Bingham v City of New York
2007 NY Slip Op 31863(U)
June 22, 2007
Supreme Court, New York County
Docket Number: 0110900/2004
Judge: Doris Ling-Cohan
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SCANNED ON 6/28/2007

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 110900/2004
BINGHAM, MARIANNE
VS
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT

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

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

	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 by third-party defendant for summary judgment is granted in accordance with the attached memorandum decision.

FILED
JUN 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/22/07

J.S.C.

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

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: IAS PART 36

----------x

Marianne Bingham,

Plaintiff,

-against-

The City of New York and The Halcyon Construction Corp. s/h/a Halcyon Construction Corp.,

Defendants.

----------x

The City of New York and Halcyon Construction Corp.,

Third-Party Plaintiffs,

-against-

Tectonic Engineering Consultants Corp.,

Third-Party Defendant.

----------x

Index No. 110900/04

Motion Seq. No.: 001

FILED
JUN 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

Doris Ling-Cohan, J.:

In this negligence action, third-party defendant Tectonic Engineering Consultants Corp (Tectonic) moves for summary judgment dismissing the third-party complaint. Upon review of the submitted papers, Tectonic's motion is granted as detailed below.

On October 23, 2003, plaintiff, a 72-year old woman, suffered a leg fracture when she fell on an allegedly uneven surface of the roadway that was covered by a temporary steel plating in a crosswalk intersection at Madison Avenue and East 44th Street. It is undisputed that Halcyon Construction Corp. (Halcyon) had placed the steel plate in the intersection, pinned it in place and ramped it with asphalt. Photos shown to the plaintiff at her deposition depicted such a ramped steel plate in the crosswalk. During her deposition, plaintiff stated that she fell when her foot hit a bump or a mound in the roadway surface. [Notice of Motion, Exh. G, Plaintiff's Deposition, at 21, lines 5-6 (Plaintiff's Deposition)]. Plaintiff stated that she felt the mound with her foot but did not see it, as she was watching the traffic light and looking straight ahead as she crossed the

street. [Plaintiff's Deposition at 21, lines 13-25].

The City of New York (the City) first contracted with Tectonic to enter into a "Standard Requirements Contract for Resident Engineering Inspection Services" with the City Department of Design and Construction (see Exhibit L) to act as the resident engineer for a project identified as "Project MED-584A, Cleaning and Surveying of Existing 48-inch Water Main in Madison Avenue between East 39th Street and East 78th Street" (the project). The City subsequently contracted with Halcyon to be the general contractor for the project (see Exhibit K).

Article 11 of the City/Tectonic contract, entitled "Indemnification," provides in pertinent part:

> The Engineer shall indemnify and hold harmless the Commissioner and the City ... against all claims against any of them for bodily injury or wrongful death or property damage arising out of the negligent performance of services, including professional services, or caused by any error, omission or negligent act of the Engineer or anyone employed by the Engineer, in the performance of this Contract.

However, Tectonic posits that it is entitled to summary judgment of dismissal since, pursuant to the terms of its contract with the City, it is not liable to any third party for any injury suffered other than that caused by an affirmative act on its part. As such, Tectonic argues that its contractual role as inspector of work performed by Halcyon cannot impose liability on Tectonic regardless of the propriety or lack thereof of the inspected work product. Certain relevant portions of Tectonic's contract, and the City/Halcyon contract, support Tectonic's position. Article 6, section 6.1 of the City/Tectonic contract, entitled "General Description of Services," provides, in pertinent part:

> The Engineer shall provide, to the satisfaction of the Commissioner, all services necessary and required for the inspection, management, coordination and administration of the Project, so that the required construction work is properly executed, completed in a timely fashion and conforms to the requirements of the construction contract and to good construction practice.

Article 6, section 6.4, entitled "Services During Construction Phase," subsection 6.4.6 (c) provides, in pertinent part, that the Engineer shall:

> Review the safety program developed by the contractor(s) and monitor the adherence of the contractor(s) to such program. The Engineer shall not be responsible for prescribing, instituting or maintaining a safety program, nor for providing safety engineers.

Subsection 6.4.25 provides that the Engineer shall "check the erection of structures necessary to protect the public during construction operations." Additionally, Subsection 6.4.27 provides that the Engineer shall "check the construction contractor's layout and concrete form work for correctness, including line and grade. Check the placement of concrete, structural concrete and ***asphalt pavements***". [emphasis added]. Finally, Article 13, section 13.1, provides, in pertinent part:

> Nothing contained herein shall be deemed to create a contractual relationship between Engineer and contractor(s), subcontractors or material suppliers on the Project, nor shall anything contained herein be deemed to give any third party any claim or right of action against the City or the Engineer beyond such as may otherwise exist without regard to this Agreement.

The Tectonic witness, Harry Gordon, a resident engineer for the project, indicated that the accident site had been inspected by one of Tectonic's staff inspectors at the end of the work shift on the date of the accident (Affirmation in Opposition, Exh. A, at 41, lines 21-25). It was standard practice that at the end of the work night, Halcyon would place, pin and ramp a plate placed over an excavation (id). Gordon stated that the ramping depicted in the photo exhibits of the accident site was "proper" according to industry standards (id. at 65, lines 2-7) and that the ramping depicted in the photos shown to him looked similar to the way that Halcyon ramped the plates on "any given night" (id. at 45 and at 47, lines 9-14 and 24-25, respectively). Gordon explained that ramping is the creation of a smooth transition from one elevation to another through the use of asphalt (id. at 43, lines 11-25). The ramping was done pursuant to the New

York City Department of Transportation standards (id. at 40 and at 41, lines 4-25 and line 2, respectively) which allowed for the use of either hot asphalt or cold asphalt for ramping the plates (id. at 61 and at 62, lines 15-25 and lines 2-5, respectively). According to Gordon, while cold asphalt could be used, hot asphalt created a "better transition" than cold asphalt (id. at 63, lines 6-11). Gordon also testified that a Tectonic inspector would look at the street condition when the plating was finished and make a note of its condition in his report (id. at 41, lines 21-25). Gordon further indicated that if there was a problem with the plate pinning and ramping process, the Tectonic inspector would have brought that problem to the attention of the Halcyon supervisor (id. at 42, lines 2-7). But, even if a Tectonic inspector informed a Halcyon superintendent about a seemingly unsafe roadway condition, a rectification of the allegedly unsafe condition might occur only if that Halcyon superintendent "felt that the inspector was justified or correct" (id. at 29-30, lines 21-25 and 2, respectively).

In support of Gordon's statements, the contract between Tectonic and the City does not reflect that Tectonic had the contractual authority to demand such a rectification. Moreover, the pertinent October 23, 2003 inspection report, which listed a "Y" (indicating "Yes") on the safety checklist for plates, did not contain any notation that the placement, pinning or ramping of the plate in the intersection crosswalk had been done incorrectly (see December 15, 2006 Affirmation in Opposition, Exhibit C). Gordon stated that he was never made aware of any plating problem at the accident site (id. at 43, lines 11-15). Neither the City nor Halcyon refuted any of Gordon's deposition statements in their opposition papers.

Article 2, subsection 2.1.27 of the City/Halcyon contract defines the Resident Engineer as the City's representative at the work site. Article 6, section 6.3 provides, in pertinent part, among other things, that the inspection and approval by the Resident Engineer:

> shall not relieve the Contractor of its obligation to perform Work in strict accordance with the Contract. Finished or unfinished Work found not to be in accordance with the Contract shall be replaced as directed by the Engineer, even though such Work may have been previously approved and paid for. Such corrective work is contract Work and shall not be deemed Extra Work.
>
> Article 7, subsection 7.2 provides, in pertinent part, that:
>
> During the performance of the Work and up to the date of final acceptance, the Contractor shall take all reasonable precautions to protect the persons and property of the City and of others from damage, loss or injury resulting from the Contractor's, and/or Subcontractors' operations under this contract. The Contractor's obligation to protect shall include the duty to provide, place or replace and adequately maintain at or about the Site suitable and sufficient protection such as lights, barricades and enclosures.

Additionally, article 22, entitled "Insurance," requires the Contractor to obtain insurance adding the City as an additional insured for indemnification purposes, as delineated in subsection 22.1.1. Article 31, subsection 31.1 states that the Resident Engineer "shall have the power to inspect, supervise and control the performance of the work, subject to review by the Commissioner". The Resident Engineer, however, shall not have the power to issue an extra work order except via a writing from the Commissioner.

The abbreviated deposition colloquy of the City witness, Joseph Crupi, Engineer in Charge for the City, attached as Exhibit N in Tectonic's motion papers, included an acknowledgment by the City that it did not do any work at the construction site and that any of the plating, pinning and ramping at the accident site was done exclusively by Halcyon. The abbreviated deposition colloquy of the Halcyon witness, Joseph Monte, Field Superintendent for Halcyon, attached as Exhibit O to the same, included Monte's admission that Halcyon did the plating, pinning and ramping at the accident site. Monte also stated that it used the "cold patch" method to ramp the plate where plaintiff fell.

Defendants contend that Tectonic is liable for any judgment incurred as a result of its

failure to adequately inspect the project in accordance with its contract with the City. The third-party plaintiffs list four causes of action: (1) plaintiff's injuries, if not caused by plaintiff herself, were caused by Tectonic's negligence via omission or commission; (2) plaintiff's injuries were caused by Tectonic's primary and active negligence in permitting the alleged condition in the plaintiff's complaint, without any active or primary negligence on the part of the third-party plaintiffs; (3) any violations of ordinances and statutes were the result of acts by Tectonic; and (4) the City should be indemnified based on the City/Tectonic contract.

A party seeking summary judgment has the burden of setting forth evidentiary facts sufficient to establish that the movant is entitled to the relief being sought (*Cox v Kingsboro Medical Group*, 88 NY2d 904, 906 [1996]). To defeat a motion for summary judgment, the opponent must in turn produce admissible evidentiary proof which is sufficient to raise a triable issue of material fact (*Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 967 [1988]). Here, the movant has established via the testimony of the project resident engineer that an onsite inspection of the accident site occurred on the date of the accident and that there was no record of a problem with the plate ramping. The inspection was done in the regular course of Tectonic's contractual obligation to the City and the ramping was purportedly proper, as Halcyon used one of the two permissible ramping methods as required by the City DOT; those two methods being ramping a plate with hot asphalt or cold asphalt.

The record does not reflect any affirmative negligence on the part of Tectonic, which could support a basis for Tectonic's liability to either Halcyon or the City for the injuries incurred by plaintiff. Defendants have failed to raise a factual issue with respect to Tectonic's potential negligence. An engineer such as Tectonic, "retained to assure compliance with construction plans and specifications, is not liable for injuries to a member of the general public unless the

engineer commits an affirmative act of negligence or such liability is clearly imposed by contract" (*Fecht v City of New York*, 244 AD2d 315, 315 [2nd Dept 1997]). Halcyon, who used the acceptable cold patch method, cannot extend liability to Tectonic unless Halcyon can show an affirmative act of negligence on the part of the resident engineer, which is unsupported by the record. Nor has the City established a basis for any indemnification from Tectonic, and in any event, the City is being defended and indemnified via the relevant clauses in the City/Halcyon contract. Accordingly, it is

ORDERED that the third-party defendant's motion for summary judgment is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, third-party defendant shall serve a copy upon all parties with notice of entry.

Dated: 6/22/07

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

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