

Siegel v City of New York

2006 NY Slip Op 30638(U)

October 3, 2006

Sup Ct, NY County

Docket Number: 102930/02

Judge: Marilyn Shafer

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

PRESENT:

Index Number : 102930/2002

PART _____

SIEGEL, JEROME

vs

INDEX NO. _____

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is denied
pursuant to attached items in
Sequence #002*

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

FILED
OCT 11 2006
NEW YORK
COUNTY OF NEW YORK

HON. MARILYN SHAFFER, JSC

Dated: 10/3/06

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----x
JEROME SIEGEL and JOAN SIEGEL,

Plaintiffs,

Index No. 102930/02

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,
CONSOLIDATED EDISON and PETROCELLI
ELECTRIC CO., INC., and EMPIRE CITY
SUBWAY COMPANY (LIMITED) s/h/a
EMPIRE CITY SUBWAY LIMITED,

Defendants.

-----x
EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

-----x

MARILYN SHAFER, J.:

Motion sequence nos. 002 and 003 are combined for
disposition.

In motion sequence no. 002, defendant Petrocelli Electric
Co., Inc. (Petrocelli) moves, pursuant to CPLR 3212, for an order
granting summary judgment dismissing the complaint and all cross
claims asserted against it.

Defendant Consolidated Edison Company of New York, Inc. (Con
Ed) cross-moves, pursuant to CPLR 3212, for an order dismissing
the complaint and all cross claims asserted against it.

FILED
OCT 11 2006
NEW YORK
COUNTY CLERK'S OFFICE

In motion sequence no. 003, defendant Nico Asphalt Paving, Inc. (Nico) moves, pursuant to CPLR 3212, for an order dismissing the third-party complaint and all cross claims.

This is a personal injury action. Plaintiffs allege that, on May 7, 2001, plaintiff Jerome Siegel sustained serious injuries when he was caused to trip and fall in the roadway on 68th Street and York Avenue, New York, New York (the subject site). At his deposition, plaintiff claimed that he tripped on a defect in the intersection, approximately 8-10 feet north of the pedestrian crosswalk at the southeast corner of York and 68th Street, and in the northbound lanes of York Avenue. He testified that, initially he was crossing from the southwest corner of 68th Street towards the northeast corner. Plaintiffs contend that defendants negligently failed to maintain the roadway, and that they created the defective condition which caused plaintiff's accident. The third-party complaint and cross claims seek contribution and/or indemnification.

At the time of the accident, defendant Petrocelli's work involved the installation of a public pay telephone for the New York City Public Telephone Company. Defendant Con Ed was performing repair work on defective manhole covers. Third-party defendant Nico was, and is, in the business of the permanent restoration of asphalt roadways throughout Manhattan and the Bronx.

PETROCELLI'S MOTION FOR SUMMARY JUDGMENT¹.

Petrocelli argues that it is entitled to summary judgment dismissing the complaint and cross claims because it did not perform any work in the area of the subject site, but instead, was performing work across the street, on the west side of York Avenue. It argues that, based upon the evidence it submits, it cannot be said that it created the alleged defect in the roadway. Petrocelli further argues that, since it is a municipal contractor, it cannot be held liable to plaintiff, nor to the non-contracting co-defendants herein.

To succeed on its motion for summary judgment, a defendant has the burden of demonstrating the absence of all triable issues of fact (see Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Winegrad v New York University Medical Center, 64 NY2d 851 [1985]; CPLR 3212). Where the allegations stem from a roadway defect, a defendant must establish as a matter of law, by submitting admissible evidentiary proof, that it did not create the roadway defective or dangerous condition that caused plaintiff's accident (see Cendales v City of New York, 25 AD3d 579 [2d Dept 2006]).

Petrocelli has submitted business records regarding their work. David Ferguson (Ferguson), Director of Outside Electrical Installations for Petrocelli, testified at his deposition, held on August 3, 2005, that Petrocelli performed the job of installing a

¹Although plaintiff has provided a stipulation of discontinuance against Petrocelli, Petrocelli has not signed it because it is not "without prejudice." Petrocelli requests that this court decide its motion and grant it summary judgment dismissing the complaint and cross claims asserted against it.

public pay telephone for the New York City Public Telephone Company on March 4th and March 5th of 2000. He described the work as the installation of 75 feet of two-inch conduit on the west side of York Avenue, southbound in the west roadway of York Avenue. He stated that Petrocelli did not perform any work on the east side of York Avenue, either on the southeast corner or northeast corner.

Petrocelli's motion has no opposition from the other parties. Further, Petrocelli has tendered sufficient evidence, by proof in admissible form, that it did not work in the area of plaintiff's accident, to warrant summary judgment (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Accordingly, Petrocelli's motion for summary judgment dismissing the complaint and any cross claims against it is granted.

CON ED'S CROSS MOTION FOR SUMMARY JUDGMENT

Con Ed argues that the evidence indicates that it did not create the roadway condition that allegedly caused plaintiff's accident. Con Ed claims that its work did not involve the subject site, but was confined to two concrete slabs that were not on the subject accident location.

On September 16, 2005, Gary Soso (Soso), a senior specialist for Con Ed, who was the operating supervisor at the time of plaintiff's accident, testified as to the work performed by Con Ed at that time. Referring to three documents, known as "opening tickets," Soso testified that Con Ed was engaged in repairing defective manhole covers. Soso stated that the first document was

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for work performed on January 24, 2001, at the intersection of York Avenue and 68th Street for defective 32-inch manhole covers; that the size of the excavation was nine feet by seven feet, was 15 feet east of the west curb of York Avenue, and 10 feet north of the south curb of 68th Street.

