

Turner-Bent v New York City Tr. Auth.

2008 NY Slip Op 30102(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 0103985/2005

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

TURNER-BENT, ELAINE

INDEX No. 103985/05

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 003

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2+3

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

FILED
JAN 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/3/08

Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
ELAINE TURNER-BENT,

Plaintiff,

-against-

Index No. 103985/05

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY AND CONSOLIDATED EDISON
COMPANY OF NEW YORK,

Defendants.

-----X

DONNA MILLS, J.:

The defendant Consolidated Edison Company of New York (Con Edison) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims.

This is an action to recover damages for personal injuries suffered by the plaintiff Elaine Turner-Bent (Turner-Bent), when, as she was taking her first step off of a New York City Transit Authority (NYCTA) bus, she tripped and fell on a defect in the roadway in front of 1486 Lexington Avenue, in Manhattan. The alleged defect is a Con Edison manhole cover that is not level with the surrounding grade.

In support of its motion, Con Edison argues that there is no evidence that it performed any work at the accident location.

In opposition to the motion, the plaintiff Turner-Bent argues that she tripped over a defective Con Edison manhole cover. It is argued that Con Edison made special use of the roadway, and that it had a duty to maintain the manhole. Turner-Bent submits photographs of the manhole bearing the legend "Con Edison" stamped on the manhole.

Also in opposition to the motion, the co-defendant NYCTA argues that the manhole covers a Con Edison box nine or 10 feet from the curb, the precise location of the trip and fall. In addition, the NYCTA submits the transcript of a stipulation entered into by a Con Edison attorney at Turner-Bent's deposition, agreeing that "Con Edison owns and operates (the manhole) and has a duty to maintain it."

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action even where the facts are uncontradicted (Ugarriza v Schmieder, 46 NY2d 471 [1979]).

Con Edison, fails to cite the controlling statute, the Highway Rules governing underground street access covers, transformer vault covers and gratings, 34 RCNY § 2-07 (b) (1), which provides:

Maintenance requirements. (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware.

The movant Con Edison fails to tender evidentiary proof in admissible form so as to establish its defense sufficiently to warrant the court as a matter of law to direct judgment in its favor. Instead, Con Edison offers only an unsubstantiated and conclusory affirmation of its

counsel, who states that it did not do any work at the situs of the trip and fall. The imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the property. Here, the photographs, Con Edison's stipulation, and the controlling statute all demonstrate a factual issue as to whether Con Edison's use of the roadway was a special use. The duty to maintain the area of special use runs with the land and is not dependent upon a finding that Con Edison actually repaired the manhole (Trustees of Vil. of Canandaigua v Foster, 156 NY 354 [1898]; Tyree v Seneca Center-Home Attendant Program, Inc., 260 AD2d 297 [1st Dept 1999]; Karr v City of New York, 161 AD2d 449 [1st Dept 1990]; Santorelli v City of New York, 77 AD2d 825 [1st Dept 1980]). Thus, it is a question whether Con Edison may be held liable for the injuries caused by the alleged dangerous, or defective condition of the roadway.

Accordingly, it is

ORDERED that the motion is denied.

Dated: 1/3/08

ENTER:

[Signature]

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
JAN 15 2008
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NEW YORK