

Digiantomasso v City of New York

2007 NY Slip Op 33931(U)

November 28, 2007

Supreme Court, New York County

Docket Number: 0116932/2005

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 Part 5

Index Number : 116932/2005
DIGIANTOMASSO, RITA
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : # 003
 SUMMARY JUDGMENT

Justice

INDEX NO. 11693205

MOTION DATE #003

MOTION SEQ. NO. #003

MOTION CAL. NO. _____

Filed on this motion to/for _____

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits

Cross motion

3

Replying Affidavits

Opp
reply

4, 5

6

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):

FILED

DEC 05 2007

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 11/29/07

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
RITA DIGIANTOMASSO,

Plaintiff,

Index No.
116932/05

- against -

Mot. Seq.:
003

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, BOVIS
LEND LEASE LMB, INC., JUDLAU CONTRACTING,
INC., CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC. FELIX ASSOCIATES, LLC and
LIRO KASSNER, INC. d/b/a LIRO ENGINEERS, INC.,

Defendants.
-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on a raised manhole cover located "18 feet south of the northeast corner and 17 feet north of the southeast corner of the intersection and on line with the east curb line of William Street at the north side of the intersection" with Beaver Street New York, New York on October 15, 2004. Defendant Bovis Lend Lease LMB, Inc., who was responsible for construction work on a high rise building located on the northwest corner of Beaver Street and William Street, but performed no work on the roadways of Beaver and William Streets, was granted dismissal of the action as against it. Defendant Judlau Contracting, Inc. ("Judlau") is alleged to have performed water main installation at the corner of Beaver Street and South William Street at some time between August 5, 2003 and November 21, 2003. Defendants Felix Associates, LLC and Liro-Kassner, Inc. d/b/a Liro Engineers, Inc. ("Liro") are alleged to have been the contractor and resident engineer for a project resurfacing streets South of Canal Street, and presumably including the subject location, as part of the MOSAICS Capital Project managed by the City of New York ("City"). Defendant Judlau moves for summary judgment pursuant to CPLR 3212. Defendant Liro cross-moves for summary judgment. Plaintiff opposes Judlau's motion and Liro's cross-motion. Defendant City partially opposes both the motion and the cross-motion.

[* 3]

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]).

Judlau submits: (1) the pleadings; (2) plaintiff's verified bill of particulars; (3) an order issued by this court granting summary judgment to defendant Bovis Lend Lease LMB; and (4) the EBT transcript of plaintiff dated July 18, 2007.

Judlau, argues that plaintiff's own failure to identify what caused her to trip at one point in time, and her contrary declaration that she fell on a raised manhole cover, raises sufficient doubt as to her testimony. Thus, Judlau argues, it is entitled to summary judgment as a matter of law. Liro, by way of its cross motion, joins in Judlau's argument.

Plaintiff was deposed on July 18, 2007. At that deposition, in response to certain questions, she explained:

Q: Could you describe how you fell?

A: My foot hit something and I went down.

Q: At the time of the accident, did you see what your foot hit?

Mr. Dorfman: At what point, before, after or when it happened?

Mr. Mevorach: Before.

A: No.

Q: After the accident, did you see what your foot hit?

A: No, I don't remember. (Plaintiff Deposition Page 19, Lines 17-25 & Page 20, Lines 2-8).

Plaintiff, in response to another attorney's questions at the same deposition, explained:

Q: Did you ever return to the location of your accident to see what your foot hit?

A: Yes.

...

Q: What did you see at that time?

A: I saw a manhole cover.

...

Q: In the same crosswalk area where you had fallen?

A: Yes, where I had fallen

Q: Did you see that manhole cover on the day of the accident, either before, during or immediately after?

A: I don't remember. (Id at Page 54 Lines 10-24).

Finally, in response to yet another attorney's questions at the same deposition, plaintiff described:

Q: You said that your foot hit something immediately before you fell; is that correct?

A: Yes.

Q: Do you know if your foot hit the metal of that manhole or if it hit the asphalt around the manhole or something else?

A: I don't know.

Q: Was there any debris in the roadway that you saw?

A: I didn't see.

Q: Did you fall over debris?

A: I didn't see any. (Id at page 64, line 15 through page 65, line 3)

and:

Q: Have you ever made a determination prior to your return to the location of the accident approximately three weeks later, had you ever made a determination prior to that time as to what caused your fall?

...

A: Yes.

Q: When in that three week period of time did you make a determination as to what caused you to fall?

A: I believe it was on that day. (Id at page 74, line 21 through page 75, line 8.)

Plaintiff, in opposition, submits: (1) a transcript of plaintiff's 50-h hearing dated February 23, 2005; (2) several black and white photocopies of photographs of the manhole cover; and (3) two black and white photocopies of photographs of the manhole cover which has been circled by plaintiff at her 50-h hearing and (4) its discovery responses served upon Judlau and Liro dated December 28, 2005 which included the photographs and the 50-h hearing testimony.

Plaintiff argues that she clearly and sufficiently identified the cause of her fall in her 50-h testimony. Plaintiff testified, in response to questions:

Q: Could you tell me what caused you to fall in the roadway as you were crossing Beaver Street?

...

A: I tripped over a manhole cover.

Q: Were there any writings or markings on the manhole cover that you tripped over?

A: I didn't see anything at the time.

Q: Since then have you learned if there were any markings or writings on the manhole cover?

A: Yes. (Plaintiff 50-h, Page 32, Lines 4-18)

Plaintiff went on to explain:

Q: What was the condition of the manhole cover vis-a-vis the roadway?

A: It was elevated.

Q: The manhole covered(sic) was?

A: yes.

Q: Could you describe for me the elevation of the manhole cover at the place where you had your accident?

A: It had asphalt around it.

Q: But in other words, in terms of depth let's say - -

Mr. Dorfman: Height.

Q: Or height?

A: Like that much (indicating).

Ms. DeBellis: By counsel.

Mr. Dorfman: I would say that's about two and a half inches. Would you stipulate to that?

Ms. DeBellis: Absolutely.

Mr. Dorfman: So stipulated. (Id. at 34, Lines 2-22).

Plaintiff stated unequivocally that the manhole cover was the cause of her fall. Indeed, she circled it on photographs at the 50h hearing. That the hearing itself was conducted outside of the presence of Judlau, and would be considered hearsay for the truth of the matter asserted within, it is offered here merely for the fact that it was said. A statement which is not offered to establish the truth of the facts asserted is not hearsay. (*Stern v. Waldbaum, Inc.*, 234 A.D.2d 534[2nd Dept. 1996]).

Defendants urges that in a slip and fall case, mere speculation as to the cause of the fall is not enough to establish a prima facie case of negligence. (*Manning v. 6638 18th Realty Corp.*, 28 A.D.3d 434[2nd Dept. 2006]).

Here, however, Plaintiff neither speculates nor urges that circumstantially, it must have been the manhole cover which caused her fall.¹ Instead, she identifies the raised manhole cover with specificity.

Wherefore it is hereby

ORDERED that defendant Judlau Contracting, Inc.'s motion for summary judgment is denied; and it is further

ORDERED that defendant Liro-Kassner, Inc. d/b/a Liro Engineers, Inc.'s cross-motion for summary judgment is denied.

DATED: November 28, 2007


EILEEN A. RAKOWER, J.S.

FILED
DEC 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

¹ To establish a prima facie case of negligence based wholly on circumstantial evidence, it is enough that plaintiff shows 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 Hospital Center, Inc.*, 67 N.Y.2d 743[1986]).