

Moore v City of New York

2008 NY Slip Op 30123(U)

January 10, 2008

Supreme Court, New York County

Docket Number: 0112732/2004

Judge: Eileen A. Rakower

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

PRESENT: _____

PART S

Index Number : 112732/2004

MOORE, TERESA

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO.

112732/04

MOTION DATE

MOTION SEQ. NO.

005

MOTION CAL. NO.

is motion to/for _____

PAPERS NUMBERED

1

2, 3, 4, 5, 6, 7

~~8, 9, 10, 11, 12, 13, 14, 15, 16, 17~~

8

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No (2)

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

FILED

JAN 17 2008

NEW YORK

COUNTY CLERK'S OFFICE

Dated: 1/14/08



HON. EILEEN A. RAKOWER

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
TERESA MOORE and LEROY MOORE,

Plaintiffs,

- against -

Index No.
112732/04
**ORDER AND
DECISION**
Mot. Seq.:
004&005

THE CITY OF NEW YORK, THE NEW YORK
COLLEGE OF PODIATRIC MEDICINE,
MARRIOT INTERNATIONAL, INC. CHINA
CONSTRUCTION AMERICA, INC. and 1800
PARK AVE LLC,

Defendants.

-----X
EILEEN A. RAKOWER, J.S.C.

FILED
JAN 17 2008
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff, Teresa Moore, tripped and fell over a hose which was stretched across the southerly sidewalk on East 125th Street between Madison Avenue and Park Avenue New York, New York on January 8, 2004. Plaintiff Leroy Moore brings a derivative action. Defendant the New York College of Podiatric Medicine ("College") moves for summary judgment pursuant to CPLR 3212. Defendants the City of New York ("City") and 1800 Park Avenue LLC ("Park Avenue") cross-move for summary judgment. Defendant China Construction America, Inc. ("CCA") moves by separate motion for summary judgment. Plaintiff and City both oppose College and CCA's motions and Park Avenue's cross-motion. Plaintiff, CCA, College and Park Avenue each oppose City's cross-motion. Defendant Marriot International, Inc. does not submit papers.

College is the owner of the building and vacant lot, which is used for student and faculty parking, adjacent to the sidewalk where Ms. Moore fell. Sometime in 2001, College and Park Avenue entered into a "ground lease" involving the vacant

lot for Park Avenue's development of a mixed use project which was to be called "Harlem Park." Park Avenue, on October 23, 2003, entered into a management agreement with Marriot . CCA, by a contract dated November 12, 2003, was hired by Park Avenue to act as the construction manager for the project.

The following exhibits are appended to the various motions, cross-motions, opposition papers and replies: the deposition transcript of Ms. Moore; the pleadings; the deposition transcript of Joel Sturm, Vice President of Administration for the College; the deposition transcript of Michael Caridi, Part Owner of Park Avenue; the deposition transcript of Jessie Luis, Vice President of Marriot; Jeffrey Hass, Vice President of CCA; the affidavits of Joel Sturm; Michael Caridi, Jeffrey Hass and Jessie Luis; the notice of claim; a contract between CCA and Park Avenue dated November 12, 2003; two color photocopies of photographs depicting the location of plaintiff's accident and the parking lot adjacent to the college; an "Individual Time Summary" sheet by CCA for the invoice period of 1/1/04 to 1/31/04; a "preliminary climatological data" sheet for January, 2004; an "ambulance call report" for the date and location of plaintiff's injury; the deposition transcript of Patrick S. Dellorusso, responding EMS worker; a copy of the note of issue; the deposition transcript of Yolanda Vasquez, a construction laborer for the Department of Environmental Protection ("DEP"); the deposition transcript of Cynthia Howard, record searcher for the New York City Department ("DOT") of Transportation Litigation Support Unit; a response sheet to a search request for the date of accident including street opening permits issued and complaints/repair orders; a big apple pothole map; and "water records" pertaining to the accident location.

Ms. Moore testifies that the hose she tripped over was attached to a fire hydrant closest to the street across from the parking lot. The lot itself is surrounded by a wall that is partially chain link and partially brick at the bottom. It is covered by painted blue pieces of plywood except for two chain link "gates." The gate closest to where Ms. Moore fell was kept locked and College security had the keys. The other gate had an electronic lock and needed to be buzzed open by a college security guard who had his booth in the parking lot.

College, in support of its motion, argues that it did not hire anyone to clean or hose down the sidewalk on the date of Ms. Moore's accident and that plaintiffs' allegations are merely speculative. CCA and 1800 adopt College's argument. According to Ms. Moore's own testimony, the hose was attached to a fire hydrant and

was being used by two City employees in order to wash down the sidewalk. Plaintiff testifies as to her observations on the date of the accident:

Q: . . . I believe you said that when you were first walking down the street you saw one of the workers hosing, using the hose to wash the sidewalk?

A: I was seeing they were like cleaning the sidewalk, doing some cleaning, I guess.

Q: Before you got to the spot that you fell, they had stopped washing the sidewalk?

A: They still were doing some, you know, taking a push broom, you know, like cleaning the sidewalk and stuff. (Moore Deposition, Page 84).

...

Q: Was the person washing the sidewalk using the hose at the time the accident happened?

A: No, but I could see that water was on the sidewalk . . . (Id. at Page 21).

...

Q: . . . did you see the end of the hose, the nozzle where the water comes out, did you see it?

A: No. (Id. at Page 87).

Plaintiff describes the men:

Q: Were these men wearing any kind of uniform?

A: No, no uniforms. They just had work boots, a vest, like a hat and on the back it said city. That's what I remember, it said city.

Q: It just said city or did it say—

A: It just said city. (Plaintiff deposition, Page 20).

...

Q: The clothing that they had on that said city, was the vest or their shirts, which article of clothing?

A: It was in the back of the vests and it was yellow and it said city.

Q: Was it like a bright yellow?

A: Yeah, like a bright yellow. (Id. at Page 44).

Plaintiff describes the location of the hose:

Q: As best you could, could you describe the location or shape that the hose ran in across the sidewalk . . . ?

A: It was hooked to the fire hydrant and it went all the way, like from the fire hydrant to inside. I think it was coming from inside the building . . . it was like connected to somewhere . . . (Id. at Page 28).

...

Q: . . . there seems to be a wall and a brick wall over here on the right?

A: Yes.

Q: Did the hose go over this wall or through this wall in any way?

A: It was through, through, inside.

Q: So it went through the wall into an area?

A: Uh-huh

Q: There seems to be a gate here, did it go through that area or somewhere else?

...

A: All I saw was it was hooked up to the fire hydrant and inside there, but I don't know. (Id. at Page 29&30).

College argues that construction had not commenced in the vacant lot at the time of plaintiff's accident. The only activity that was done in preparation for construction was the drilling of "test pits" for soil samples sometime in 2003. Michael Caridi testifies about the drilling:

Q: What did those - - I'm sorry, did you say test pits?

A: Yes.

Q: What did those test pits entail to the best of your understanding?

A: Basically a drilling within the parking lot structure to ascertain the makeup of the below-grade surface. (Caridi Deposition, Pages 18-19).

...

Q: What were the results of the test pit drilling?

A: There was some environmental contaminants, there was some water, there was various forms of rubble beneath the surface.

Q: With respect to the water under the surface, was there any methods employed to to remove the water?

A: Not at that time.

Q: Did there come a point in time when methods were used to remove that water?

A: Not at present, no.

Q: Sorry?

A: Not at present.

Q: I'm sorry, I mean - -

A: The physical construction has not started so thereby there's been no excavation or what have you to physically start that process. So this was more of an exploratory operation to see what the makeup of the underlying conditions are. (Id. at Page 21&22).

Plaintiffs, in opposition, argue that there are questions of fact as to who employed the men who were using the hose. Plaintiff points to the testimony of Patrick S. Dellorusso, the EMS worker who arrived on the scene:

Q: Your first observations was of Ms. Moore sitting in a chair?

A: Yes . . . just to the west of her was a red rubber hose that was extended from the site, the construction site, out into the - out onto the curb. I don't recall if that hose was attached to the fire hydrant or not but I do recall it was headed out toward the street. (Dellorusso Deposition, Page 24).

Mr. Dellorusso testifies as to his observations regarding the two men present at the scene:

Q: I want to just stay on that reflective vest for a moment. Did the reflective say anything on it?

A: I don't recall if it said anything on it . . . I do recall the vest being blue and yellow. (Id. at Page 37).

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]).

Here, College, CCA and 1800 submit proof in the form of deposition testimony and affidavits showing that they did not hire anyone to clean the sidewalk and that no work was performed in the vacant lot on or before the date of Ms. Moore's accident which would require the use of a hose. In opposition, plaintiffs submit the deposition testimony of both plaintiff and Mr. Dellorusso who state several times that they both saw the hose going into or coming out of the vacant lot adjacent to where Ms. Moore fell. Mr. Dellorusso also testifies that the lot appeared to be a construction site and that he saw activity behind the fence.

Whether Ms. Moore's or Mr. Dellorusso's testimony is credible is for a jury to determine. It is well settled that issues of witness credibility are not properly resolved in a motion for summary judgment (*Santos v. Tempco Services Industry, Inc.*, 295 A.D.2d 218 [1st Dept. 2002]) and the assessment of the value of a witness's testimony constitutes an issue for resolution by the trier of fact (*Dollas v. W.R. Grace and Co.*, 225 A.D.2d 319 [1st Dept. 1996]). Further, the motion court's proper role is merely issue finding, not issue determination and the court must draw all reasonable inferences in the opposing party's favor. (*Rose v. Da Ecib USA*, 259 A.D.2d 258 [1st Dept. 1999]).

City, in support of its cross-motion, argues that there is no credible evidence indicating that it performed any work in the area or that it had prior written notice of the defective condition. Initially, prior written notice was not required in this case as an exception to New York City Administrative Code §7-201(c)(2) exists for hazards caused or created by the City. Plaintiffs allege that Ms. Moore tripped over a hose on the sidewalk which was allegedly placed there by City workers. Thus, plaintiff need not prove prior written notice. (*Kiernan v. Thompson*, 73 N.Y.2d 840 [1988]).

Neither has City shown that no issues exist as to its possible involvement in Ms. Moore's accident. The City's Department of Environmental Protection ("DEP") witness testified that the "fire hydrant maintenance" workers were usually dispatched in twos and they wore yellow reflective vests with the words "NYC DEP" written on the back. Plaintiff has testified that the men she saw cleaning the street were wearing vests that said "City" on the back. Mr. Dellorusso testified that the two men present

at the accident scene were wearing reflective vests that were yellow and blue. Thus, there are issues of fact as to whether it was City employees who were using the hose that caused Ms. Moore's accident.

Wherefore it is hereby

ORDERED that defendant the New York College of Podiatric Medicine's motion for summary judgment is denied; and it is further

ORDERED that defendant China Construction America, Inc's motion for summary judgment is denied; and it is further

ORDERED that defendant 1800 Park Avenue LLC's cross-motion for summary judgment is denied; and it is further

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

DATED: January 10, 2008



EILEEN A. RAKOWER, J.S.C.

FILED
JAN 17 2008
NEW YORK
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