

Fulco v Burger King Corp.

2008 NY Slip Op 31217(U)

April 17, 2008

Supreme Court, Nassau County

Docket Number: 6036-05/

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 11
ANTOINETTE FULCO and MARIO FULCO,

INDEX NO. 16036/05

Plaintiffs,

-against-

Motion Date: 2/19/08

Sequence No. 004, 005,
006, 007

BURGER KING CORPORATION D/B/A
BURGER KING RESTAURANTS, BURCON
PROPERTIES, INC., FULL SERVICE
CONTRACTING, INC., OPAL CONSTRUCTION
CORP. and TERRY GALLAGHER, INC.,

Defendants.

-----X

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Upon the foregoing papers, it is ordered that the motion by defendant Burger King for an order dismissing the cross-claims of defendant Full Service is granted.

The cross-motion by defendant Full Service Contracting, Inc. for an order granting summary judgment dismissing plaintiff's Complaint against it is denied. The branch of defendant Full Service's cross-motion for an order directing co-defendant Burger King to indemnify it is denied.

The motion by defendant Opal Construction for an order granting summary judgment dismissing plaintiff's Complaint and all cross-claims against it is denied.

The motion by defendant Terry Gallagher, Inc. For an order granting summary judgment dismissing plaintiff's Complaint and all cross-claims against it is denied.

In this trip-and-fall negligence action plaintiff seeks to recover damages for injuries allegedly sustained from a slip and fall in a Burger King parking lot on September 14, 2005 on Jericho Turnpike in Garden City Park, N.Y.

Defendant Burger King is the lessee and defendant Burcon Properties is the landlord and manager of the premises on which an underground water main project was conducted five years before the accident date of September 14, 2005. Defendant Burger King, defendant Burcon and defendant Full Service entered into a written contract to repair an underground water main. Defendant Full Service, as General Contractor, entered into an agreement with defendant Opal Construction Corp. ("Opal") and defendant Terry Gallagher for the construction work. The alleged negligence involves the pavement unevenness caused by the refilling of the water main trenches and re-paving thereof.

On May 18, 2006 plaintiff entered into a Settlement Agreement and Release with Burger King. Plaintiff Ann Fulco's injuries, as listed in the Bill of Particulars, include fractured femoral neck and total hip replacement and left shoulder derangement, sprain and strain.

In support of this application, defendant Burger King refers to the May 18, 2006 settlement agreement with plaintiff which contained a "hold harmless" clause for any judgment resulting from the incident. Defendants Opal and Gallagher also stipulated to discontinue their cross-claims with prejudice in favor of defendant

Burger King. Defendant Full Service did not voluntarily discontinue their cross-claims against defendant Burger King and is the subject of this motion.

In opposition to Burger King's motion and in support of its motion for summary judgment against Burger King defendant Full Service argues that it hired Opal Construction and Terry Gallagher, Inc. to excavate the parking lot, repair a water main and backfill the excavation in 2000. Accordingly, defendant Full Service had no direct involvement in the actual construction work at the Burger King site. There are allegedly no written contracts between Full Service and Terry Gallagher or Opal Construction for this project.

Defendant Full Service admits to having billed Burger King for the project, asserts that they did not guarantee the work or promise to approve the work. Hence, defendant Full Service opposed the dismissal of the cross-claims for common law indemnification against defendant Burger King.

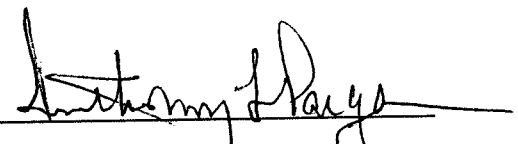
In support of its motion for summary judgment defendant Opal contends that it was hired by defendant Full Service to complete a "full depth asphalt repair" at the Burger King site on May 7, 2000. Defendant Opal cites sworn testimony as to various factors that could have an impact on the repair over the course of the five years between the work and plaintiff's fall in 2005.

In support of its motion for summary judgment, defendant Terry Gallagher, Inc. submits sworn testimony to demonstrate the lack of complaints in the time between the work completion in 2000 and plaintiff's fall in 2005. Furthermore, defendant Terry Gallagher, Inc. explains that its part of the project was limited to a water main replacement which was inspected and approved by the local municipal water authority.

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 demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)). The contentions that defendants' construction work five years before plaintiff's fall is "insufficient, without more, to entitle it to summary judgment" (*King v. County of Nassau*, 262 AD2d 533 (2nd Dept., 1999); *Hayes v. DeMicco Bros.*, 34 AD3d 641 (2nd Dept. 2006)).

Defendants Opal, Full Service and Terry Gallagher have not demonstrated the absence of questions of fact regarding the location of the repair work in relation to where plaintiff allegedly tripped and fell. Responsibility or liability for the trench filling and paving work cannot be discerned from the record before the Court on these motions.

Dated: April 17, 2008.



Anthony J. Parga, J. S. C.

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