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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice PART 5

Index Number : 106461/2004

GRAY, MARIA

VS

CITY OF NEW YORK

Sequence Number : 004

DISMISS

INDEX NO. 106461/04

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered ... is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
JUL 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/7/08

EILEEN A. RAKOWER J.S.C.

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

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MARIE GRAY,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, EMPIRE CITY SUBWAY COMPANY (LIMITED), RCN TELECOM SERVICES, INC. and DACOSTA LANDSCAPING CONTRACTORS, CORP.

Defendants.

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RCN TELECOM SERVICES, INC.

Third-Party Plaintiff,

-against-

FELIX EQUITIES, INC.,

Third-Party Defendant.

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Index No. 106461/04

Decision/ Order

Mot. Seq.: 004&005

Third-Party Index No.: 59099/05

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on a defective curb located in front of 207 Columbus Avenue in the County and State of New York on April 22, 2003. Defendant Dacosta Landscaping Contractors Corp. ("Dacosta") moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes Dacosta's motion. By separate motion, defendant RCN Telecom Services, Inc. ("RCN") also moves for summary judgement. Third-party defendant Felix Equities, Inc. ("Felix") cross-moves for summary judgment. No party opposes either RCN's motion or Felix's cross-motion. Defendants the City of New York, New York City Department of Parks and Recreation ("City"), and Empire City Subway ("ECS") do not submit papers.

It is alleged that this accident occurred when plaintiff started to exit her car and her left foot caught on an area of missing and broken curb; Marie Gray fell forward, sustaining injuries to her ankle, hands, left side of her body and her knee. The curb was immediately adjacent to some granite bricks that were laid in order to fill a tree-well pit. Plaintiff states in her Notice of Claim that the specific defect that caused her fall was located in front of 207 Columbus Avenue, between 69th and 70th Streets. Dacosta is alleged to have performed work in the area. Specifically, Dacosta was in the business of planting trees and/or filling in tree-wells with "pavers." RCN is alleged to have performed work in the subject location. Felix was impleaded by RCN, who seeks indemnification.

Dacosta, in support of its motion, submits: (1) the pleadings; (2) Plaintiff's notice of claim; (3) Plaintiff's 50-h hearing transcript; (4) an excerpt of plaintiff's deposition transcript; (5) the deposition transcript of Fatima DeCarvalho-Gianni, Corporate Secretary for Dacosta and the accompanying exhibits including: a work order sheet, a street opening permit issued August 4, 1999, a work order issued by the City of New York Parks & Recreation ("Parks")dated June 10, 1999, a bid award confirmation dated March 17, 1999, a "Punch List Inspection Report" dated May 5, 2000, and a "Guarantee Punch List Inspection Report" dated May 13, 2002; and six (6) black and white photocopies of photographs of the subject defect. Plaintiff, in opposition, submits her deposition transcript dated February 23, 2007 and seven black and white photocopies of a photograph of the subject defect and location.

Dacosta argues that, pursuant to contracts between it and Parks, it did not perform any work on the tree well adjacent to the alleged defect. At her deposition, Ms. Gianni testifies about work that was performed by Dacosta on Columbus Avenue between 69th and 70th Streets. According to Ms. Gianni and the work order sheet submitted by Dacosta, planting was done on November 19, 1999 and Paving was done on December 30, 1999 in front of 209 Columbus Avenue. Further, Ms. Gianni testifies about an inspection form which shows that any work done by Dacosta was approved by Parks. Upon questioning about the specific tree-well adjacent to the defect, Ms. Gianni re-emphasizes that Dacosta only had permits to perform work in front of 209 Columbus Avenue and that Dacosta never did work on curbs. Further, Ms. Gianni was shown a photograph of the subject tree-well which was surrounded by a black guardrail, and she stated that Dacosta does not place that type of guardrail around its tree-wells. Ms. Gianni did state that the pavers in the photograph shown to her of the subject tree-well were of the same type that Dacosta uses.

Plaintiff, in opposition, argues that there are questions of fact about whether Dacosta negligently installed the "pavers" in the tree well immediately adjacent to the defective curb, thereby causing or creating the subject defect. Plaintiff claims that summary judgment is precluded because Dacosta worked on "three separate tree pits at or near the area in question" and that it "belies common sense" that all three of the pits were installed in front of 209 Columbus Avenue. Plaintiff argues that this fact raises an issue as to whether the tree-well in front of 207 Columbus Avenue was one of the tree pits worked on by Dacosta.

