

Gomez v City of New York

2007 NY Slip Op 33204(U)

October 2, 2007

Supreme Court, New York County

Docket Number: 0111720/2003

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 : 111720/2003

GOMEZ, ELMES

vs

CITY OF NEW YORK

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

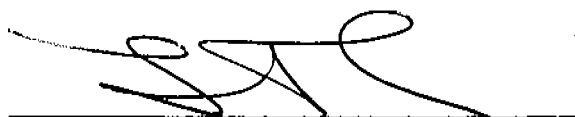
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 09 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/2/07



EILEEN A. RAKOWER J.S.C.

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
ELMES GOMEZ and ALLISON GOMEZ,

Plaintiffs,

Index No.
111720/03

- against -

Decision and Order

THE CITY OF NEW YORK, TISHMAN CONSTRUCTION
CORPORATION, THREE TIMES SQUARE ASSOCIATES,
LLC, and LA STRADA GENERAL CONTRACTORS, INC.,

Defendants.

-----X
TISHMAN CONSTRUCTION CORPORATION,
THREE TIMES SQUARE ASSOCIATES, LLC,

Third-Party Index
No.:
590811/05

Third-Party Plaintiffs,

-against-

S.N. TANOR, INC.,

Third-Party Defendant.

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

Plaintiff Elmes Gomez brings this action for personal injuries allegedly sustained when he tripped and fell over metal pipes and screws protruding from the sidewalk which was the former base and underlying structure of a street lamp. The accident occurred alongside the curb of, and adjacent to, Three Times Square, located on 43rd Street, between Seventh and Eighth Avenues in the County and State of New

York on May 7, 2002. Allison Gomez brings a derivative action. La Strada General Contractors, Inc. (La Strada) contracted to do the site work at Three Times Square with Tishman Construction (Tishman), who was the Construction Manager for the construction of the Three Times Square building. La Strada sub-contracted with S.N. Tannor (Tannor) to do the street lighting, which included installation of the subject underlying structure (offending structure) on which plaintiff allegedly fell. Three Times Square Associates, LLC (owner) was the owner of the building.

La Strada makes this motion for summary judgment pursuant to CPLR 3212, asserting that once it installed the lamp post foundation and completed its work at the job site, it was no longer responsible for the continued safe maintenance of the lamp post foundation. After installing the foundation, the foundation was completely covered by a wooden box so that no part of the lamp post foundation was exposed. Further, La Strada claims it completed this work shortly after May 25, 2001, more than 11 months prior to plaintiff's accident, and owed no duty to plaintiff. Tishman and owner oppose. Neither the City of New York nor plaintiff submit papers. Tannor submits no papers.

La Strada, in support of its motion, submits the pleadings of this and the third party actions, the examination before trial of Elmes Gomez, plaintiff's verified bill of particulars, photographs of the offending structure, the examination before trial of Dominic Macedo, project manager for La Strada, the contract between Tishman and La Strada, the agreement between La Strada and Tannor for the installation of the street light, along with the paid invoice for Tannor's work, the affidavit of Pietro Guglielmi, foreman for La Strada on this construction project, an invoice for cement work provided to La Strada by Empire Transit Mix, the examination before trial of Kevin Cummings, an employee of Ruden Management, appearing on behalf of Tishman, La Strada's supplemental discovery response dated April 4, 2007 and other communication between the parties' attorneys.

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).

La Strada has demonstrated that it was hired by Tishman to do exterior work. Included in this work was the installation of the subject street light. La Strada sub contracted with Tannor to install the foundation and lamppost, including conduits. The work order with Tannor confirms the scope of the work; however, at some point between the Tannor proposal dated May 23, 2001 and the date the Tannor invoice was issued for work completed on May 25, 2001, it was concluded that the proposed lamppost was not to be installed. The paid invoice to Tannor confirms that the work performed was only the installation of one new standard concrete foundation. Photos show that this included the pipes sticking up. A work order for Empire Transit Mix confirms that concrete was provided May 30, 2001. Dominic Macedo, project manager for La Strada, testified that "typically after the foundation is installed, the concrete needs two days to harden and then we'll install the light pole. In the meantime, we'll install over that base a two-foot, by two-foot, by three-foot box so that it's visible to everybody." Finally, the affidavit of Pietro Guglielmi, La Strada's foreman who oversaw the Tannor work completed on May 25, 2001, personally observed La Strada employees place a wooden box cover over the entire lamp post foundation leaving no part exposed. Guglielmi concluded that La Strada left the work site shortly after May 30, 2001.

