

Wingate v Con Edison
2007 NY Slip Op 31848(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0115278/2003
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Index Number : 115278/2003

PART 36

WINGATE, WILLIAM A.

vs
CON EDISON

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

5, 6, 7

8, 9

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion *& cross-motion for summary judgment are denied in accordance with the attached memorandum of law.*

FILED

JUN 27 2007

NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 6/19/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
WILLIAM A. WINGATE, EXECUTOR OF THE
ESTATE OF ADELE WINGATE and WILLIAM
A. WINGATE, individually,

Plaintiff,

Index No. 115278/03
Motion Seq. No.: 002

- against -

CON EDISON, SIGMA ELECTRIC, INC.,
60th STREET RESTAURANT CORP. d/b/a
P.T.Z. REALTY, LLC,

Defendants.

FILED

JUN 27 2007

NEW YORK
COUNTY CLERKS OFFICE

HON. DORIS LING-COHAN, J.:

In this personal injury action, defendants 60th Street Restaurant Corp. d/b/a Patsy's ("Patsy's") and P.T.Z. Realty, LLC ("PTZ") move, and defendant Sigma Electric, Inc. ("Sigma") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and any third-party actions, crossclaims, or counterclaims against them.

Background

Plaintiff, William A. Wingate, executor of the estate of Adele Wingate, and individually, brings this action to recover damages from defendants Con Edison, Sigma, Patsy's, and PTZ for personal injuries sustained by Adele Wingate, his late wife, when she tripped and fell on the sidewalk in front of Patsy's, a pizzeria located 206 East 60th Street, New York, New York, on July 30, 2003. PTZ owns the premises at 206 East 60th Street.

On the day of the alleged incident, defendants Con Edison and Sigma, an electrical contractor, were working to restore to

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the premises at 206 East 60th Street electricity that was lost due to a burnout of the cables. According to the submissions, Sigma was responsible for running electrical cables from the basement of the premises at 206 East 60th Street to the property line, and Con Ed was responsible for running the cables from the property line to its power source. Adele Wingate allegedly tripped on a wooden covering that had been installed over the electrical cables that extended across the sidewalk in front of Patsy's.

Adele Wingate initially commenced this action against Con Ed and Sigma. Thereafter, Sigma impleaded an entity called 87th Pizzeria Corp. and PTZ. Adele Wingate then amended the Complaint to include 87th Pizzeria Corp. and PTZ as defendants. After Adele Wingate's death on August 5, 2005, the Complaint was again amended to reflect the executor of the estate and to replace 87th Pizzeria Corp. with Patsy's.

The Amended Complaint alleges that Adele Wingate sustained severe and permanent injuries when she tripped and fell over a raised, wooden covering over electric cable wire that extended across the sidewalk in front of Patsy's. The Amended Complaint also states that the alleged incident was caused solely by the negligence of defendants, *inter alia*, in the operation, management, maintenance, and control of the sidewalk, cable wires, and wooden covering. The Amended Complaint further

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alleges that William A. Wingate suffered the loss of his wife's services as a result of the incident.

The Bill of Particulars alleges, *inter alia*, that defendants were:

negligent in the ownership, operation, management, maintenance and control of the raised wooden covering over an electric cable wire that stretched across the sidewalk[;] in failing to warn pedestrians lawfully walking on the sidewalk, by proper signage or barriers, of the dangerous, raised condition[;] in causing, allowing and permitting said sidewalk ... to be, become and remain for a period of time after notice, either actual or constructive, in a defective, dangerous and/or hazardous condition ...; in causing, allowing and permitting a trap to exist at said location; in failing to maintain the ... raised wooden cover in a reasonably safe and proper condition;...in negligently and carelessly causing and permitting the above raised wooden cover to be and remain in said condition for an unreasonable length of time, resulting in a hazard to the plaintiff

Issue was joined as to each defendant with the service of separate answers generally denying the allegations in the Amended Complaint and asserting numerous affirmative defenses. In addition, Sigma asserts crossclaims against codefendants for contribution or indemnification.

