

Crawford v City of New York

2007 NY Slip Op 30277(U)

March 12, 2007

Supreme Court, New York County

Docket Number: 0118914

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PART Part 5

DECENT.

J.S.C.

Index Number : 118914/2003

CRAWFORD, JOAN

vs

CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2, 3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/12/07

EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
JOAN CRAWFORD and GARY NORTH,

Plaintiffs,

Index No.
118914/03

- against -

Decision and
Order

THE CITY OF NEW YORK and PETROCELLI
ELECTRIC CO., INC.,

Defendants.

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when a traffic light pole fell over and struck her while she was standing at the corner of East Broadway and Catherine Street in the County and State of New York on March 31, 2003, at approximately 12:30 p.m. Plaintiff's husband, Gary North, was with her. Defendant Petrocelli Electric Co., Inc. ("Petrocelli") now moves for summary judgment pursuant to CPLR 3212. Defendant the City of New York ("City") cross moves for summary judgment dismissing all claims and cross claims as against it. Plaintiff opposes both Petrocelli's motion and City's cross motion.

Petrocelli, in support of its motion, first argues that it did not receive actual notice of a defect with regard to the subject traffic light pole. Petrocelli submits the standard construction contract between it and the City which, Petrocelli claims, requires it to perform maintenance "only upon notification of a defective condition from the City." Petrocelli argues that it did not receive such notice from the City. As evidence of this fact, Petrocelli submits the deposition testimony of David Ferguson, Project Director of Outside Electrical Installations for Petrocelli. Mr. Ferguson explains the nature of calls listed on the traffic maintenance log for the maintenance of traffic signals, essentially decoding the list. Petrocelli asserts that the traffic maintenance log dates back over a year before plaintiff's accident and that none of

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the calls relate to a defective condition with regard to the subject traffic light pole.

Petrocelli next argues that it did not have any constructive notice of a defective condition. It submits the deposition testimony of Lester Berkowitz, a traffic repairman for Petrocelli. Mr. Berkowitz made repairs at the subject location on February 3, 2002. He claims to have made a general visual inspection of the pole. Mr. Berkowitz testifies:

“Yes, do a general visual of the intersection, which includes making sure everything is lit and that all base doors are on.”

Q: Would your general visual inspection also include a determination of the stability of the pole?

A: No.

Q: Would your general visual inspection also include whether there was any visible broken parts of the base or the pole?

A: Yes” (Lefkowitz Deposition , P.21 Lines 4-15)

Mr. Berkowitz was called again to the same location on March 22, 2003, approximately one week before plaintiff’s accident. This repair involved a replacement of an RCU, which is a communication device between the traffic light controller and the City’s computer. Although the pole Mr. Berkowitz was called to repair was across the street from the one involved in plaintiff’s accident, he testifies that he made a visual inspection of the entire intersection, including the subject pole. According to Mr. Berkowitz’s testimony, he did not observe any broken portions of the pole or the base on that day:

Q: Did you make a visual inspection of any of the street poles on the other corners other than the one with the controller that you worked on March 22nd 2003?

A: Yes.

Q: And did you find any broken areas or parts or anything unusual about the condition of the street poles or their base areas on March 22nd 2003?

A: No, I did not.

Q: And had you found something like that, meaning something unusual or broken, would you have made a report of such a finding?

A: Yes, I would, I would have-

Q: What would you have done?

A: Just-

Q: Go ahead.

A: Written on my repair sheet that there was a damage base and have somebody of post truck come and replace it.”(Berkowitz Deposition, P. 43 Line 20- P.44 Line 20)

Finally, Petrocelli claims that it is not liable for plaintiff’s injuries because it did not cause or create a defective condition. It submits the deposition testimony of four repairmen, each of whom assert that the only way the pole could have fallen over is by vehicle impact. According to Mr. Berkowitz’s, the usual cause of a pole coming down is external impact:

“Q: Is there a usual cause or causes for that type of condition when the pole is down?”

A: Usually knocked down by a truck turning. (Page 46 Line 8-12)

Next, Petrocelli submits the deposition testimony of Stanley Brown. Mr. Brown is questioned about the possibility of a pole suffering enough damage from vehicle hits to fall down:

“Q: And can that rim be broken off from the rest of the base by a car or vehicle that hits it?

A: Yes.

Q: And once that rim is damaged or broken will that at some point cause the pole to fall down?

A: It depends on the extent of the damage.

Q: If the damage is extensive enough it could cause it to come down?

