

Sepe v City of New York
2007 NY Slip Op 30960(U)
April 25, 2007
Supreme Court, Queens County
Docket Number: 0009674/2004
Judge: Kevin J. Kerrigan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
RALPH SEPE, Index
Number: 9674/04
Plaintiff(s),
Motion
Date: 04/03/07
- against -
Motion Seq. No. 3

THE CITY OF NEW YORK, PETROCELLI
ELECTRIC CO., INC., JOSEPH L. BALKAN,
INC., NEW YORK PAVING, INC.,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., and ,CONSOLIDATED EDISON, INC.,
Defendant(s).

-----X

The following papers numbered 1 to 15 read on this motion by defendant, NEW YORK PAVING, INC., for an order granting summary judgment dismissing the complaint and any cross-claims against said defendant.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... 1-4
Affirmation in Opposition-Exhibits.....5-7
Affirmation in Opposition-Exhibits.....8-10
Reply.....11-13
Reply.....14-15

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

This Court is deciding the instant motion since it was referred to this Court pursuant to the order issued by Justice David Elliot on April 19, 2007. The papers were received in chambers on April 23, 2007.

New York Paving's motion for summary judgment is denied.

In order to obtain summary judgment, movant must make a prima

facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). New York Paving has failed to meet its initial burden.

Plaintiff allegedly sustained injuries as a result of tripping and falling in a pothole in the roadway on Liberty Avenue approximately 150 feet from the intersection with 104th Street in Queens County on April 17, 2003. A prior cross-motion by NY Paving for summary judgment was denied without prejudice to move again after NY Paving had given its deposition, pursuant to the order issued by Justice David Elliot on October 24, 2006.

NY Paving now moves anew for summary judgment. Peter Miceli, supervisor of paving for NY Paving, in his deposition annexed to the moving papers as Exhibit "E", was asked if NY Paving did any type of work on the roadway on Liberty Avenue between 104th and 105th Street prior to April 17, 2003. In response, he merely conjectures that if it did and if those were the search parameters, then he would have a work ticket. Since he did not have a ticket, he concludes that no work was done at that location (pp. 17-18). Miceli, however, had also testified that he did not personally conduct any type of search, had no records with him at the deposition, did not know for what particular area other than just Liberty Avenue a search was conducted and did not know the parameters of the search. He also did not know whether a search, in fact, was performed. He stated that he understands that a search was performed, but when asked who at NY Paving conducted a search, he replied that normally, an in-house attorney assigns the task to a clerk to search for any work orders (pp. 10-12).

It is clear, therefore, that NY Paving's witness had no knowledge as to whether or not it performed any work at the subject location.

The deposition testimony of the witnesses for Petrocelli and Con Edison are not dispositive of the issue of whether NY Paving performed any work at the subject location.

The witness for Petrocelli, in his deposition, indicated that NY Paving did restoration work for Petrocelli on Liberty Avenue at the intersection with 105th Street.

The witness for Con Edison, in his deposition, testified that a search was conducted for the two-year period prior to April 17, 2003 encompassing any work that it or any subcontractor on its behalf did. The search included any paving orders that Con Edison

may have issued. He found no paving orders.

Whether NY Paving did any work for Petrocelli or Con Edison does not establish whether it performed work for any other contractor at the subject location.

Miceli testified that NY Paving did work mostly for Con Edison and Keyspan but not exclusively, and that it does paving work for various other contractors as well (deposition p. 8). Thus, even if Petrocelli and Con Edison do not have records indicating that NY Paving did any paving work for them at the subject location during the two-year period prior to the accident does not establish that it did no work at that location for any other contractors.

Thus, NY Paving has failed to submit sufficient evidence in admissible form demonstrating the absence of a triable issue of fact as to whether it created the alleged defect (see *Lurie v. Brooklyn Union Gas Company*, 29 AD 3d 538 [2nd Dept 2006]).

The affidavit of Miceli submitted for the first time in movant's reply papers for the purpose of remedying the fundamental deficiencies in its prima facie showing may not be considered (see *Rengifo v. City of New York*, 7 AD 3d 773 [2nd Dept 2004]; *Migdol v. City of New York*, 291 AD 2d 201 [1st Dept 2002]).

The record on this motion raises questions of fact as to whether NY Paving performed any work at the subject location resulting in the defect that allegedly caused plaintiff's injuries.

Accordingly, NY Paving's motion for summary judgment is denied.

Dated: April 25, 2007

KEVIN J. KERRIGAN, J.S.C.