Patsy's, PTZ, and Sigma now seek summary judgment dismissing the Amended Complaint against them.

Discussion

It is well established that a party seeking summary judgment must make a prima facie showing of its cause of action or defense

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sufficiently to warrant the court as a matter of law directing judgment in its favor, and must do so by tendering sufficient evidence to demonstrate the absence of any material issues of fact (see CPLR 3212[b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff alleges claims for negligence and derivative relief based on personal injuries sustained by the late Adele Wingate when she tripped and fell on the sidewalk in front of Patsy's. A finding of negligence requires that defendant owed a duty of care to plaintiff, and that there was a breach of that duty, resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976], citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342 [1928]).

Furthermore, it is well settled that a sidewalk is part of the public street or highway and, therefore, the duty of maintaining it in a reasonably safe condition generally is on the municipality (*City of Rochester v Campbell*, 123 NY 405, 411

[1890]). The abutting landowner or lessee owes no duty to keep the sidewalk in a safe condition (*Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726 [2d Dept 2003]).

"Liability may only be imposed on the abutting landowner or lessee where it either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk (*id.*).

Here, plaintiff seeks to impose liability on the defendants for creating the alleged condition. Plaintiff essentially alleges that defendants negligently installed the wooden covering over the electrical cables on the sidewalk, creating a hazard for pedestrians and causing Adele Wingate to trip, fall, and sustain serious personal injuries.

In seeking summary judgment, however, Patsy's and PTZ deny causing the alleged condition that resulted in plaintiff's injuries since they did not install the wooden covering on the sidewalk. Defendants also insist that they had no notice of the alleged condition of the sidewalk, and maintain that said condition was not inherently dangerous. To support their position, Patsy's and PTZ rely, *inter alia*, on the transcripts of the examination before trial ("EBT") of the parties.

Sigma also relies on the parties' EBT transcripts to substantiate its assertion that it did not install the wooden

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covering on which Adele Wingate allegedly tripped and fell. In addition, Sigma adopts the argument of Patsy's and PTZ that the condition of the sidewalk was not inherently dangerous.

At an EBT held on October 5, 2004, Adele Wingate testified that as she was walking on the sidewalk in front of Patsy's, one of her feet came into contact with something, causing her to fall forward and land on the cement (EBT of Adele Wingate, Not of Mot, Exh D, pp. 30-31). She further stated that she did not see what her foot hit before she fell, but that after she fell, she looked around and saw an elevated ramp that spread across the sidewalk from the curb to Patsy's building line (*id.* at 42, 47). In addition, she stated that there were no cones or barricades in the area where she fell, but that the ramp was covered with a black, "fuzzy-ruggy thing" after she fell (*id.* at 45, 57).

William Wingate testified, at an EBT held the same day, that he was not present when his wife fell, that he received a telephone call informing him that his wife had fallen over a ramp, and that when he arrived at the scene of the alleged incident, he observed a ramp on the sidewalk with no cones, signs, or barricades (EBT of William Wingate, Not of Mot, Exh F, pp. 6, 7, 10, 11).

At an EBT held on February 16, 2005, Daniel Cantu, the operating supervisor of Manhattan installation and apparatus for Con Ed, essentially confirmed that Con Ed was responsible for running electrical cables from the street to connect electrical

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cables run by Sigma from Patsy's property line to the basement of the building in which Patsy's is located, but insisted Con Ed was not responsible for installing the wooden covering over the cables (EBT of Cantu, Not of Mot, Exh G, pp. 12-16). He also testified that he observed Sigma employees installing the wooden covering over the electrical cables on the sidewalk in front of Patsy's (*id.* at 12-13).

Petros Kalemkeridis, the president of Sigma, testified at an EBT held the same day, that Patsy's hired Sigma to upgrade the electricity to the pizzeria to restore power loss caused by a burn out (EBT of Kalemkeridis, Not of Mot, Exh I, pp. 6-7). He also stated that Sigma's job was to run electrical cables from inside the building to the property line, and that Con Ed was responsible for running electrical cables from the property line across the sidewalk to its underground power source in the street (*id.* at 7-8). He further stated that the wooden covering over the electrical cables on the sidewalk in front of Patsy's were installed by a third-party retained by Patsy's (*id.* at 8-9).

Nick Tsoulos, one of the owners of Patsy's and PTZ, testified at an EBT held on March 20, 2006, that his partner, Nicholas Pashalis, entered into agreements with Con Ed and Sigma to improve the power source to the pizzeria¹ (EBT of Tsoulos, Not of Mot, Exh K, p. 7-10), and that he did not receive any

¹Nicholas Pashalis was reportedly on vacation at the time of the alleged incident, and a review of the submissions do not reveal any affidavits from him.

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information about which entity would install the wooden covering over the electrical cables that ran across the sidewalk (*id.* at 12). He stated that it was his understanding that Con Ed was responsible for removing the electrical cables and wooden covering from the sidewalk at the completion of the job (*id.* at 13-14). He further stated that about 3:00 or 4:00 P.M., Petros Kalemkeridis from Sigma came up to his office and said that he was finished and had to leave, but that Con Ed had not removed the cables and wooden covering from the sidewalk (*id.*). He testified that as he was attempting to contact Con Ed to remove the electrical cables and wooden covering from the sidewalk, someone informed him of the alleged incident (*id.* at 14). In addition, he testified that after the alleged incident, he saw "two cones diagonally on either side" of the wooden covering (*id.* at 15). He stated that he did not see the cones before the alleged incident (*id.*).

In opposition, plaintiff maintains that defendants created the alleged condition that caused Adele Wingate to trip, fall, and sustain injuries. In addition to the EBT transcripts relied on by defendants, plaintiff submits the transcript of a second EBT of Petros Kalemkeridis, held on February 27, 2006. Petros Kalemkeridis testified that Sigma performed no other work except running electrical cable from the electric room of the building to the trap door (EBT of Kalemkeridis, Not of Mot, Exh J, p. 18). He also testified that he did not see Con Ed place anything on

the sidewalk in front of Patsy's, but that the owner of Patsy's had a carpenter build a platform over the electrical cables that stretched across the sidewalk (*id.* at 26-27, 31-32). He described the wooden platform as a small stepping ramp, two feet by eight feet and about three or four inches high, comprised of standard plywood, that extended across the sidewalk (*id.* at 36). He further stated that he did not see anything covering the wooden covering before the alleged incident, but that after the incident, there were extra cones and some sort of mat on the wooden covering (*id.* at 49).

Plaintiff also relies on the transcript of the EBT of Angelo Astuto, another Con Ed employee. Angelo Astuto testified that he worked at 206 East 60th Street on the day of the alleged incident and that Con Ed was responsible for running the electrical cables across the sidewalk to connect with electrical cables run by Sigma from the building to the property line (EBT of Astuto, Not of Cross Mot, Exh A, pp. 5-7). Angelo Astuto also testified that Con Ed usually installed the wooden covering over electrical cables on sidewalks, that it did so in this instance, and someone, possibly associated with Patsy's or a contractor, expressed dissatisfaction with Con Ed's wooden covering, removed them, and installed their own (*id.* at 7-9).

On review of the submissions, the Court concludes that the conflicting evidence as to which party installed the wooden covering on the sidewalk where plaintiff fell, and thus created

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the alleged condition of the sidewalk, raises a triable issue of fact which precludes the motion and cross motion for summary judgment. Furthermore, the submitted evidence raises a further triable issue as to whether the condition of the sidewalk was inherently dangerous before the alleged incident.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated:

6/19/07

HON. DORIS LING-COHAN



Hon. Doris Ling-Cohan, J. S. C.

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