La Strada argues that once it left the work site, it had no continuing responsibility to maintain the area. Indeed, Kevin Cummings, an employee of Ruden Management who appeared on behalf of Tishman, testified that Tishman laborers "typically made sure" a cone was covering the exposed conduits. Further, if he noticed the cone covering was missing, he "would have one of [his] cleaners put a cone on it."

Plaintiffs, when opposing a motion for summary judgment, must lay bare their proof in their 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]). Here, Plaintiff does not submit opposing papers. Rather, Tishman opposes the motion for summary judgment. Tishman, in its answer, brings cross claims against La Strada for breach of contract for failing to provide insurance, common law indemnification, and apportionment.

La Strada provided the contract between it and Tishman, dated June 12, 2000. The scope of work contains the following provision: "Contractor must maintain a safe pedestrian environment during the performance of its work, including providing, maintaining and removing all necessary wood and/or concrete barricades and other protection required by any agency having jurisdiction." Tishman argues that La Strada was still responsible for the subject site at the time of the accident. It provides the final change order punch list dated June 17, 2002. That list includes a comment regarding the proposed light pole, and states "not installed by LaStrada, to be performed by others." According to Tishman, La Strada was not relieved of its obligation to provide the lamp post until this change order.

La Strada alleges that Tishman wanted a specific lamp post which it was unable to purchase for this project. Macedo testifies:

Initially Tishman asked us, you know, to procure one and install it. So through conversations I had with Tannor, it was very difficult to get one because the manufacturer doesn't make one at a time. You have to order lots of them, like ten or 20. They are very expensive; 15, \$18,000 for one light pole. Just to buy it, you couldn't buy just one, so I really couldn't furnish one to them. And they, after going back and forth for a while, Tishman told us forget about it. The owner will deal with the City to get that particular light installed."

Macedo also testified:

Q: Was there any correspondence, any verbal correspondence between you and Tishman saying forget about it, you know we'll deal directly with the City?

A: It was verbal between myself and Brian Kaplan. I have to see if a letter was followed up on.

Q: Brian Kaplan is?

A: Worked for Tishman.

La Strada insists it was no longer at this site after it left, shortly after May 30,

2001. Tishman, by contrast, alludes to its continued presence until June 17, 2002. Tishman insists that the Court disregard the affidavit of Guglielmi, which first appeared after the note of issue was filed, and without Tishman having an opportunity to depose him. This affidavit, however, is not the only source of the facts asserted within it regarding when La Strada concluded its work at the subject area. Tishman is certainly in possession of records and daily logs which could serve to contest La Strada's position that it was not longer present at the site as of the time of this accident. The fact that Guglielmi affirmatively states La Strada protected the conduits is not determinative on the issue of whether the conduits were properly covered some eleven months after their installation. The issue is what entity was responsible to maintain the area at the time of the accident. La Strada provides the testimony of both Macedo and Cummings who agree that Tishman would have been responsible for the area after La Strada's work was finished.

Tishman has failed to demonstrate the La Strada had a continuing presence and an obligation to maintain the subject area at the time of the accident. The only evidence it provides is a change order form dated June 17, 2002, which, unaccompanied by any affidavit explaining its origin, is not in admissible form. That and the attorney affidavit fail to rebut La Strada's prima facie showing that it owed no duty to plaintiff.

FILED
OCT 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted, and the complaint is hereby severed and dismissed as against defendant La Strada General Contractors, Inc., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATED: October 2, 2007


EILEEN A. RAKOWER, J.S.C.