

Blanke v City of New York

2007 NY Slip Op 30957(U)

April 10, 2007

Supreme Court, Queens County

Docket Number: 0002324/2002

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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MAUREEN BLANKE,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK
CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, PHIPPS HOMES and PHIPPS HOUSES,

Defendant(s).

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

PROTO CONSTRUCTION & DEVELOPMENT
CORPORATION,

Third-Party Defendant.

-----X

Index
Number: 2324/02

Motion
Date: 04/03/07

Motion
Cal. Number: 1

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by third-party defendant, Proto Construction & Development Corporation, for summary judgment dismissing the complaint against said defendant.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Affidavit-Exhibits.....	5-8
Affirmation in Opposition-Exhibits.....	8-11
Reply.....	12-14

Upon the foregoing papers it is ordered that the motion is decided as follows:

Proto's motion for summary judgment is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling over a wooden plank lying on the sidewalk located at the corner of 50th Street and 39th Avenue, in Queens County on February 12, 2001.

Proto asserts that it is entitled to summary judgment since it did not own or place the wooden plank at that location and, therefore, the condition alleged by plaintiff could not have been caused by Proto. In support of its motion, Proto annexes a copy of the deposition transcript of its former vice president, Dimitrios Spanos, in which he concedes that Proto performed work at the subject location consisting of installation of a catch basin. He testified that the work involved excavation of the sidewalk and part of the street (Exhibit M to motion, transcript p. 11). When asked whether wooden planks would be involved in the work, Spanos answered, "Not for the completion of the work" (*id.*). This evasive answer hardly constitutes a categorical denial that such plank was not in fact used at all by Pronto in connection with its work at the subject location. Indeed, when asked again whether wooden planks would be used for such a construction project, Spanos stated that he did not know (transcript p. 28). Moreover, Spanos was not present at the work site on a day to day basis and was unfamiliar with the daily work activities at that location.

Proto also asserts that it completed its work at the subject location approximately eight months prior to plaintiff's trip and fall accident and, therefore, the discarded plank could not have been related to its work. However, Spanos was not able to state exactly when the work was completed, saying only that he thinks it was in 2000/2001. Moreover, Herman Rizzo, an engineer for the New York City Department of Design and Construction, in charge of the catch basin project, in his deposition annexed to the motion, did not know when the work either began or was completed (Exhibit N, p. 11).

The documentation annexed to the moving papers indicating that the installation of the catch basin at the subject location was completed on June 13, 2000 does not establish that construction materials from that job were not present at the site after such date. Indeed, the photograph annexed to the motion as Exhibit "T" (marked as defendant's exhibit I) clearly shows orange construction barrels bearing the name "PROTO" at the subject location in close proximity to the discarded wooden plank. The photograph also shows a new sidewalk bed that had been poured and part of the roadway that had been cut, around which were placed the orange barrels. Spanos was shown this photograph and stated that the sidewalk and

street work depicted therein was consistent with the installation of a catch basin, although he was non-committal as to whether that was Proto's job (deposition p. 23-24).

The argument by Proto's counsel in his reply affirmation that the Proto barrels might have been placed at that location by another contractor is entirely speculative. Moreover, the plank lying on the sidewalk in close proximity to the barrels and construction tape surrounding the barrels could, ostensibly, be part of the materials left by Proto after installation of the catch basin at that location.

Therefore, the affidavits raise questions of fact as to whether Proto was responsible for leaving the wooden plank on the sidewalk at the subject location that allegedly resulted in plaintiff's injuries.

Accordingly, Proto's motion for summary judgment is denied.

Dated: April 10, 2007

KEVIN J. KERRIGAN, J.S.C.