

Milling v City of New York

2008 NY Slip Op 30707(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0122470/2002

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN
Justice

PART 52

MILLING

INDEX NO. 122470/02

MOTION DATE 2

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

CITY, et al.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

MAR 12 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/12/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
SANDRA MILLING and ELLIOTT MILLING,

Plaintiff,

against

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
TULLY CONSTRUCTION CO. INC., GRACE
INDUSTRIES, INC., LIRO CONSULTING
ENGINEERING, P.C., and NICO ASPHALT, INC.,
Defendants.

Index Number 122470/2002
Mot. Seq. No. 004

DECISION AND ORDER

-----X
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third-Party Plaintiff,

against

NICO ASPHALT, INC.,
Third-Party Defendant.

T.P. Index No. 591049/2004

For the Plaintiff:

Michael S. Leyden, Esq.
Goldberg & Carlton, PLLC
31 East 32nd Street, 4th Fl.
New York NY 10016
(212) 683-9559

For Defendant Grace Industries:

Vincent J. Battista, Esq.
Torino & Bernstein, PC
200 Old Country Road, Suite 220
Mineola NY 11501
(516) 747-4301

For Defendant Liro Consulting:

Mark Volpi, Esq.
Havkins Rosenfeld Ritzert & Varriale
LLP
114 Old Country Road, Suite 300
Mineola NY 11501
(516) 620-1700

For City of New York:

Michael A. Cardozo, Esq.
Corporation Counsel of City of NY
100 Church Street
New York NY 10007
(212) 788-0303

Papers considered in review of this motion for summary judgment :

Papers	Numbered
Notice of Motion	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Reply Affirmation.....	<u>3</u>

FILED
MAR 12 2008
NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

Defendant Grace Industries, Inc., moves for summary judgment and dismissal of the complaint and all cross-claims as against it pursuant to CPLR 3212. For the reasons which

follow, the motion is denied.

Background

Plaintiff alleges that on May 14, 2002, she tripped and fell on an uneven area of the roadway jutting from the abutting curb at Battery Place, approximately 48 feet of Greenwich Street, New York, New York, and suffered breaks of both left and right ankles (Not. of Mot. Ex. A, Ver. Am. Complaint; Ex. C, Ver. Bill of Partic.). She describes the area as having “a concrete lip that was jutting out of the curb” (Not. of Mot. Ex. G, S. Milling EBT 26:18-19).

In May 2002, defendant Tully Construction was involved in milling and paving of streets in lower Manhattan pursuant to a contract, including Battery Place and Greenwich Street (Not. of Mot. Ex. J, Tim Moyer EBT [hereinafter Moyer EBT], 9:25, 10:2, 11:18-19, 13:2-5). The contract was between the City of New York and the joint venture of Tully and Grace Industries (Not. of Mot. Ex. K, Chung EBT [11/16/04] [hereinafter Chung EBT [11/16/04]], 11:4-15). Both Tully and Grace provided milling and paving equipment, and at some locations, they both worked while at others, one or the other company would work (Moyer EBT 16:8-13, 38:18-25). The milling work was done overnight (Not. of Mot. Ex. L, Chung EBT [8/23/06] [hereinafter Chung EBT [8/23/06]], 103:3-4). According to the City’s witness, Ewan Chung, Engineer in Charge with the Department of Design and Construction, milling involves removing a certain depth of asphalt, usually an inch and a half, with a large milling machine, resulting in a road surface one and a half or two inches below the existing road surface, and then new hot asphalt is deposited onto the surface and worked with a paving machine to resurface the roadway (Chung EBT [11/16/04] 28:20-25, 29:2-8; Chung EBT [8/23/06] 9:10-13). The grinding machine that removes the asphalt is built in such a manner that it leaves behind a 10-12 inch strip, requiring a

second machine to be used at some point afterwards to rip up the strip (Moyer EBT 28:8-11, 17-24).¹

Plaintiff Sandra Milling and her husband commenced their lawsuit on February 13, 2004 (Not. of Mot. Ex. A, Suppl. Summons & Am. Ver. Compl). A Note of Issue was filed on May 23, 2007. Summary judgment has previously been granted in favor of defendants Con Edison and Nico Asphalt, and denied as to the City of New York and Tully Construction (Dec. & Ord., Mot. Seq. No. 002 dated Oct. 24, 2007 and entered Oct. 30, 2007). By Amended Decision and Order of today's date, this court's prior short form order on motion sequence 003 is vacated and summary judgment is granted in favor of Liro Consulting Engineering P.C. (Dec. & Ord., Mot. Seq. No. 003 dated March 12, 2008). At oral argument, the court reserved decision on Grace Industries' timely motion for summary judgment and dismissal of the complaint and all cross-claims as against it (mot. seq. 004). That motion is now denied.

Legal Analysis

Summary judgment is appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]).

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that

¹This work is typically done either with a jackhammer or a payloader (Chung EBT [8/23/06] 75:13-14).

defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]).

The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 (2002)). It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy" (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], *aff'd* 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219, 228 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053, 1055 [1983]). The scope of any such duty of care varies with the foreseeability of the possible harm (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d at 108, citing *Pulka v Edelman*, 40 NY2d 781, 785-786 [1976]).

Grace Industries argues that as a contractor with the City of New York, it had no duty to plaintiff, a third party, citing among others, *Church ex rel. Smith v Callahan Indus. Inc.*, 99 NY2d 104 (2002). In *Church*, a subcontractor who agreed to install a guiderail system along a portion of the New York State Thruway but did not complete the installation, was held not to have had a duty of care to the infant plaintiff who was severely injured when the driver of the vehicle in which he was riding fell asleep and the car veered off the road at a location where the guiderails were missing. The Court noted that the subcontractor had no preexisting duty imposed by law to install guardrailing at that part of the Thruway, and that its breach of contract with the general contractor could not by itself create a duty to the plaintiff.

It is well-established that an independent contractor does not owe a duty of care to a non-contracting third party unless the contractor either creates or increases an unreasonable risk of harm; or where the injured third party reasonably relied upon the contractor's continuing performance arising out of a contractual obligation, or where the contractor has entirely displaced the other party's duty to maintain the premises safely (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept. 2004]). *Church ex rel. Smith* discussed these three exceptions and why none of them applied to the facts in that case (99 NY2d at 112). Of particular note is the Court's discussion of the first exception. *Church* notes that there was no evidence that the subcontractor's incomplete work either created or increased the risk of the vehicle diverging from the road beyond the risk already existing before the contract was entered into. In other words, the failure to install the additional length of guiderail did not make the road safer, but also did not make it less safe than before the project was commenced. (99 NY2d at 112).

In contrast, here, the work undertaken by Grace and co-defendant Tully of milling the street surfaces, resulted in streets that were temporarily no longer level and included the "lip" testified to by plaintiff which was the result of the milling machinery's inability to cut away the entire street surface. The process of milling made the street surface less safe than before the project was undertaken. Therefore, Grace falls into the exception to the general rule and under the law, it had a duty to plaintiff.

Grace argues that it did not breach any duty as there is no testimony or evidence to show that the milling work was done improperly, citing *Lacy v New York City Hous. Auth.*, 4 AD3d 455 (2d Dept. 2004). It argues that street repair is a benefit to society as a whole, and that any risk posed by the "lip" formed between the milled and unmilled road surface is a reasonable risk

undertaken by society in order to facilitate necessary road repairs. It also argues that it had no power to close the roadway from pedestrians until the work was completed.

It is well-established that a contractor who performs work on a public way has a duty of care to those who use that public way (*Wright v Tudor City Twelfth Unit, Inc.*, 276 NY 303, 307 [1937]; *Soto v Anron Enterprises*, 293 AD2d 395, 395 [1st Dept. 2002]; *Tytell v Battery Beer Distrib.*, 202 AD2d 226, 227 [1st Dept. 1994]). It is also well-established that even where a hazard is open and obvious, as defendant argues, the party is not relieved of its duty to maintain the premises in a reasonably safe condition (*Garrido v City of N.Y.*, 9 AD3d 267, 268 [1st Dept. 2004]). The issue of whether a condition is in fact open and obvious is usually a question for the trier of fact unless it is one that could not be overlooked by any observer reasonably using his or her ordinary senses (*Garrido*, at 268, citing *Tagle v Jakob*, 97 NY2d 165).

Here, it cannot be said as a matter of law that Grace, as part of a joint enterprise with Tully Construction, together the contractors of the milling/resurfacing project, had no duty of care to the public traversing the streets (*see, Rothstein v State*, 284 AD2d 130, 131 [1st Dept. 2001]). Moreover, whether the “lip” was open and obvious remains a question of fact. Plaintiff’s failure to observe the condition will go to the question of comparative fault but does not resolve the issue of whether Grace breached its duty of care (*see, Centeno v Regine’s Originals, Inc.*, 5 AD3d 210, 211 [1st Dept. 2004]).

Accordingly, for the above-stated reasons, and as well as for the reasons previously given the for the denial of Grace’s joint partner, Tully’s motion for summary judgment, the instant motion for summary judgment and dismissal is denied. It is

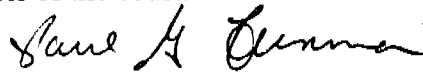
ORDERED that the motion by Grace Industries, Inc. for summary judgment and

dismissal of the complaint and cross-claims as against it is denied;

ORDERED that the remaining parties in this action (plaintiffs, The City of New York, Tully Construction Co., Inc. and Grace Industries, Inc.) are to appear as previously scheduled for jury selection before J.H.O. Ira Gammerman on March 17, 2008 in Part 27 of Supreme Court, New York County, 60 Centre Street, New York, NY.

This constitutes the decision and order of the court.

Dated: March 12, 2008
New York, New York



J.S.C.

FILED
MAR 12 2008
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