A: Absolutely.” (Brown Deposition, P. 38 Line 24-P.39 Line 11)

Joseph Canning, another repairman testified about the different causes he has encountered when poles come down:

“Q: Would it be fair to say then that the causes always had to do with a force, an outside force that hit the pole and which caused it to fall, caused it to come down?

A: Yes.” (Canning Deposition, Page 32, Line 7-11)

Ronald Campbell, testified that, in his opinion, only a vehicle hitting the pole could cause the "cleats" which secure the pole to come loose:

"Q: Is there anything else other than the impact of a vehicle that in your opinion could have caused the cleats to loosen and slide out?

A: No. . . . no. I don't know of anything except a car or truck that takes them down." (Campbell Deposition P. 57 Lines 11-20)

Plaintiffs, in opposition to Petrocelli's motion, first argue that there is no evidence that the subject light pole was hit by a vehicle prior to plaintiff Joan Crawford's accident. In support of this contention, plaintiffs submit an Expert Witness Affidavit of Joseph C. Cannizzo, a civil engineer. Mr. Cannizzo affirms that he has read all of the depositions in the case and states his opinion based on an engineering drawing of a "typical traffic signal post as the one in question." Mr. Cannizzo opines that the subject post was not hit by a vehicle because, if it had been, it would have fallen down immediately. Mr. Cannizzo states:

" If a truck or vehicle had hit the post with enough force to knock it down, it would have fallen immediately. Furthermore, the damage to the post caused by the impact with a truck would have been observable by plaintiffs, who were standing there waiting for the light to change."

Regarding the photographs of the subject pole, Mr. Cannizzo states:

"The black and white photographs that I have reviewed [taken on the date of the accident and before removal of the downed pole]...demonstrate that there is no sign of impact to the base of the post or the bottom of the shaft."

The City cross moves for summary judgment. City argues that it did not have a duty to maintain the signal pole at the subject location. Further, City asserts that, to the extent such a duty existed, it did not have actual or constructive notice of the alleged defect. City submits the deposition testimony of Dorothy Rozier, a record searcher with the Department of Transportation. She brought with her certain records and stated "[t]his computer printout shows that a search was made for the time period January 31, '03 to March 31, '03 for the location Broadway and Catherine Street." (page 10, lines 18-21) "There were no records on file. It says at Broadway and

Catherine Street. There were no complaints made. There were no repairs made for this location.” continuing page 11, line 3-6. Later, this witness was confronted with the traffic maintenance log, which did indicate repairs at the subject location on the date of the accident.

Q: ...it indicated to you that on March 31, 2003 some time at approximately 1:00 or 2:00 in the p.m., there was a problem with a traffic post or pole at the intersection of East Broadway and Catherine Street, correct?

A: That’s correct

Q: Okay; so that would indicate to you that had there been any prior complaints with regards to a traffic post or a traffic pole at that location, that would be indicated on these traffic maintenance logs; is that correct?

A: Now yes. I can say yes.

(Rozier deposition, p.28 lines 16-25, p.29 lines 1-2)

Plaintiffs, in opposition to City’s motion, argue that the City has failed entirely to meet its burden of demonstrating that it had no notice, actual or constructive, of the dangerous condition at issue. The City’s witness, Ms. Rozier, brought with her to the deposition evidence of a search for a different location than the site of the accident. Her search was of Broadway and Catherine Street, rather than East Broadway and Catherine Street. Broadway is a different street entirely from East Broadway in the borough of Manhattan. Plaintiffs claim that this explains why the search failed to render evidence of a repair in the maintenance log.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

The affidavit submitted by defendant City is insufficient to prove that there are no issues of triable fact. The search conducted by Ms. Rozier was faulty in that it was conducted for the wrong location. Thus, City has not shown that it had no notice of a defective condition at the subject location.

Finally, plaintiffs argue that, even if neither defendant had actual or constructive notice of a defective condition, there is enough circumstantial evidence to allow their claim to get to a jury under the theory of *Res Ipsa Loquitur*. Plaintiff Joan Crawford attests:

“all I know is that I was standing there one minute and then there was a sudden flash of light and then I blacked out, and then I - - I don't know.”
(Crawford deposition page 16, line 24 to page 17, line 3)

Gary North, who was present with Ms. Crawford at the time of the accident, attests that:

“No vehicle struck the pole. No other object struck the pole. There was no accident. There was nothing observable that happened which could cause the pole to leave its moorings and fall over.”

