

Camacho v City of New York

2008 NY Slip Op 30472(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0115219/2003

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

CAMACHO, BRIGIDA

INDEX NO. 118219/03

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 006

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

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

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

1, 2 + 3

Answering Affidavits- Exhibits _____

4

Replying Affidavits _____

5, 6, 7

CROSS-MOTION: YES NO

FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 2/14/08

D. 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
BRIGIDA CAMACHO,

Plaintiffs,

Index No.
118219/03

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, JOHN P. PICONE,
INC. and POWER CONCRETE CO. INC.,

Defendants.

-----X
DONNA MILLS, J.

FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Nos. 006 and 007 are consolidated for disposition.

In Motion Sequence No. 006, defendant Power Concrete Co. Inc. (Power) moves for summary judgment dismissing the complaint and all cross claims brought against it. Defendant John P. Picone, Inc. (Picone) cross-moves for summary judgment dismissing the complaint and all cross claims brought against it. Defendant The City of New York (City) cross-moves for summary judgment dismissing the complaint and all cross claims brought against it. In Motion Sequence No. 007, plaintiff moves to compel City, defendant The New York City Transit Authority (NYCTA) and defendant Metropolitan Transportation Authority (MTA) to provide discovery demanded by plaintiff, and to extend her time to file her Note of Issue and Statement of Readiness.

In this personal injury action, plaintiff alleges that on May 2, 2003, she suffered injuries as a result of falling on the eastern sidewalk of Broadway between West 173rd and 174th Street, 15 feet from the M5 and M100 bus stop sign, in New York City.

Plaintiff commenced a suit against Power, claiming that Power was negligent in its repair

of the sidewalk at the above location. Power moves for summary judgment on the ground that it did not create the condition on the sidewalk that led to plaintiff's fall. Power claims to have had an agreement with RLI Insurance, a bonding company, to complete work under a contract issued by City to an entity known as Thailer Associates Ltd. (Thailer). Thailer defaulted under its contract and the bonding contract assumed Thailer's contract. Power states that it had received a work permit from City that was issued on September 3, 2002 and was valid from September 3, 2002 to December 15, 2002. Power was to perform major reconstruction on the sidewalk on Broadway between 173rd and 174th Street. Subsequently, Power constructed new concrete slabs in that area. Plaintiff alleges that she fell as a result of slipping on an asphalt patch on the sidewalk. Power denies using asphalt as backfill to level off the sidewalk before pouring concrete to create the sidewalk. Power states that it was paid in full for its labor.

Power claims that plaintiff is merely speculating that Power created a defect by negligently performing repairs that caused her accident. Power asserts that its job was to replace certain sidewalk areas, not create asphalt patches.

Picone cross-moves for summary judgment, claiming that it was under contract with the New York City Department of Environmental Protection (DEP) from June 1, 2001 to April 10, 2002. Picone denies that it did any repair work on Broadway between 173rd and 174th Street. Picone submits a copy of a City permit issued to it for the month of March 2002. Picone was to do work at the location of plaintiff's accident. Picone argues that even if it did do work at that location, the entire sidewalk was redone six months later by Power and inspected and approved by City.

City cross-moves for summary judgment, arguing that the asphalt patch did not result

from Power's work. City states that its only involvement with the sidewalk replacement work was its relationship with Power. City denies performing and/or commissioning any construction work at the location of the accident at the time of the accident, and denies having prior written notice of the defect.

Plaintiff opposes the motion and cross motions. She submits photographs of the sidewalk area, claiming that the condition was "man-made." She states that defendants have not submitted any testimony from anyone with any personal knowledge of the issues being disputed.

Moreover, deposition testimony from City executive Robert Schenck revealed that a punch list was issued by City upon completion of Power's reconstruction work. The punch list is supposed to show any post construction changes or alterations that were performed on the sidewalk.

Plaintiff asserts that the punch list has never been provided despite her discovery demand for it. She states that without the punch list it is impossible to determine not only the final condition of the sidewalk but whether Power actually had to make a repair and alteration, after the sidewalk replacement, which would have made the defect complained of herein.

Plaintiff states that City, in its cross motion, fails to submit any affidavit or search results demonstrating the absence of prior written notice. She submits a copy of a recent Big Apple Pothole Map, which shows the triangular area of the sidewalk at bar and notes both extended areas of cracked and uneven sidewalk at this location. According to plaintiff, this raises an issue of fact as to whether City had prior written notice.

In reply, Power states that there is insufficient proof that it was responsible for creating the asphalt patch on the sidewalk at bar. Picone replies that there is no proof that it had done any work at the subject location, relying on a letter from the DEP, stating that the department had no

knowledge as to whether Picone did any work there. City replies that it never received prior notice of a sidewalk defect, pursuant to section 7-201 (c) (2) of the City of New York Administrative Code (Code). The map submitted by plaintiff is dated October 25, 2002. City asserts that the map was issued prior to the date of completion of reconstruction by Power, which was mid-November 2002, and is not relevant to this case.

The court shall first determine City's cross motion. Section 7-201 (c) of the Code limits City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location. Prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against City. See Katz v City of New York, 87 NY2d 241 (1995). Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon. See Weinreb v City of New York, 193 AD2d 596 (2^d Dept 1993).

City states that the map provided by plaintiff depicts the sidewalk at bar as it looked on October 25, 2002, but the work performed by Power was completed in November 2002. According to deposition testimony from Jose Casimiro, vice president of Power, Power completed its work on November 20, 2002 at the latest. Plaintiff does not dispute this testimony in her papers. A subsequent map would have superceded this map. Plaintiff's failure to provide a subsequent map that was closer in time to the alleged defect precludes her from bringing this action against City. There is no evidence that City ever had prior written notice of the asphalt patches on the sidewalk.

As for Power and Picone, plaintiff has not provided an issue of fact as to whether these

defendants were liable for creating the defect on the subject sidewalk. Power and Picone have provided evidence that shows that they were not responsible for the asphalt patch on the sidewalk.

Plaintiff moves for an order compelling City, NYCTA and MTA to respond to a discovery demand for the punch list for the first contract of which Thailer was a party, as testified by Robert Schenck at a deposition held on May 11, 2007. Plaintiff seeks an extension of time in which to file a Note of Issue.

In response, City asserts that the document sought by plaintiff has already been disclosed and marked as "Plaintiff's Exhibit 13" at the February 2, 2007 deposition of another City executive, Kalpesh Patel. A copy of the punch list is submitted by City.

It appears that plaintiff has already received the punch list. At the deposition of Schenck, plaintiff's counsel provided Schenck with this punch list. Schenck identified the punch list as the one related to the first contract under Thailer.

Plaintiff's motion is denied. The punch list was already in the possession of plaintiff's counsel.

Accordingly, it is

ORDERED that Power Concrete Co. Inc.'s motion for summary judgment, John P. Picone Inc.'s cross motion for summary judgment and City of New York's cross motion for summary judgment are granted and the complaint is severed and dismissed as against these defendants, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

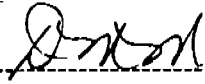
ORDERED that plaintiff's motion to compel discovery and extend time to file a Note of

Issue is denied; and it is further

ORDERED that the remainder of this action shall continue.

DATED: 2/14/08

ENTER



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
FEB 22 2008
NEW YORK
COUNTY CLERK'S OFFICE