

Wiener v City of New York

2007 NY Slip Op 33160(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0119788/2003

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Rakower
Index Number : 119788/2003

PART 5

WIENER, CHARLES

vs
CITY OF NEW YORK

Sequence Number : 002

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 _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>City</u>	<u>1</u>
Answering Affidavits — Exhibits <u>X motion</u> <u>II, Safety, Voter</u>	<u>2, 3, 4, 5, 6, 7, 8, 9</u>
Repeating Affidavits _____	<u>10</u>

Cross-Motion: Yes No

→ 11, 12, 13, 14


Upon the foregoing papers, it is ordered that this motion

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

DECISION MADE IN ACCORDANCE WITH ACCOMPANYING DECISION ORDER

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

EILEEN A. RAKOWER
J.S.C.


EILEEN A. RAKOWER
J.S.C.

Dated: 9/28/07

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
CHARLES WIENER and NANCY WIENER,

Plaintiffs,

Index No.
119788/03

- against -

Decision and
Order

THE CITY OF NEW YORK, YONKERS
CONTRACTING CO., INC., SAFETY MARKETING,
INC. and VOLLMER ASSOCIATES,

Mot. Seq.
002 & 003

Defendants.

-----X
HON. EILEEN A. RAKOWER

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Charles Wiener brings this action for personal injuries allegedly sustained when, while bicycling along the bike path at or near 12th Ave. and W. 52nd St. in the County and State of New York, he fell. The accident happened on May 30, 2003. It is alleged that a white sandy substance accumulated on the path, causing the wheels of plaintiff's bike to skid out from under him, throwing him down. Nancy Wiener brings a derivative action. Plaintiffs allege in their Notice of Claim that the bicycle path was a municipal thoroughfare owned, maintained, operated and controlled by The City of New York (City). Further, that in maintaining the path, City caused triangular-shaped markings to be placed and/or painted onto the bicycle path surface, incorporating a white sandy substance in the painting process. Vollmer Associates (Vollmer) was the general contractor and safety manager for the creation and construction of the subject bike path. Yonkers Contracting Co., Inc. (Yonkers) was the contractor and Safety Marketing, Inc. (Safety) was the subcontractor responsible for the bicycle path markings. This action results from the consolidation of three separate actions.

City moves for summary judgment pursuant to CPLR 3212 seeking to dismiss all claims and cross claims as against it. Safety and Vollmer oppose. Plaintiff

concedes that City was not in active control of the location on the date of the accident, and consents to City's motion to dismiss. Plaintiff also cross moves to compel Yonkers, Safety and Vollmer to fully comply with its discovery demands. Vollmer opposes and cross moves for leave to amend its answer. Yonkers joins in Vollmer's cross motion. Safety files opposition to Vollmer's cross motion. Safety cross moves for summary judgment dismissing all claims and cross claims asserted against it, or in the alternative, to compel plaintiff to produce outstanding discovery and appear for a deposition. Yonkers files an affirmation of support for Safety's cross motion. Plaintiff opposes Safety's cross motion. Finally, by separate motion, Yonkers moves for summary judgment seeking dismissal of all claims and cross claims as against it, which plaintiff opposes.

City asserts that the subject bicycle path is owned, not by it, but by the State of New York. City, in support of its motion to dismiss, provides the Notice of Claim, the pleadings, the affidavit of Gregory Mosiejewski, Principal Title Examiner, City Registrar filings and the results of searches for the Department of Transportation. City concludes that, as it was not the owner of the property at the time of the accident, it is not responsible for plaintiff's injuries.

Safety points out in its opposition that City does not address plaintiffs' allegation that City permitted the accumulation of white sandy substance on the subject bike path. Vollmer points out in its opposition that plaintiffs allege it was the duty of the City to maintain the bicycle path. Nevertheless, plaintiffs "are satisfied that the City of New York although the previous owner of the bicycle path at the intersection of 12th Avenue and 52nd Street, was not in active control of that location on the date of accident and the plaintiff respectfully consents to a dismissal of the Plaintiff's case against the City of New York without cost or disbursements." Therefore, City's motion to dismiss is granted.

Plaintiffs cross move to compel Yonkers, Safety and Vollmer to fully comply with the Case Scheduling Order of the Court dated November 21, 2006 and to direct depositions of these defendant. Plaintiffs, through counsel, assert that the white sandy substance alleged to have caused this accident was actually "glass beads for re-factorized pavement marking paints," and that the markings were freshly painted. Plaintiff asserts that Vollmer was the construction manager, Yonkers was the general contractor and Yonkers sub-contracted with Safety to do the markings. The November 21, 2006 Order directed all of the parties to provide responses to various

discovery demands. A subsequent order dated March 6, 2007 directed further discovery be held in abeyance until City responded.

Vollmer cross moves seeking to amend its answer after the consolidation of the three separate actions. It states it seeks to add cross claims for common law and contractual indemnification and contribution as against all co-defendants. It includes a proposed amended answer as well as the contract between itself and the New York State Department of Transportation for consulting services related to the planned bike path, and signed by the State Comptroller and the State Department of Transportation. The proposed amended answer fails to implicate the City, or Safety and the State is not a party to this action. The only party implicated in the proposed cross claim is a "Co-Defendant, Peter Corsell," who is unknown to this litigation. Safety opposes, pointing out that it is not implicated in the proposed amended answer with cross claims. Yonkers seeks relief similar to Vollmer, but fails to append a proposed amended answer.

While leave is freely given to amend pleadings, Vollmer's proposed amended answer with cross claims fails to implicate the co defendants in this action, as stated. Indeed, Vollmer's own exhibit demonstrates that it did not have a contract with City, but rather, a contract with the State. The proposed amended answer provided by Vollmer is rejected, and Vollmer shall be granted leave to file an amended answer within 20 days of receipt of this order with notice of entry.

Safety moves to dismiss all claims as against it, stating it did not create the condition on which plaintiff fell. Safety, in support of its motion provides the affidavit of Patrick Clyne, Safety Director for Safety, the plaintiff's verified bill of particulars, plaintiff's affirmation in support of plaintiff's cross motion, the subcontract between it and Yonkers, Safety work records in connection with the Yonkers project, the pleadings as they relate to the actions against Vollmer, Yonkers and Safety, communication between certain of the parties, and a response to preliminary conference order.

Safety asserts that its own records show it was not working on the bath path for some two years prior to the accident. Safety points out that plaintiff indicates the markings were freshly painted, and therefore, it could not have been Safety that painted them. Yonkers, by attorney affidavit only, concurs that Safety was only involved in the reconstruction of the Westside Highway, Rte 9A project, which was

completed on July 2001.

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[1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Plaintiffs oppose, now backpedaling from their original cross motion where they consented to dismiss the action as against the City. Plaintiffs point to outstanding discovery not obtained from the City of New York and conclude that, pursuant to CPLR 3212(f), the motion of Safety is premature. Plaintiffs do not reconcile this with their earlier concession that City did not own or control the area in question, and presumably would have no records regarding the markings on the bike path. This is further supported by Vollmer's contract with the State (not the City) and Safety's subcontract with Yonkers (the subcontract acknowledges the "Contractor entered into a Contract with State Department of Transportation").

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (CPLR §3212(f)). The opposition must offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. (*Pow v. Black*, 182 AD2d 484 [1st Dept. 1992]).

Safety has provided its records demonstrating that it did not perform work at the subject area after 2001. It is now incumbent upon plaintiffs to lay bare their proof that Safety did indeed perform the markings which allegedly contributed to plaintiff's accident. Plaintiffs assert they have learned Safety did the markings, but show no support for that contention. Plaintiffs concede City did not own, control or maintain the area in question, and accept that State did. State is not a party to this action. It cannot be said that Safety is in exclusive possession of facts essential to prove their

involvement.

Safety, by way of reply, adds the affidavit of James Kwong, who examined the records of the New York State Department of Transportation, and provides all relevant records relating to Safety's project. The records demonstrate that "pavement markings are in place clear and visible" as of December 28, 2001.

Plaintiffs have produced no proof in admissible form to rebut Safety's contention that it did no work at the subject area for at least 18 months prior to the accident. Therefore, Safety's motion to dismiss as against it is granted. The remainder of Safety's motion regarding discovery is rendered moot.

Finally, Yonkers moves to dismiss the complaint as against it. Yonkers, in support of its motion, provides the pleadings, the consolidation order, plaintiff's verified bill of particulars, the 50(h) hearing testimony of plaintiff Charles Wicner, the affidavit of Fred Cardillo, project manager for Yonkers, a letter from the New York State Department of Transportation accepting the contract with Yonkers, dated December 26, 2001 and received January 2, 2002, a subcontract between Yonkers and Safety, dated September 19, 2003, response to plaintiff's notice for discovery and inspection dated April 4, 2007, and a supplemental response to preliminary conference order dated May 17, 2007.

Yonkers points to plaintiffs' description of the accident as being caused by "an accumulation of an excessive and dangerous reflective material and wet paint." Yonkers asserts that it could not have been responsible for the condition since it was not working at the site at the time of the accident. Indeed, like Safety, it shows its work had been accepted and its work completed in the area by December 26, 2001. It entered into a subsequent contract with the State of New York in July, 2003, but this was after the alleged accident and did not involve the subject area. Yonkers provides a subcontract with Safety, which supports these time frames in regard to Safety as well.

Yonkers has demonstrated that it did no work at the location of plaintiff's accident after 2001. It is again, incumbent upon plaintiffs to produce proof in admissible form to rebut Yonkers' contention that it owed no duty, breached no duty, and caused no injury to plaintiff. Again, plaintiffs rely solely on the testimony of plaintiff, according to counsel, that "markings in the form of painted arrows with

[* 7]

reflective beads appear to have been newly painted on the bike way and remained cleaned and un-swept.” The court notes that nowhere in Charles Wiener’s deposition testimony does plaintiff describe the area as newly painted. Rather, wet paint is mentioned in the verified bill of particulars to describe defendant’s failure to apply the reflective material to wet paint and within the confines of wet paint.

Yonkers, by way of reply, points out that plaintiff used this path daily, and did not notice this granular substance, which was across the entire width of the bike path, prior to the date of his accident. Additionally, if there had been wet paint, the affidavit of Patrick Clyne explains that the marking material cures within 3 to 5 minutes. Thus, having not been present at the accident location since 2001, Yonkers concludes it could not have been the source of the granular substance. Plaintiffs have failed to rebut Yonkers’ contention that neither it nor Safety worked in the subject area for more than one year prior to the accident.

Wherefore, it is hereby

ORDERED that The City of New York’s motion for summary judgment dismissing all claims and cross claims as against it is granted, and the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that Safety Marking, Inc.’s cross motion for summary judgment dismissing all claims and cross claims as against it is granted, and the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that Yonkers Contracting Co., Inc.’s motion for summary judgment dismissing all claims and cross claims as against it is granted, and the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff’s cross motion to compel discovery is granted to the extent that Vollmer Associates is directed to respond to plaintiff’s outstanding demands to the extent they have not already responded within 45 days of receipt of this order with notice of entry; and it is further

ORDERED that Vollmer Associates’ cross motion for leave to file an amended answer is granted to the extent that the proposed amended answer is rejected and Vollmer Associates shall file its amended answer within 20 days of receipt of this

order with notice of entry; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room158. Any compliance conferences currently scheduled are hereby cancelled.

All other relief requested is denied.

This constitutes the decision and order of the court.

DATED: September 28, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE