

Cabrera v Touchstone Tel. Prods., LLC

2021 NY Slip Op 31510(U)

April 29, 2021

Supreme Court, New York County

Docket Number: 159983/2016

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 159983/2016

JUAN CABRERA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

TOUCHSTONE TELEVISION PRODUCTIONS, LLC d/b/a
ABC STUDIOS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for SUMMARY JUDGMENT.

In this trip and fall action commenced by plaintiff Juan Cabrera, defendant Touchstone Television Productions, LLC d/b/a ABC Studios moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case, commenced on November 29, 2016, arises from an incident on October 21, 2015 in which plaintiff was allegedly injured when he tripped and fell on electrical cables laid across a sidewalk by defendant, a film production company, at 611 West 171st Street, near the intersection of West 171st Street and Broadway, in Manhattan. Doc. 1 at pars. 17, 21. Prior to the date of the incident, defendant allegedly obtained a permit to film at that location. Id. at pars.

14-16, 18. On the day of the incident, defendant allegedly covered the cables but the cover it used was broken. Id. at pars. 19, 25.

Defendant joined issue by its answer filed January 3, 2017. Doc. 4. In its answer, it denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Id.

In his bill of particulars dated July 26, 2017, plaintiff claimed that he was “walking on [the] sidewalk when he was caused to trip and fall due to a defective and broken cover covering cables on the sidewalk” in front of 611 West 171st Street, between St. Nicholas Avenue and Broadway. Doc. 28, BOP, at pars. 2-3.

Plaintiff testified at his initial deposition in September 2018 that he fell at the intersection of West 171st Street and Broadway, specifically on the sidewalk abutting Broadway. Doc. 31 at 58. He then stated that the incident occurred while he was on West 171st Street. Id. at 61. He said that he tripped over a “like yellow” cover which had been placed across the sidewalk by a company filming a movie. Doc. 31 at 65-66. He admitted that he saw the cover as he was walking. Doc. 31 at 68. Plaintiff initially testified that he fell in front of a laundromat but then stated that it was not a laundromat but rather a salon. Doc. 31 at 29.

At his continued deposition in November 2018, plaintiff again testified that he fell on the sidewalk in front of a salon on West 171st Street between Broadway and St. Nicholas Avenue. Doc. 33 at 1, 96, 101, 103. Plaintiff, who walked with a cane, said that the incident occurred when his shoe “became entangled” in the “thing that was covering the cables.” Doc. 33 at 109-113, 156. He admitted that he was not paying attention when his foot became entangled. Doc. 33 at 147. He said that there was a crack approximately 2” long in the board or cover over the cables and that is what caused him to trip. Doc. 33 at 125-127, 142. The cover was yellow or red. Doc. 33 at 112. He denied that he had seen the cover prior to his fall. Doc. 33 at 124.

Michael Murray appeared for deposition on behalf of the defendant, his employer, in March of 2020. Doc. 42. He testified that, on October 21, 2015, the defendant did a one-day film shoot for a show called Luke Cage at 611 West 171st Street. Doc. 42 at 10-11, 32. That day, he served as a liaison between the owner of the premises and the film crew. Doc. 42 at 12. The shoot required that power cables be run across the sidewalk to power lights for outdoor shooting and the said cables were covered with a cable jacket. Doc. 42 at 21, 26-28, 32-37. Although a policeman at the site told Murray that a pedestrian had fallen in the area of a nearby restaurant, he did not know whether anyone witnessed the incident. Doc. 42 at 29, 43. Murray acknowledged that the officer told him that plaintiff's fall occurred in the vicinity of 611 West 171st Street and that the cables were covered. Doc. 42 at 30-32

Murray identified a production report generated on the day of the incident, which indicated that a "pedestrian fell over one of [the defendant's] cable crossings at 171st & Broadway" and that the defendant "had it covered with a cable jacket." Doc. 36.

Plaintiff filed a note of issue on July 21, 2020. Doc. 21.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendant relies on plaintiff's deposition testimony, asserting that it is so speculative and inconsistent regarding the cause and location of the incident that it warrants dismissal of the complaint. Doc. 25.

In opposition, plaintiff argues, inter alia, that the complaint is not subject to dismissal simply because his testimony about the cause and location of the accident was imprecise. Doc. 40.

In reply, defendant argues that, since plaintiff cannot establish the cause or location of his fall without speculating, the complaint must be dismissed. Doc. 47. Defendant further maintains

that, despite numerous opportunities to clarify what caused him to fall, “he still could not set forth a prima facie case.” Doc. 47. Additionally, urges defendant, Murray’s testimony does not warrant the denial of the motion since he has no personal knowledge about the incident. Doc. 47.

LEGAL CONCLUSIONS

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 demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Here, the defendant has failed to establish its prima facie entitlement to summary judgment. Contrary to defendant’s contention, plaintiff consistently testified that he tripped when his shoe was caught on a broken cover which had been placed over power cables on the sidewalk and he identified the general location of the incident (*See Martinez v City of New York*, 190 AD3d 561 [1st Dept 2021] [denial of summary judgment to defendant affirmed where plaintiff identified cause and general location of the alleged accident]). Further, “[a]ny inconsistencies in plaintiff’s testimony as to the cause [and exact location] of [his] fall present credibility issues for the jury’s determination” (*Martinez v City of New York*, 190 AD3d at 561 [citation omitted]; *see also Patton v Taszo Coffee, LLC*, 156 AD3d 443 [1st Dept 2017]).

Additionally, since “it was not [plaintiff’s] obligation to prove his claim to defeat the motion for summary judgment, he was entitled to a reasonable inference” that his foot got caught on the broken cable cover and that this caused him to fall (*Cuevas v City of NY*, 32 AD3d 372, 372-373 [1st Dept 2006] [citations omitted]; *see also Yoon Peng Choo v Fiedler Cos., Inc.*, 123 AD3d 529 [1st Dept 2014]). This is especially so since Murray, who was on location at the

shoot on the day of the incident, admitted at his deposition that defendant placed covered cables on the sidewalk in the vicinity of 611 West 171st Street. Moreover, plaintiff alleges in his verified complaint and verified bill of particulars that he tripped over a broken cable cover on the sidewalk in front of 611 West 171st Street (See *Negrelli v 531 W. 19th LLC, Lan Chen Corp.*, 2020 NY Slip Op 32357[U], *16 [Sup Ct, NY County 2020]).

Finally, although not raised by plaintiff, defendant seeks to prevail on its summary judgment motion merely by pointing to gaps in plaintiff's proof. However, since one cannot prevail on a summary judgment motion in such manner, the motion is denied on this ground as well (See *Martin v City of NY*, 191 AD3d 152, 156 [1st Dept 2020]).

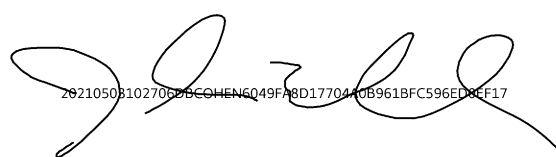
The parties' remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant Touchstone Television Productions, LLC d/b/a ABC Studios is denied.

4/29/2021

DATE



DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: