

Zimmer v Felix Indus., Inc.

2007 NY Slip Op 32713(U)

August 28, 2007

Supreme Court, New York County

Docket Number: 0107617/2002

Judge: Paul G. Feinman

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

PRESENT: Hon. PAUL G. FEINMAN PART 52

Justice

Anna Zimmer

INDEX NO. 107617/02
MOTION DATE 7/25/07
MOTION SEQ. NO. 005
MOTION CAL. NO.

FILED

- v -
Telix Industries Inc. AUG 31 2007

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to/for RR

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1
2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion
MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

Dated: 8/28/07

BAF

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
ANNA ZIMMER,

Plaintiff,

against

Index Number 107617/2002
Submission Date July 25, 2007
Mot. Seq. Nos. 005

FELIX INDUSTRIES, INC. and THE CITY OF
NEW YORK,

Defendants.

-----X
FELIX INDUSTRIES, INC.,

Third-Party Plaintiff,

T.P. Index No. 590583/2005

against

DECISION AND ORDER

EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third-Party Defendant.

-----X

For Felix:
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For Empire City Subway:
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New York NY 10007

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Papers considered in review of this motion to reargue:

Papers	Numbered
Notice of Motion and Exhibits Annexed.....	<u>1</u>
Affidavit in Opposition.....	<u>2</u>
Affirmation in Reply.....	<u>3, 4</u>

**NEW YORK
COUNTY CLERK'S OFFICE**

PAUL GEORGE FEINMAN, J.:

Third Party-Defendant Empire City Subway (Limited) (ECS) moves pursuant to CPLR 2201(d) for leave to reargue the branch of the decision and order of the court dated March 5, 2007 which denied its motion for summary judgment. The motion for leave to reargue is granted and upon reargument the court vacates and recalls the portion of the decision which discusses ECS's summary judgment motion. However, the court adheres to the original determination.

Specifically the court recalls and vacates that portion of the decision which begins at the second full paragraph on page 16 and bearing the heading “ECS’s Motion for Summary Judgment (Motion Sequence No. 003)” through the last paragraph of the decision at the top of page 21. The following text shall be deemed substituted for the vacated portion of the decision:

ECS’s Motion for Summary Judgment (Motion Sequence No. 003)

ECS seeks summary judgment and dismissal of the third-party complaint on the ground that plaintiff cannot establish her claim. A third-party defendant may assert against a plaintiff any defenses which the third-party plaintiff has to the plaintiff’s claim, pursuant to CPLR 1008, and it is of no significance that the third-party plaintiff does not raise a defense on its own behalf or that the third-party action seeks different relief from the main complaint (*see, Prigent v Friedman*, 264 AD2d 568, 569 [1st Dept. 1999]). Here, ECS’s arguments focus on the circumstantial nature of plaintiff’s claim.

To establish a prima facie case of negligence based only on circumstantial evidence, a plaintiff must show “facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred” (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986], quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). A plaintiff need not disprove every other possible cause of her or his accident, but the proof must render those other causes sufficiently “remote” or “technical” so that a fact finder can reach a verdict based not upon mere speculation, but upon logical inference drawn from the evidence (*Gayle v City of New York*, 92 NY2d 936, 937 [1998], *remand* 256 AD2d 541 [2d Dept. 1998] [citations omitted]). A plaintiff need only prove that it was “more likely” or “more reasonable” that the injuries were caused by the defendant’s negligence rather than by

another's agency (*Gayle*, at 937, citations omitted).

An action based on circumstantial evidence must link a defendant's acts to the cause of injury by a reasonable and logical flow of inferences (*Tower Ins. Co. v M.G.B., Inc.*, 288 AD2d 69 [1st Dept. 2001]; *Gomes v Courtesy Bus Co., Inc.*, 251 AD2d 625 [2d Dept. 1998]). Thus, in *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189 (1st Dept. 2004), the Appellate Division reversed the lower court and granted summary judgment to the defendants, where the plaintiff could not remember how his accident occurred because he was intoxicated at the time, and was unable to present a theory of liability and facts in support of his claim. Similarly, in *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228-229 (1st Dept. 2006), where the plaintiff was walking on the plaza abutting defendant's building, and was warned of a tractor backing up on the sidewalk and altered her direction, but fell after three or four steps, it was held that she failed to establish a prima facie claim of negligence against any of the defendants where she did not testify that she was frightened or that the tractor made contact with her body, but only that she did not know why she fell. In *Tower Ins. Co. of New York v M.B.G. Inc.*, 288 AD2d 69, the complaint was dismissed as being based on "unwarranted speculation" where plaintiff alleged only that the fire was started in a back room of a store under defendants' exclusive control and where the individual defendant admittedly smoked a pack of cigarettes on a daily basis and the Police Department concluded that while the cause of the fire could not be determined, it could have been caused by an errant cigarette left on the shelf in the back room. So too, in *Gomes v Courtesy Bus Co., Inc.*, 251 AD2d 625, the complaint was dismissed where the plaintiff could not establish that the defendant's bus, in the area, actually struck the nearby wooden plank forms, causing them to injure him; witnesses did not see the bus actually strike the planks and there

were other vehicles in the area, thereby improperly leaving the fact finder to speculate how the accident occurred (*see also, Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [1st Dept. 2005] [plaintiff alleged that he slipped and fell on a wet ramp but testified that he did not recollect any slippery or wet conditions on the ramp as he walked down it and did not know what caused him to fall; his testimony that an hour earlier he saw water being sprayed from a hose going down the ramp did not permit an inference that water was present when and where he fell]).