The second document that Soso testified about was for work performed on York Avenue, 60 feet south of 68th Street, outside of the four corners of the intersection. The third document that Soso testified about was for work performed on 68th Street between First Avenue and York Avenue. Soso stated that all of Con Ed's work was confined to two concrete slabs within the crosswalk and intersection, and did not involve the defect at the subject site.

However, Soso testified that he did not know whether Con Ed did work in the area identified by plaintiff as the defect in the roadway. Further, although Soso testified that the excavation work was subcontracted out to Roadway Contractors, Inc. (RCI), there was no specific contract directing RCI where to perform the work, and no documentation concerning the completion of the work. Instead, Soso testified that RCI was told "orally" where to perform the work, that Con Ed supervises their work "off and on," and that Soso did not recall whether he reviewed the completed work.

Con Ed has failed to establish its entitlement to judgment as a matter of law. The evidentiary submissions, including Soso's deposition testimony, the photographs of the accident site, and Con Ed's "Report of Street and/or Sidewalk Openings-Intersection,"

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raise a triable issue of fact as to whether certain work by Con Ed, performed in close proximity to the accident site, created the roadway defect which allegedly caused plaintiff's accident (see DeSilva v City of New York, 15 AD3d 252 [1st Dept 2005]; Cucuzza v City of New York, 2 AD3d 389 [2d Dept 2003]). Accordingly, Con Ed's cross motion for summary judgment is denied.

NICO'S MOTION FOR SUMMARY JUDGMENT

Nico argues that it is entitled to summary judgment dismissing the third-party complaint asserted against it by defendant/third-party plaintiff Empire City Subway Company (Limited) (ECS), and all cross claims for indemnification and/or contribution asserted against it by the defendants. Nico maintains that the record indicates that it did not do any work which created the roadway defect that allegedly caused plaintiff's accident. NICO does its paving work for both Con Edison and ECS. This court notes that there are no opposition papers submitted by ECS.

John Denegal (Denegal), NICO's job superintendent, was deposed on September 16, 2005. He testified that, prior to the deposition, he searched for records of paving work conducted by NICO for ECS in the location of 68th Street and York Avenue, for a period of two years prior to the date of plaintiff's accident. His search consisted of checking Con Ed records and ECS records, as well as a computer search of NICO's records. He stated that he could not find any records that showed that NICO performed any

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paving or restoration work in the subject intersection during the relevant time period for either Con Ed or ECS.

Pursuant to a compliance conference order, dated December 22, 2005, Nico and ECS were directed to conduct another search of records for four years prior to the accident for trench and paving work at the subject site. In its response to the compliance conference order, Nico indicates that Denegal conducted another search of Nico's records, and that Denegal determined that there were no records that Nico did any work during the years 1998 through May 7, 2001 within the intersection of First Avenue and East 68th Street.

The City and plaintiffs argue, in opposition to Nico's motion, that the response to the compliance conference order indicates that the record search was conducted of a wrong location, i.e., "First Avenue and East 68th Street" rather than the correct location of "York Avenue and East 68th Street." The City and plaintiffs further point to the compliance order's direction that, in the event no records were found for the four-year period, that Nico and ECS were to conduct a five year search prior to the date of the accident. They argue that Nico's motion for summary judgment is premature since discovery is not yet completed.

In reply, Nico's counsel affirms that the reference to "First Avenue" in the response to the compliance order was a clerical error; that the search conducted by Denegal involved the four years prior to the date of the accident, and that no records were found of work done by Nico at York Avenue and East 68th Street.

With regard to the second argument, Nico's counsel attaches a supplementary letter, dated April 20, 2006, which advises all parties that Denegal conducted a further search of Nico's records, and did not find any records that Nico did any paving work at York Avenue and East 68th Street in the year 1997.

Inasmuch as the parties do not contest Nico's reply to defendants' opposition, this court deems the response to the compliance order amended to state that the search was conducted at York Avenue and East 68th Street. Nico has established prima facie its entitlement to summary judgment, and the opposing parties fail to raise any triable issue of fact as to Nico's negligence. Accordingly, Nico's motion for summary judgment dismissing the third-party complaint and all cross claims asserted against it is granted.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint and cross claims are hereby severed and dismissed as against defendant Petrocelli Electric Co., and the Clerk is directed to enter judgment in favor of said defendant, with cost and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s cross motion for summary judgment is denied; and it is further

ORDERED that the motion for summary judgment dismissing the third-party complaint and cross claims is granted and dismissed as

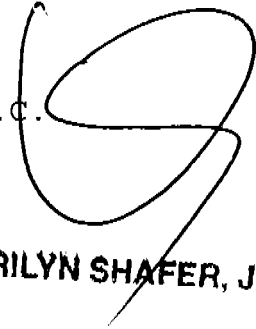
against third-party defendant Nico Asphalt Paving, and the Clerk is directed to enter judgment in favor of the third-party defendant, with costs and disbursements as taxed by the Clerk.

DATED:

10/3/06

ENTER:

J.S.C.



HON. MARILYN SHAFER, JSC

FILED

OCT 11 2006

NEW YORK
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