

Cruz v New York City Housing Authority

2006 NY Slip Op 30051(U)

May 3, 2006

Supreme Court, New York County

Docket Number: 0107306/2004

Judge: Rolando T. Acosta

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

HON. ROLANDO T. ACOSTA

PRESENT: _____
Justice

PART 61

Index Number : 107306/2004

INDEX NO. _____

CRUZ, JUAN B.

MOTION DATE _____

vs

HOUSING AUTHORITY

MOTION SEQ. NO. _____

Sequence Number : 004

MOTION CAL. NO. _____

SUMMARY JUDGMENT

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2 (Ex. A-D), 3

Answering Affidavits — Exhibits _____

4 (Ex. A-P), 5

Replying Affidavits _____

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAY 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/7/07

SO ORDERED

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

Juan B. Cruz and Elba Cruz,

Plaintiffs,

– against –

The New York City Housing Authority,
The City of New York, and Technico
Construction Services, Inc.,

Defendants.

New York City Housing Authority,

Third-Party Plaintiff,

– against –

Rutgers Casualty Insurance Company,

Third-Party Defendant.

DECISION/ORDER

Index No. 107306/04

Motion Seq. 4

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

Third-Party Index No:
591274/04

FILED
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The following documents were considered in reviewing defendant Technico Construction Services, Inc.'s motion for summary judgment dismissing the action:

Papers

Notice of Motion, Affirmation in Support, Affidavit

Affirmation in Opposition, Affidavit

Reply Affirmation

Numbered

1, 2 (Ex. A-D),

3 (Ex. A-D)

4 (Ex. A-P), 5

6

Plaintiffs commenced the instant action alleging personal injuries and loss of services.¹ According to the complaint, Juan B. Cruz sustained personal injuries on June 19, 2003 near the premises known as 170 Avenue D, New York, New York, when part of the fence bordering the building allegedly opened while he was leaning upon it, causing him to fall. Defendant Technico Construction Services ("Technico"), Inc. in turn moves for summary judgment dismissing the action against it on the ground that it did not have anything to do with the fence or its alleged defect. Defendant New York City Housing Authority ("NYCHA") opposes the motion on the ground that there exists material issues of fact, and in any event, discovery has yet to be completed.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," *id.*, "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra*, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.*, at 562. In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, affording them the benefit of all reasonable inferences that can be drawn. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

¹ Plaintiffs' claims against the City of New York have been discontinued.

According to Technico, it performed brick facade side work on the face of the subject premises, and used larger open gates to enter and exist, and not the gate that plaintiff leaned on and fell. Moreover, Technico asserts that the incident occurred in an area where it had no contact, and at an alleged time when it was not on the premises. However, based upon plaintiff Juan B. Cruz's deposition testimony, NYCH asserts that material issues of fact remain as to whether Technico workers created the opening in the fence through which plaintiff fell. The Court agrees.

According to Cruz's testimony, "[t]here were some people that were doing work." (tr. P. 22). Cruz further testified that there had been construction work being performed on his building prior to his accident, and he believed that one of the construction workers had opened the fence. Indeed, it is uncontroverted that Technico was performing construction work on the date of the accident. Furthermore, at his deposition, the Superintendent with NYCHA of the Riis Houses, where the alleged accident occurred, testified that NYCHA did not leave gates like the on plaintiff leaned against open or unguarded.. Thus, there clearly exists an issue of fact as to which defendant, if any, was responsible for the allegedly defective gate. Accordingly, based upon the foregoing, it is hereby

ORDERED that defendant Technico Construction Services, Inc.'s motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: May 3, 2006

ENTER **NO ORDERED**
Rolando T. Acosta
Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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