

Heleniak v City of New York

2007 NY Slip Op 33634(U)

November 2, 2007

Supreme Court, New York County

Docket Number: 0102797/2005

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

J.S.C.

PRESENT: RAKOWER
Justice

PART 5

Index Number : 102797/2005

HELENIAK, WLADYSLAW

vs

CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

NOV 13 2007

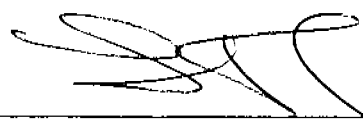
Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 11/2/07



J.S.C.

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
WLADYSLAW HELENIAK and ANA HELENIAK,

Plaintiffs,

Index No.
102797/05

- against -

DECISION/ORDER

THE CITY OF NEW YORK, NEW YORK CITY
HOUSING AUTHORITY, UTB-UNITED
TECHNOLOGY, INC., and LILLY CONSTRUCTION
CO., INC.,

Seq. No.: 005 & 006

Defendants.

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

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff Wladyslaw Heleniak (“plaintiff”) was operating a compressor in the street abutting the curbcut to the driveway leading to the entrance to 1955 Second Avenue New York, New York on December 29, 2003. Specifically, plaintiff claims he was an employee of a sub contractor for a construction project at the property and premises 1955 Second Avenue. While moving a generator which was mounted on wheels, from his employer’s truck to the construction site, one of the wheels caught in a hole, causing him to fall and the generator to land on him. Plaintiff brings this labor law claim for the failure of the City of New York (City) and New York City Housing Authority (“NYCHA”) to provide a safe place for the plaintiff to work pursuant to the Labor Law. Plaintiff’s wife, Anna Heleniak, brings a derivative action. Defendant City brings 2 identical motions, moving for summary judgment pursuant to CPLR 3212 and/or dismissal of the complaint and all cross-claims pursuant to CPLR 3211(a)(7). Plaintiffs do not oppose and defendants the NYCHA, UTB-United Technology, Inc., and Lilly Construction Co., Inc. do not submit papers.

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]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

City, in support of its motion, submits: (1) the pleadings; (2) the deposition testimony of Cynthia Howard, record searcher for the City Department of Transportation (“DOT”) Litigation Support Unit; (2) a response sheet for a search done of Second Avenue between East 100th and East 101st Streets; (3) A “Street Opening Permit” issued to Consolidate Edison issued on February 19, 2002; (4) A defect report or complaint dated May 8, 2003; (5) a “history of defect” report which states “referred to maintenance” and “close defect”; and (6) a “Big Apple Map.”

City argues that it did not have written notice of the alleged defect before plaintiff’s accident as is required by §7-201(c) of the Administrative Code of the City of New York. However, City fails to address the allegations in plaintiff’s amended complaint, which mirror those in the Notice of Claim. Specifically, plaintiff brings these claims, not as a pedestrian on a public sidewalk or roadway (although this was stated in the original complaint), but as a laborer working at a construction site at 1955 Second Avenue. Indeed, the complaint states “the property and premises of the defendants, The City of New York and/or The New York City Housing Authority was under repair, renovation, construction and/or alteration.”

City has failed to meet its initial burden of demonstrating that there are no issues of fact regarding plaintiffs’ claims pursuant to Labor Law Sections 200 and 241 to maintain a safe workplace. Therefore, the motion to dismiss must be denied.

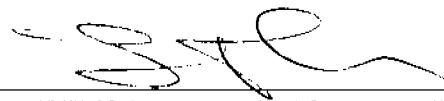
Wherefore it is hereby

ORDERED that defendant the City of New York’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

All other relief requested is denied.

DATED: November 2, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
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NEW YORK