dep. Tr. 43:20-21, June 25, 2020.)

Hence, there is no issue, for purposes of this motion, that Cutting made the relevant cuts in Sabin Street. At the very least, Cardi demonstrated this to be an issue of fact.

“Answer. I asked them and they said they didn’t do it.” (Ex. F, Dep. Tr. 42:4-10, Nov. 5, 2019.)

Simply put, Cutting failed to establish the absence of an issue of material fact. It was inappropriate for Cutting to allege at hearing that it established that Cutting had NOT made the cuts or that it had established an issue of fact. It was unfair to the opposing party to raise such allegations too late for the opposition to respond or prior to the hearing before the Court.

B. Obligations Under the Subcontract

In its original August 17, 2021 summary judgment memorandum, Cutting alleged that it was not responsible under the contract for maintaining the area in question, claiming that its performance had ended as a Cardi supervisor had signed off on the work. The subcontract with Cardi states:

“Payment by Contractor to Subcontractor for all or any part of the work [s]hall not relieve Subcontractor of responsibility for all materials and work upon which payment has been made and the removal and replacement of damaged work ...” (Cutting’s Mem., Ex. B at 4.)

The subcontract implies a longer contractual relation as opposed to a specific location contract. It does not list the specific locations of the cuts to be made. The subcontract requires an inspection by the city before “final acceptance of all work on the project...” *Id.* at 6. Accordingly, the plain language of the subcontract establishes that the subcontract is not terminated when the specific cuts are completed or first inspected by Cardi.

C. Indemnification

Next, Cutting claims that, as a subcontractor, it need not indemnify the contractor for the contractor’s negligence. However, it has failed to establish that Cardi, the contractor, was negligent. The subcontract contains a valid, clear indemnification clause:

“The subcontractor shall indemnify and hold the Contractor harmless from any and all liability, loss claims or damage which the Contractor may suffer as a

result of demands, costs, judgments or claims of any nature against the Subcontractor or the Contractor which arise out of the acts or neglects of the Subcontractor, its officers, agents, or employees or independent contractors, whether pursuant to performance of this Subcontract or the Contract.” *Id.* at 16.

D. Contribution

Finally, Cutting claims Cardi is not entitled to contribution because no duty was owed to the Plaintiff, Ms. Fournier. If Cutting made the specific cuts, both Cutting and Cardi may be held responsible as joint tortfeasors per G.L. 1956 § 10-6-3. Without an affirmative showing to the contrary, the Court must presume that each of them owes a duty of care to unsuspecting pedestrians using the crosswalks which are being reconstructed, such as Ms. Fournier. Without more, the Court makes no specific conclusions of fact or other conclusions of law regarding the contribution claim, preserving those issues for trial.

III

Conclusion

Third party Defendant Cutting’s motion for summary judgment is denied.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Fournier v. Lombardi, et al. and Cardi Corp. v. Concrete Cutting Corp.

CASE NO: PC-2017-1482

COURT: Providence County Superior Court

DATE DECISION FILED: December 31, 2021

JUSTICE/MAGISTRATE: Lanphear, J.

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