

Colucci v Tishman/Harris

2007 NY Slip Op 32958(U)

September 17, 2007

Supreme Court, New York County

Docket Number: 0112504/2005

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: **J.S.C.**

PART 5

Index Number : 112504/2005

COLUCCI, CARMEN

vs
TISHMAN/HARRIS

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

FILED

SEP 21 2007

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 9/17/07



EILEEN A. RAKOWER J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
CARMEN COLUCCI,

Plaintiff,

Index No.
112504/05

- against -

Decision and Order

TISHMAN/HARRIS d/b/a TISHMAN/HARRIS
CONSTRUCTION and THE CITY OF NEW YORK,

Defendants.

FILED
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NEW YORK
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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on a public sidewalk near the Whitehall Ferry Terminal in New York, New York on June 28, 2004. Defendant Tishman/Harris d/b/a Tishman Harris Construction ("Tishman") moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes and cross moves for an order compelling Tishman to produce a witness for deposition. Defendant the City of New York ("City") does not submit papers.

Tishman submits a copy of plaintiff's summons and complaint, the verified bill of particulars, a transcript of plaintiff's deposition taken on January 18, 2007, five color photographs taken by plaintiff's cousin depicting the accident scene and one showing plaintiff's injuries; and an affidavit by Andrew Gale, Project Director for Tishman. Plaintiff does not submit any evidence.

Initially, the exact location of the accident is unclear. Plaintiff states in her summons and complaint that the accident occurred "about 46 feet west of White Street on Water Street" New York, New York. However, plaintiff states in her verified bill of particulars that the accident occurred "about 46 feet off Whitehall Street on State Street." Although the Notice of Claim is not annexed to its moving

papers, Tishman affirms that the notice states that the accident occurred on Water Street. At her deposition on January 18, 2007, plaintiff first asserts that the accident occurred on State Street, but later she gives testimony that the accident occurred on Water Street:

Q: I understand that the accident scene occurred on State Street. Is that correct?

A: Yes. (Plaintiff Deposition, Page 11, Lines 7-10).

...

Q: You are saying the accident occurred on Water Street near Whitehall Street?

A: Yes. (Plaintiff Deposition, Page 72, Lines 11-14).

According to plaintiff's testimony, her accident occurred near a construction site which was managed by Tishman. The project consists of the rebuilding of the Whitehall Ferry Terminal ("the project") and, according to Andrew Gale, Project Director for Tishman, the site is enclosed by fencing, concrete barricades and wooden walls. Plaintiff testifies about how the accident occurred:

Q: When you stepped off, what happened after you stepped off the bus?

A: When I stepped off the bus, I went to go on the sidewalk but it was really dark and there was a hole. They had broken the sidewalk about, I would say, maybe a foot and a half or two feet and you couldn't see because it was really dark. When I stepped into the sidewalk, I fell into that hole.

...

Q: When you were standing in the roadway just getting off the bus, where were you going to go? . . .

A: I was trying to take the ferry.

Q: From where you were standing in the roadway, how far was the building in front of you?

A: It was covered. They had like walls so you have to turn a little bit around to go.

...

Q: Were these the walls of the ferry building or construction?

A: Construction yard, yes. (Plaintiff deposition, Page 20 Line 19-Page 21 Line 13).

...

Q: Do you recall how far the walls were in front of you?

A: I couldn't tell you how far but it wasn't close.

Q: Could you reach out and touch the walls?

A: Of course not. (Plaintiff deposition, Page 21 Line 24-Page 22, Line 6).

Tishman argues that any area of construction related to the project has always been fully protected from pedestrians and that the only way that plaintiff could have accessed the site would be through a staffed security checkpoint or to climb over the physical barrier. Further, it argues that it did not create the defective condition and that it did not have the duty to maintain the subject sidewalk. Plaintiff submits no evidence but argues that Tishman's motion is premature because she did not file her note of issue and never deposed Tishman. However, by way of reply, Tishman submits a copy of plaintiff's note of issue which was filed on April 6, 2007. According to court records, the note of issue has not been vacated.

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).

Tishman submits the affidavit of its Project Director who states that all construction done in the subject area was behind protective walls. It is undisputed that plaintiff fell on the sidewalk as she stepped off the bus and not within the protected construction area. In fact, plaintiff herself states that the walls of the site were "not close" and that she could not touch them. Plaintiff alleges in her complaint that the City, not Tishman, owned, managed and maintained the subject sidewalk.

Plaintiff, when opposing a motion for summary judgment, must lay bare her proof in her opposing papers in order to show that their allegations are capable of

being established at trial. (*Albouyeh v. Suffolk County*, 96 A.D.2d 543[2nd Dept. 1983]). Plaintiff does not submit proof in admissible form to dispute Tishman's claim that it did not create the defective condition. Rather, she merely speculates that because Tishman was conducting construction in the area, it should be liable for the defect which allegedly caused her accident.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted, and the complaint is hereby severed and dismissed as against defendant Tishman/Harris d/b/a Tishman/Harris Construction, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that plaintiff's cross-motion compelling Tishman to produce a witness for deposition is denied, and it is further

ORDERED that the remainder of the action shall continue.

DATED: SEPTEMBER 17, 2007



EILEEN A. RAKOWER, J.S.C.

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