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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART Part 5

Index Number : 101644/2001
BROWN, ERIC
VS
CITY OF NEW YORK
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECISION AND ORDER
ACCOMPANYING DECISION / ORDER

FILED
JUN 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: May 25, 2007

EILEEN A. RAKOWER 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 5

----------X

ERIC BROWN

Plaintiffs,

- against -

THE CITY OF NEW YORK, TROCOM CONSTRUCTION CORP., ANTHONY SANTORO, JOSEPH TROVATO, FELIX EQUITIES INC., FELIX INDUSTRIES, INC., URBITRAN ASSOCIATES, INC., URBITRAN ASSOCIATE ENGINEERS, P.C., URBITRAN CONSTRUCTION and MANAGEMENT CORP., JOHN COELLO and ROBERT COELLO,

Defendants.

Index No. 101644/01

Mot. Seq. 004 & 005

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EILEEN A. RAKOWER, J.S.C.

Plaintiff filed this action for personal injuries allegedly sustained on Saturday, November 6, 1999, at approximately 3:23 a.m., in New York, New York. Specifically, Plaintiff was a passenger in a vehicle that was "speeding" southbound on the Henry Hudson Parkway (the Parkway) when the driver hit a construction compressor that was located near 103rd Street in a lane that was closed to traffic. The vehicle flew into the air and landed upside down in the Hudson River.

On the morning of the accident, a portion of the Parkway was closed due to a reconstruction project to restore the Cherry Walk bike/walking path (Cherry Walk project)that is adjacent to the Parkway. The City of New York's General Contractor on the reconstruction project was Defendant Trocom Construction Corp., (Trocom). Defendants Anthony Santoro and Joseph Trovato are Trocom's Vice President and its work site supervisor, respectively. This particular phase of the reconstruction was focused on the installation of a catch-basin, and to accomplish that task, Trocom was permitted to close a lane of traffic on the Parkway to excavate the site. Trocom also had the contract for replacement of selective portions of the guardrails (Guardrail project) along the Parkway and it hired Defendants Urbitran Associates, Inc., Urbitran Associate Engineers, P.C. and Urbitran Construction and Management Corp., (collectively, Urbitran) as engineers for that project. Urbitran's function was to monitor and inspect that the quality of Trocom's work. Defendants Felix Equities Inc.

and Felix Industries, Inc., (Felix) are alleged by plaintiff to be contractors who negligently controlled, maintained or operated the portion of the Parkway where the accident occurred.

Defendants Urbitran (motion sequence 004) and Felix (motion sequence 005) move for an order of the Court pursuant to CPLR§ 3212 granting summary judgment and dismissing all claims and cross claims as against them. Additionally, each moves for costs and/or sanctions claiming that Plaintiff improperly named it as a Defendant in this action and continued the action against it long after it was apparent that neither was responsible for the accident site at the time of this accident. Plaintiff opposes these motions. No other party files papers regarding these motions.

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).

Urbitran argues that while it did have a role in the reconstruction of the guardrails at the site, it was never retained in connection with the Cherry Walk project and is not liable to plaintiff. It maintains that its responsibility under the Guardrail project was to review plans to assure conformance with various codes and regulations, and to monitor, review and approve work done by others on the guardrails. Urbitran argues that construction work under the Guardrail project was not performed at the accident site before or at the time of the accident. It notes that the New York City Department of Design and Construction contract which controlled the Guardrail project prohibited week-end work and specifically dictated that Urbitran could only close one lane of traffic between 10:00p.m. and 6:00 a.m., Monday through Friday. Thus, it concludes it could not have been responsible for the lane closure in the early morning hours of Saturday November 6, 1999.

Urbitran, in support of its motion, provides the pleadings, portions of the sworn deposition testimony of Plaintiff, the Plaintiff's testimony in a related action against the same defendants, depositons of Wessam Fahmy, (Urbitran's resident engineer) Joseph Trovato (the Trocom supervisor who was on duty at the accident site), Anthony Santoro, (Vice President of Trocom), Frank Galeano(The City of New York's supervisor on the site), as well as various Police reports, Trocom's daily log report from the night of the accident, the work permit issued to Trocom by the Department of Transportation for the Cherry Walk project, the work permit issued to Trocom for the Guardrail project, correspondence between Urbitran and Plaintiff regarding the possible discontinuation of this action against Urbitran, and, finally, copies of the compliance conference orders in this case.

Felix argues that it was not involved with any construction or maintenance project at the accident location. It refers to the same deposition testimony as Urbitran to support its contention that Trocom was the only entity working at the accident site on the morning of the accident. It argues that Plaintiff's own failure to request the deposition of defendant Felix is virtually a concession that Felix is unrelated to this action. Felix states that two separate searches of its records confirm that at the time of the accident the only contract it had with the City was to perform work on the Parkway up to 26th Street, no where near the 103rd Street accident location.

In support of its motion Felix provides the pleadings, the complete sworn depositions of the Plaintiff, Joseph Trovato, Anthony Santoro, portions of Frank Galiano's deposition, various Police reports, Trocom's daily log report from the night of the accident, the work permit issued to Trocom by the Department of Transportation for the Cherry Walk project, correspondence between Felix and Plaintiff regarding the possible discontinuation of this action against Felix, copies of the compliance conference orders in this case and affidavits from Tom Miller (Felix's former director of Risk Management) and Matthew Verkuilen (a Felix employee who's duties include maintaining project and work records for Felix.)

