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

PRESENT: EILEEN A. RAKOWER J.S.C. PART Part 5

Index Number : 115573/2003
KOSOFF, STEVEN
VS
CITY OF NEW YORK
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5, 6
Replying Affidavits	7, 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

FILED
JAN 09 2008
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: 12/A/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

STEVEN KOSOFF,

Plaintiff,

- against -

THE CITY OF NEW YORK, WESTMINSTER HOUSE OWNERS, INC. COACH, INC., DACOSTA LANDSCAPING CONTRACTORS CORPORATION and MADISON 35, LLC.,

Defendants.

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Index No.
115573/03
Mot. Seq. No.: 003

Decision and Order

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries he sustained when he allegedly tripped and fell over a piece of plywood that was positioned in a tree well which was located in front of 1149 Madison Avenue, a/k/a 35 East 85th Street New York, New York on June 5, 2002 at approximately 1:00 p.m. The parties to the action include the City of New York (City) as owner of the sidewalk, Westminster House Owners, Inc. (Westminster), the owner and lessor of a strip of frontage along Madison Avenue, Coach, Inc. (Coach), the occupant of the storefront at street level in the adjoining building, Dacosta Landscaping Contractors Corporation (DaCosta), the contractor responsible for doing work on tree pits and including the installation of tree guards and paving and expansion of tree pits in the area, and Madison 35, LLC. (Madison), the lessee of a strip of frontage and owner of the commercial condominium leased to Coach.

Originally, Madison and Coach moved for summary judgment, seeking dismissal of plaintiff's claim as against each of them. A stipulation of discontinuance as to defendants Westminster, Madison and Coach has since been filed, and the motions by Madison and Coach are deemed withdrawn. Defendant DaCosta Landscaping Contractors Corporation cross-moves for summary judgment pursuant to CPLR 3212. Plaintiff and defendant the City of New York ("City") oppose DaCosta's cross-motion. City also cross-moves for summary judgment pursuant to

CPLR 3212. Plaintiff opposes City's motion.

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]).

DaCosta claims it did no work in the subject tree well, left no plywood, and did not cause or create the condition on which plaintiff claims he fell. DaCosta, in support of its cross-motion, submits the following exhibits: (1) the summons and complaint; (2) its answer; (3) the bill of particulars; (4) the deposition transcript of plaintiff; and (5) an incomplete copy of the deposition transcript of Fatima DeCarvalho-Gianni, corporate secretary for DaCosta (the transcript is missing various pages).

DaCosta demonstrates that it was issued a City permit to work on the block where plaintiff's accident occurred, but that work did not include the tree well where plaintiff fell. Further, DaCosta argues, it did not begin any work at all on that block until July of 2002, after plaintiff's fall.

Mr. Carvalho, DeCosta's foreman, testified:

> Q: . . . in June of '02 did you receive permits from the Department of Transportation for work to be done on Madison between 85th and 86th Streets?
>
> . . .
>
> A: Yes, okay. That's the permit normally we get to work all over the place.
>
> . . .
>
> Q: Where does this permit say that the work is to be done?
>
> A: It doesn't say where the work has gotta be done . . . the papers that we

have to tell us where the work should be done is from Parks and Recreation . . .
Q: Do you recall where the contract had you doing work?
A: Yes.
Q: Where was that?
A: It was on Madison Avenue. I have it here, a copy of the page of the contract with the Parks Department that lets us know the address . . . it's on Madison. 1161, 1167 and 1171. Those are the addresses that we had to do work.
. . .
Q: Do you recall when you first went to the location to do the work?
A: According to my papers, I went there to do the work on 7/8/02.
. . .
Q: As a foreman were you on that job site every day in which work was done?
A: Yes, every day. (Carvahlo Deposition Pages 6-15).

Ms. DeCarvalho-Gianni also testified:

Q: Where was the work done by your company?
Mr. Borkowski: Are there any records that refresh your recollection?
The Witness: Yes.
Mr. Wartell: You can refer to those.
A: This is a contract book that the City gives us for jobs. These were the only addresses on Madison Avenue between East 85th Street and 86th Street. The listings are 1161, 1167 and 1171. This sheet indicates the work done at that time of those locations on 7/8/02 . . .
. . .
Q: . . . does it state what job is supposed to be done?
A: . . . expand the pit and put granite pavers.
. . .
Q: Do you know if a wooden cover is used on the topsoil?
A: At no time do we use wooden covers . . . (DeCarvalho-Gianni Deposition Pages 9-11).