ECS argues, and Felix adds its support, that plaintiff cannot sufficiently allege the occurrence of events that led to her injury. Defendants note that neither witness saw plaintiff hit by the rock, and while both saw a chunk of rock or asphalt on the ground near plaintiff, with blood on it, neither saw how it was propelled nor do they establish that any of the defendants were responsible for its presence simply because they were or had been performing work in the roadway near the location of her accident. They argue that there were other equally plausible causes for the accident, including that the chunk was on the street for some period of time prior to the accident and propelled by the spinning wheels of the car attempting to pull out of its parking place adjacent to plaintiff immediately prior to the accident.

Plaintiff argues in opposition that whether the rock was actually propelled by the excavator or by passing traffic is inconsequential, as the issue is the defendants' negligence in permitting construction debris from their sites to lie in the traveled portion of West 40th Street, and without adequate barricades or warnings posted. She points to Wheeler's testimony that the excavator or backhoe kicked up gravel onto pedestrians on the sidewalk, itself giving rise to a question of negligence by Felix. Plaintiff also contends that during the course of their

construction work, defendants not only violated the permits issued to them, but also several safety statutes and regulations concerning maintenance of streets and sidewalks (Pl. Memo of Law Opp. Mot. to Dism. pp. 5-6, citing as examples, NYC Admin. Code § 19-121[b][2],[3],[6], and VTL § 1219[b]).

Unlike the plaintiffs in *Tower Ins. Co., Kane, Mazurek, and Gomes*, cited by the parties as examples of cases which were dismissed for insufficient specificity as to the nature of the negligence, plaintiff presents sufficient eyewitness evidence and circumstantial evidence to raise questions of fact that survive this summary judgment motion. Here, a reasonable trier of fact could conclude, without resorting to speculation, that the construction work being performed by Felix and/or that work apparently not yet completed by ECS was the source of the rock or asphalt projectile that struck the plaintiff.

Moreover, plaintiff argues that her claims can be established on the basis of *res ipsa loquitur*. *Res ipsa loquitur* requires a showing that the event was of a kind that ordinarily would not occur absent negligence; was caused by an instrumentality within the exclusive control of the defendant, and was not due to any voluntary action or contribution on the part of the plaintiff (*DiRoma v Mutual of Am. Life Ins. Co.*, 17 AD3d 119, 120 [1st Dept. 2005]). ECS's argument that she does not offer any evidence is overbroad, as it overlooks the testimony of the two eyewitnesses.

Plaintiff sets forth sufficient allegations to circumstantially establish that the rock could come from the construction site at which defendant Felix had workers working, and that defendant may have been negligent in the manner in which it barricaded the construction site and provided safe passageway for pedestrians and passing vehicles. She also sufficiently raises a

question of fact as to whether the construction work carried on by ECS to the west of the accident site could also have been a source of the rock which was displaced by passing traffic. Defendants argue that a car would likely kick up a heavy softball-sized piece of rock high enough to hit a woman in the head, thus calling into question whether one of the construction sites was the source of the rock. Such an argument, of course, appears to stand in stark contrast to the testimony of Beverly Wheeler, a witness on the street at the time of the accident who stated under oath that the cars were kicking up sprays of dirt and grit, and that she saw the Felix excavator's "little shovel" drop dirt and kick dirt as it turned to drive back toward the dumpster, causing the pedestrians to move away and plaintiff to raise her arms. There is a role for the "logic of common experience" which raises a question of fact for the jury as to whether Felix's negligence and/or that of ECS led to plaintiff's injury (*see Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d at 745). Accordingly, the motion to dismiss the plaintiff's complaint against Felix and the third-party complaint against ECS is denied.

ECS raises a separate argument as against both plaintiff and Felix, which is that the ECS witness establishes that its construction project was 400 feet west of the area where plaintiff's accident occurred, in the roadway close to the north side 40th Street, and that no work was done on the date of the accident. Although ECS is a third-party defendant, brought in by Felix on claims of common law indemnification and contribution, it must be pointed out that Rolff's testimony is clear that the construction job itself was not completed until about January 26, 2001, when Nico billed ECS for its work in repaving the street that ECS had excavated on January 12, 2001. There is a nondelegable duty as concerns work on a public roadway (*Ortiz v Empire City Subway Co.*, 32 AD3d 759 [1st Dept. 2006] ["anyone undertaking work on a public highway is

under a nondelegable duty to avoid creating conditions dangerous to the users of that thoroughfare]). As noted above, ECS is subject to New York City Administrative Code § 19-151(f) and *Sobel v City of New York*, 9 NY2d 187, requiring the permit holder to remain subject to a nondelegable duty until the pavement was fully restored. It is

ORDERED that ECS's motion to reargue the decision and order dated March 5, 2007 is granted and upon reargument, the decision portion is recalled and vacated in part and the foregoing substitution made; and it is further

ORDERED that upon reargument the court adheres to its original determination denying ECS summary judgment.

This constitutes the decision and order of the court.

Dated: August 28, 2007
New York, New York



J.S.C.

FILED
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