Plaintiffs assert that they should have an opportunity to demonstrate to the jury through expert testimony that, absent negligence, the pole would not have left its moorings. The sworn affidavit of Mr. Cannizzo, a civil engineer, opines that:

“the cleats that were supposed to hold this pole in place were either never properly installed and/or never properly affixed to the ‘collar’ or inner rim of the pole. It is inconsistent with sound scientific principles that if the cleats were properly bolted down and secured to the rim or ‘collar,’ that this post could have fallen as it did without deforming the bolts, cleats and/or ‘collar’.”

By way of reply, Petrocelli asserts that plaintiffs' case does not meet all of the elements of *Res Ipsa Loquitur* because they cannot show that Petrocelli had exclusive control of the subject light pole. Petrocelli argues that exclusivity does not exist when the instrumentality in question is exposed to the public at large. Petrocelli

argues that the light pole was located on a very busy and crowded street and thus was exposed to possible vehicle impact and acts of vandalism. Further, Petrocelli claims that the light pole was installed long before it entered its maintenance contract with the City. This fact, it argues, further proves that Petrocelli was not in exclusive control of the light pole.

In order to submit a case to a trier of fact on the theory of *Res Ipsa Loquitur*, a plaintiff must establish the following conditions: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *Corcoran v. Banner Super Market*, 19 N.Y.2d 425, 430.

The court in *DiRoma v. Mutual of America Life Insurance Company, Inc. et al.*, 17 A.D.3d 119 (1st Dept. 2005) , discusses the issue of exclusive control:

“Exclusivity is a relative term, not an absolute. (quoting *Weeden v. Armor Elev. Co.*, 97 A.D.2d 197) It does not require elimination of all other possible causes of an incident but simply a rational basis for concluding that ‘it is more likely than not’ that the injury was caused by defendant’s negligence.” (quoting *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489.)

Plaintiff has satisfied the first element, that the event does not ordinarily occur in the absence of negligence. It is not a common occurrence that light poles fall suddenly and unexpectedly. Incidents of this type are usually explainable by direct circumstances (i.e. during the Macy’s Thanksgiving day parade, a woman was hit by a falling a light pole moments after it was struck by a float from the parade.)

Plaintiff Crawford has also shown that her voluntary actions did not contribute to the accident. Plaintiff was merely waiting on the corner for the traffic light to change when the light pole fell on her. She did nothing to cause the light pole to fall.

Petrocelli contracted with the City to maintain “all illuminated traffic control

devices” from June 1, 2001 until May 31, 2003. Thus, defendants had exclusive access to the internal structure of the subject light pole. The affidavit by plaintiffs’ expert civil engineer establishes that the pole was secured by attachments located “inside the base.” In his opinion, the pole was not properly bolted down or secured, and it was that defect that caused the pole to fall. Petrocelli’s contention that it did not have exclusive control because the pole was located on a busy street corner does not negate the fact that it, pursuant to a contract with the City, was the only known party who had access to the internal structure of the pole.

Petrocelli attempts to show that it did not have exclusive control by comparing the instant case to *Dermatossian v. New York City*, 67 N.Y.2d 219, a case in which the instrumentality in question was exposed to the public. Mr. Dermatossian was injured when he hit his head on a “grab handle” on a City bus. The court in that case found that the City did not have exclusive control of the instrumentality because it was “continuously available for use by defendant’s passengers who were invited to use it.” *Id.* at 228.

The instant case is distinguishable. First, the traffic light poles were not designed for, nor intended for public use, as the grab handles were in *Dermatossian*. Secondly, casual public interaction with the light pole could not have caused the pole to fall. Petrocelli speculates, the light pole was damaged by repetitive impacts from cars. However, Petrocelli points out no external defects to the pole and/or base itself, nor produces any witnesses to a prior impact that would substantiate this claim.

Defendant City has failed to provide proof that it did not have actual or constructive notice of any defect to the light pole. Defendant Petrocelli has shown that it did not have constructive or actual notice of any defect in the pole. However, plaintiff has raised issues of fact pursuant to the theory of *Res Ipsa Loquitur*. The trier of fact should be permitted to consider the issue of whether Petrocelli, with exclusive control of the inside of the light pole where mechanisms to secure the pole are contained, was responsible for the pole leaving its moorings in the absence of external forces.

Wherefore it is hereby

ORDERED that defendant Petrocelli's motion for summary judgment is denied; and it is further

ORDERED that defendant City's cross motion for summary judgment is denied; and it is further

ORDERED that the case in all other respects continues.

DATED: March 12, 2007



EILEEN A. RAKOWER, J.S.C.

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