Plaintiff opposes these motions. Through the affirmation of counsel he argues that City did not provide the second of the Cherry Walk and Guardrail contracts until October, 2006, and City owes him further discovery. He states that Felix has not produced a witness yet for deposition and that Urbitran has not produced certain documents. Plaintiff disputes that sworn deposition testimony from the aforementioned witnesses constitutes prima facie evidence of entitlement to summary

judgment as a matter of law. Plaintiff states that the movants should not be awarded costs because he has not completed discovery and therefore, such sanctions are inappropriate. Finally, plaintiff submits the testimony of Urbitran's engineer to support his contention that generally, it is possible Trocom might have improperly closed the lane in question.

The sworn deposition testimony of Joseph Trovato, the Trocom supervisor at the site on the night in question, reveals that the only contract that Trocom was working on at the time of the accident was the Cherry Walk project. He states that no other entity was working with Trocom and specifically states that Urbitran was not involved in the Cherry Walk project. He testified that "at this particular site we weren't even contracted to remove or replace any guardrail on either contract." The sworn deposition testimony of Anthony Santoro, Vice President of Trocom, confirms that Urbitran was not involved with the Cherry Walk contract. Similarly, the sworn testimony of New York City's witness, Frank Galeano, substantiates that he was at the site hours before the accident witnessing a portion of the Cherry Walk project, namely the installation of a catch basin, which did not involve Urbitran. The sworn testimony of Urbitran's resident engineer, Wessam Fahmy, also states that it's contract with Trocom was in regard to guardrails only. A review of the work permit for Trocom's Cherry Walk project shows that it was allowed to work, among other times, from 10:00p.m. Friday night through 7:00 a.m. Saturday morning. A review of the work permit for Urbitran's Guardrail project shows that it was only allowed to work from 10:00p.m. until 6:00a.m. Monday morning through Friday morning. Lastly, Trocom's daily log reflects that it's work at the site on the night of the accident consisted of excavation for manholes and catch basins. The accident occurred on Saturday morning, around 2:30 a.m.

Felix maintains that it was never under contract to do any work on the Cherry Walk project, the only construction project at the site on the night of the accident. Felix cites to the aforementioned sworn testimony of Trocom's supervisor, Trovato, to confirm that Trocom was the only entity working, or required to be working at the site on the night of the accident. Felix notes that Plaintiff has never sought to depose any Felix witness and there is no evidence whatsoever to demonstrate that Felix was involved with construction or maintenance at the site of the accident. Felix also provides two notarized affidavits from employees who searched their records, each of which attests that Felix only did work on the Parkway up to 26th Street and did no work at the subject location on, or before the date of the accident. Lastly, Felix argues

that at this juncture, Plaintiff should not be permitted to claim that it has not had an ample opportunity to conduct discovery. In fact, Felix asks for costs and/or sanctions in this motion charging that after years of litigation Plaintiff "has refused to even attempt to advance any case against Defendant Felix, while simultaneously refusing to release Defendant Felix from the . . . action."

Urbitran and Felix's exhibits, consisting of the sworn testimony of numerous witnesses, a log entry from Trocom and sworn affidavits from Felix employees constitutes prima facie evidence of entitlement to summary judgment as a matter of law. Plaintiff relies on CPLR § 3212(f) for the proposition that the Court may deny a motion for summary judgment where there is outstanding discovery. However, under CPLR § 3212(f), for the Court to deny a motion for summary judgment there must be a likelihood that further discovery would lead to evidence that would defeat such a motion. The "mere hope" that such evidence would be uncovered is not enough. (See, *Frouws v. Campbell Foundry Co.,* 275 A.D.2d 761[2nd Dept. 2000]). After years of discovery, Plaintiff opposes this motion with nothing more than the affirmation of counsel and Urbitran engineer Weesam Fahmy's deposition testimony regarding a hypothetical, rather than his actual knowledge of the lane closure at issue here. See, *Zuckerman v. City of New York, supra*).

Urbitran and Felix has each established that it was not working, or required to be working, at the site on the night/morning of the accident and neither owed any duty to Plaintiff. Plaintiff has failed to demonstrate by proof in admissible form that there is an issue of fact for the jury to decide as to either defendant.

Finally, Urbitran and Felix seek costs and/or sanctions against Plaintiff for his repeated refusal to discontinue this action against each of them. While both Urbitran and Felix are clearly frustrated by Plaintiff's delay, much of that delay was occasioned by a nearly two year stay in this action, necessitated by Felix's bankruptcy proceedings. Wherefore, it is hereby

ORDERED that defendants Urbitran Associates, Inc., Urbitran Associate Engineers, P.C. and Urbitran Construction and Management Corp.'s motion for summary judgment is granted; and it is further

ORDERED that defendants Felix Equities Inc., and Felix Industries, Inc.'s motion for summary judgment is granted; and it is further

ORDERED that both Urbitran's and Felix's motions for costs and/or sanctions are denied; and it is further

ORDERED that the clerk of the court is to enter judgment accordingly; and it is further

ORDERED that the case in all other respects continues.

This constitutes the decision and order of the Court.

DATED: May 25, 2007

EILEEN A. RAKOWER, J.S.C.