Plaintiff, in opposition, submits (1) a "street opening permit" issued to DaCosta valid from June 5, 2002 through September 3, 2002; (2) a "material and labor record" dated July 8, 2002 and a "daily report-site listing attachment" also dated July 8, 2002; (3) the deposition transcript of Jose Carvalho, Foreman employed by DaCosta; and (4) a letter sent by Selective Insurance, DaCosta's insurer, to attorneys for Steven Kosoff, regarding the claim arising from Kosoff's fall.

Plaintiff urges that the insurer's letter raises issues of fact in that it admits: "[p]er our insured records they did start a job in Manhattan (MG 102M) on June 3, 2002, installing tree guards." However, the letter goes on to explain that the work done in the location where plaintiff fell occurred in front of 1171 Madison Avenue and not 1149 Madison Avenue.

City, in support of its cross-motion and in opposition to DaCosta's cross-motion, submits the following items : (1) plaintiff's deposition transcript; (2) the street opening permit issued to DaCosta; (3) DaCosta's supplemental response to plaintiff's notice of discovery and inspection (D&I"); (4) a computer printout titled "Mayor's Community Assistance Unit"; (5) the deposition transcript of William Steyer, Director of Forestry for the New York City Department of Parks and Recreation; a certificate of occupancy for 1145-1159 Madison Avenue; and (6) a New York City Department of Buildings printout titled "Property Profile Overview" for 1145-1159 Madison Avenue.

City first argues that discovery is not complete, that is has never received the complete contract between it and DaCosta, and therefore, summary judgment is premature.

CPLR 3212(f) states:

> Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion . . .

Denial of a summary judgment motion pursuant to 3212(f) is warranted only when documents which are in the *exclusive control* of the opposing party are not disclosed. (*American Home Assurance Co. v. Amerford Int'l Corp.*, 200 A.D.2d 472 [1st Dept. 1994]). Here, City claims that it is awaiting a contract which it was also a

party to. It gives no explanation why it has to rely on DaCosta to produce the contract.

City argues also, that despite the testimony of DaCosta's foreman and Ms. DeCarvalho-Gianni, who searched DaCosta's records, there are issues of fact as to whether or not DaCosta did additional work in the area.

DaCosta submits evidence that it did not do work on a tree well in front of 1149 Madison Avenue. Further, it has shown that it did not do any work on the block between 85th and 86th Streets until July 8, 2002. It is incumbent upon plaintiff and/or City to lay bare their proof, by proof in admissible form, to affirmatively show that DaCosta did work at the tree well in question. That DaCosta worked *somewhere* in Manhattan before or on the date of plaintiff's accident is insufficient.

City, in support of its cross-motion seeking dismissal of the claims as against it, claims that the defect plaintiff allegedly tripped over is trivial, and thus, does not constitute a trap or nuisance. It points to plaintiff's own testimony:

> Q: What did you see at that time?
> A: I saw that by where there was a tree planting, there was wood added to fill the dirt areas and it was fractional. I'm estimating three-eighths to a half-inch lower than the height of the cement sidewalk.
> Q: I'm sorry, what was the difference in height?
> A: Maybe, approximately a half-inch, I guess, is fair to say. (Kosoff Deposition, Pages 24-25).

Plaintiff argues that City bases its motion entirely on the description of the defect, rather than all of the evidence available. Plaintiff submits eight color photocopies of photographs of the alleged defect and argues that they show a "clear irregularity."

Whether a dangerous condition exists on the property of another so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury. (*Trincere v. County of Suffolk*, 90 N.Y.2d 976[1997]). There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of the premises and even a trivial defect may constitute a snare or trap. While a gradual, shallow depression is generally regarded as trivial, the presence of an edge which poses a tripping hazard

renders the defect nontrivial. (*Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165[1st Dept. 2000]). Here, the photographs of the alleged defect show some height differential, a delineated edge and a non-gradual drop. Thus, for the purposes of this motion, plaintiff has shown that the defect is non-trivial.

Wherefore it is hereby

ORDERED that defendant's cross-motion for summary judgment is granted and the complaint is hereby severed and dismissed as against DaCosta Landscaping Contractors Corporation, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

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

DATED: December 18, 2007

EILEEN A. RAKOWER, J.S.C