

Mayer v New York City Transit Authority

2005 NY Slip Op 30289(U)

December 5, 2005

Supreme Court, New York County

Docket Number:

Judge: Robert D. Lippmann

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+SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. ROBERT D. LIPPMANN PART 21

Justice

GRACE MAYER,

INDEX NO. 111081/01

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 006

NEW YORK CITY TRANSIT AUTHORITY
and R.A. GOTTLIEB, INC./SLATTERY
ASSOCIATES, INC., a Joint Venture,
Defendants.

MOTION CAL. NO. 88

R.A. GOTTLIEB, INC./SLATTERY, INC. A
Joint Venture s/h/a GOTTLIEB SKANSKA, INC.,
Third-Party Plaintiffs,

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

SHELDON ELECTRIC CO., INC.,
Third-Party Defendant.

The following papers, numbered 1 to 9 were read on this motion to/for summary judgment
and other reliefs.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause – Affidavits – Exhibits 1, 2, 3

Answering Affidavits – Exhibits 4, 5, 6

Replying Affidavits 7, 8, 9

Cross-Motion: G Yes G No

Upon the foregoing papers, defendant New York City Transit Authority (Transit Authority) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, and for a further order granting it summary judgment on its contractual and common-law indemnification claims against co-defendant/third-party plaintiff R.A. Gottlieb, Inc./Slattery Associates, Inc., A Joint Venture(Gottlieb). Gottlieb cross moves

for summary judgment dismissing the plaintiff's complaint on the grounds that it neither created the condition that allegedly caused plaintiff's accident nor did it have notice or a duty to remedy the defect. Third-party defendant Sheldon Electric Co., Inc. (Sheldon Electric), moves to dismiss or sever the third-party action or, in the alternative, grant it the opportunity to conduct discovery.

This is an action for personal injuries sustained by plaintiff on February 15, 1999, while she was attempting to board a southbound 7th Avenue train at the 34th Street subway station at Penn Station. Plaintiff alleges that she was caused to trip and fall due to an electrical cord that was lying on the subway platform. Plaintiff claims that she noticed the yellow "heavy duty" cord after she fell, but that she did not see whether the cord was attached to any electrical devices or connectors. Plaintiff further claims that she heard drilling in the subway although she did not see any workers on the platform.

Defendant Transit employed defendant/third-party plaintiff Gottlieb as the general contractor for the renovation of the 34th Street Station. Gottlieb employed Sheldon as a subcontractor for the electrical work. The renovation work included servicing the southbound 7th Avenue line where plaintiff's alleged accident occurred.

Plaintiff initially only commenced an action against Transit, which commenced a third-party action against Gottlieb. Plaintiff later commenced a separate action against Gottlieb and both actions were subsequently consolidated. Thereafter, Gottlieb commenced a third party action against Sheldon Electric, which now seeks to either sever the action or to compel discovery. The Court however, will first turn to the motion and

cross motion for summary judgment dismissing plaintiff's complaint, which were brought by Transit and Gottlieb, respectively, because a decision granting such applications would be dispositive of Sheldon's and the remaining derivative motions.

Transit seeks summary judgment dismissing the complaint and all cross claims against it on the ground that it neither created nor had actual or constructive notice of the condition which allegedly caused plaintiff to fall. Transit maintains that plaintiff's accident occurred on Presidents' Day and that there is no evidence, other than plaintiff's self serving testimony, that there was any construction going on at the station on that day.

On a motion for summary judgment the movant must make a prima facie showing of entitlement to judgment as a matter of law (Zuckerman v City of New York, 49NY2d 557 [1980]; Kuzyns v City of New York, 191 AD2d 169 [1st Dep't 1993]). Once a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (Zuckerman, 49NY2d). In support of the motion, Transit relies, in part, upon the deposition testimonies of its engineer, Hirisave Rangnath, Joseph Minetti, the project manager and employee of co-defendant Gottlieb, and of plaintiff.

Plaintiff testified at her examination before trial that the accident occurred on a subway platform. She stated that she had just ascended a flight of stairs and had taken "a step or two" before her "foot touched something" and she fell to the ground. Plaintiff also stated that after falling she noticed a "big electrical cord." Plaintiff testified that there was

work in progress at the time of the accident as she heard a power drill coming from "somewhere on the platform." She further testified, however, that she did not know whether the cord was attached to anything. Plaintiff stated that she boarded the train that was already in the station at the time of her accident and that she reported the accident to Transit shortly after she arrived at work.

Rangnath testified on behalf of Transit that he was employed by Transit as a resident engineer and that he was not aware of any construction work taking place on the date of the subject accident. He testified that daily reports were prepared for each day that work took place and that there was no such report for February 15, 1999, the date of plaintiff's accident. Rangnath further testified that Transit conducted inspections to ensure that the contractor's tools, materials and equipment were securely stored. Rangnath stated that it was the responsibility of the Gottlieb, the contractor, to ensure that the subway platforms were free of any tools or equipment.

Mr. Minetti, the Renovation Project's project manager who appeared on behalf of Gottlieb, testified that Gottlieb was responsible for overseeing the daily operations of the subcontractors. He testified that although subcontractors used tools that required extension cords, none of the subcontractors would have been working that Monday of the accident, Presidents' Day, or at any point during the weekend proceeding the accident. Mr. Minetti also testified that a safety engineer was employed for the project to ensure that the work was being done in a safe manner and who was responsible for the general cleanup or cleanliness of the project site.

Accordingly, Transit having established a *prima facie* entitlement to summary judgment based, in part, upon deposition testimony of Minetti and Rangnath, which support the argument that Transit and Gottlieb lacked actual or constructive notice of the electrical cord on the platform, the burden shifts to plaintiff to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (Zuckerman v City of New York 49NY2d 557 [1980]; Kuzyns v City of New York, 191 A.D.2d 169 [1st Dep't 1993]). This she has failed to do.

Plaintiff opposes summary judgment primarily on timeliness grounds. Plaintiff claims that the motion is late as it was filed after the expiration of the 120 day period provided in CPLR 3212. Transit Authority, however, established sufficient good cause for filing the instant motion after the expiration of the 120 day period provided in CPLR 3212. While “no excuse at all, or a perfunctory excuse, cannot be ‘good cause,’” it remains within this Court’s discretion to determine what indeed constitutes good or sufficient cause for a delay in timely filing a summary judgment motion (see Brill v City of New York, 2 NY3d 648, 652 [2004]). Here, Transit counsel explained that there was significant confusion on the part of the Motion Support regarding the proper caption for the motion. Transit’s motion was initially rejected by the clerk’s office due to this confusion and this Court subsequently directed that the motions be accepted by the Clerk’s office.

Plaintiff further claims the summary motion and cross motion are premature on grounds that third party defendant Sheldon requires additional time to oppose the motion. To the extent plaintiff has standing to raise such an argument on Sheldon’s behalf, the

third party action against Sheldon would be necessarily dismissed should this Court grant Gottlieb's cross motion for summary judgment. In any event, ample time has elapsed since the summary judgment motions were filed and Sheldon has since been provided with the discovery produced in this case, enabling it to have submitted opposition if it were so inclined.

Substantively, plaintiff opposes summary judgment by submitting, *inter alia*, excerpts from what appears to be Rangnath's deposition in which he testified that he did not think that there was a time during the renovation project when he was "not satisfied with the manner in which the material or the equipment was being stored or used." Rangnath testified that electrical cords were used on the subject platform to energize small electrical tools but that he did not recall whether the cords were yellow. He also testified that the renovation work was not done during morning rush hour, which is when plaintiff's accident allegedly occurred. Plaintiff proffers no evidence to support that a material issue of fact exists as to whether Transit created the condition and/or had actual or constructive notice of the condition which allegedly caused plaintiff's accident. Plaintiff's speculation that the electrical cord was left by Transit does not create a factual issue warranting trial (see Garfinkel v Manhattan and Bronx Surface Tr. Op. Auth., 8 AD3d 118 [1st Dep't 2004]). Moreover, for constructive notice to attach the alleged defective condition must have existed for a sufficient length of time for the defendant to have discovered as well as corrected it (see Gordon v American Museum of Natual Histry, 67 NY2d 836 [1986]).

Accordingly, plaintiff's evidence is insufficient to sustain opposition to the motion and Transit's motion is therefore granted.

Likewise, Gottlieb's cross motion is also granted for the forgoing reasons as both defendant and plaintiff rely upon the similar evidence in support as well as opposition of the cross motion for summary judgment.

As for Sheldon's request either to sever or compel discovery, the motion is dismissed as moot. In any event, much of the discovery which Sheldon seeks has been provided after the motion was made.

Also rendered academic is Transit's alternative theory of relief, which seeks summary judgment for common law and contractual indemnification from Gottlieb. The Court need not pass on that branch of Transit's motion as there is no finding that defendants were negligent in the happening of plaintiff's accident (see e.g. Roebuck v Roebuck, 35 AD2d 714 [1st Dept 1970]).

Accordingly, it is

ORDERED that the motion of New York City Transit Authority for summary judgment dismissing plaintiff's complaint, and for summary judgment on its contractual and common-law indemnification claims against co-defendant/third-party plaintiff R.A. Gottlieb, Inc./Slattery Associates, Inc., A Joint Venture, is granted to the limited extent that plaintiff's complaint is dismissed and is otherwise dismissed as moot; and it is further

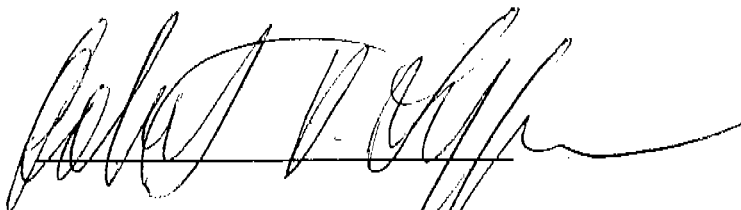
ORDERED that the motion of Sheldon Electric Co., Inc., seeking to dismiss or sever the third-party action or to compel discovery is dismissed as moot; and it is further

ORDERED that the cross motion of R.A. Gottlieb, Inc./Slattery Associates, Inc., A Joint Venture, for summary judgment dismissing plaintiff's complaint is granted for the

reasons stated herein.

Dated: December 5, 2005

ENTER:



ROBERT D. LIPPMANN, J.S.C.

**HON. ROBERT D. LIPPMANN
J.S.C.**

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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