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]).

Plaintiff asserts that Dacosta did work on three tree-wells on Columbus Avenue between 69th and 70th Streets. However, as Ms. Gianni clarifies in her deposition testimony, Dacosta only worked on two tree-wells in front of 209 Columbus Avenue in 1999. She testified regarding the period searched:

> Q: Can you just take me through the first pages . . . and tell me what it says? . . .
> A: On the left-hand side you see a No. 209. That's the address number, 209 Columbus Avenue . . . the one states that there is one tree being planted at that location . . . the third item is granite pavers that were done on 12/30/99. They were 44 square feet. (Gianni Deposition, Pages 15-17).
> . . .
> Q: Looking back at Plaintiff's Exhibit 1, there is a second entry underneath the first entry that we discussed. Can you tell me what that entry is for work?

> A: It's the same address. There were two pits at that particular address of 209 Columbus Avenue. Again, there was a tree planted, a silver linden. It was an existing pit and granite pavement was done. (*Id.* at Page 22-23).
>
> . . .
>
> Q: Is there anything on Plaintiff's Exhibit 1 which would indicate something more specific as to the location of either of these pits beyond just saying that it's in front of 209 Columbus Avenue?
> A: The address is 209 Columbus Avenue.
> Q: Is there anything more specific than that?
> A: That's as specific as they give us when we go to the field. We can only plant at the address that they give us or we don't get paid. (Id. at 23).

Pursuant to Title 19 of the Administrative Code, City, through its Parks department, is liable for the care and maintenance of the City's tree-wells. City is also responsible for defective curb stones. (*Vucetovic v. Epsom Downs, Inc.*, 45 AD3d 28[1st Dept. 2007]). In order to show that Dacosta was liable for her injuries, plaintiff must show that it either created or exacerbated the defect complained of in front of 207 Colombus Avenue. (*Pina v. New York Paving Co., Inc.*, 266 A.D.2d 120[1st Dept. 1999]).

Dacosta has submitted evidence showing that it performed work on two tree-wells in front of 209 Columbus Avenue only, not in front of 207. Plaintiff fails to submit evidence that would raise an issue of fact disputing Dacosta's or providing proof to the contrary. It is well settled that "Mere conclusory assertions, devoid of evidentiary facts, are insufficient to defeat a well-supported summary judgment motion, as is reliance upon surmise, conjecture, or speculation."(internal citations omitted). (*Grullon v. City of New York*, 297 A.D.2d 261[1st Dept. 2002]).

RCN also moves for summary judgment based on the argument that it did not work in the specific area of Plaintiff's accident. RCN, in support of its motion, submits the following evidence, not duplicative of Dacosta or plaintiff's submissions: (1) its answer; and (2) the deposition transcript of Brian Crombie, Construction and Engineering Manager for RCN. Mr. Crombie testifies that he conducted a search for records reflecting any "work that RCN's contractor would have performed in a . . .

two to three block area . . ." In this case, Mr. Crombie searched for records within a two-block radius of Columbus Avenue and 69th Street. The search encompassed engineering records from roughly 1996 until 2007. Mr. Crombie testified that RCN does not do its own excavation work but rather, it provides a drawing to their contractor, Felix, who performs the excavation. The results of the search of the general vicinity of plaintiff's accident produced a drawing for an "as-built" for 59 West 69th Street. The drawing showed where a trench was dug on Columbus Avenue to the corner of West 69th Street. Mr. Crombie testifies that the trench was dug from six to ten feet from the curb in the street and only intersected the sidewalk in front of 59 West 69th Street. Mr. Crombie states that the trench never intersected the sidewalk at any other point and no other reports were uncovered which showed that work was performed at or near the site of plaintiff's accident.

RCN 's search revealed that the only work it and it's subcontractor performed was six to ten feet from the curb in the street. Further, the only point where the trench intersected the sidewalk was on 69th Street, not Columbus Avenue. When a defendant's motion for summary judgment establishes a prima facie entitled to judgment as a matter of law, the motion shall be granted where the plaintiff fails to submit any opposing papers. (*D'Aquila Bros. Contracting Co. v. H. R.*, 35 A.D.2d 815[2nd Dept. 1970]). Here, in support of its unopposed motion for summary judgment, RCN has stated a prima facie case for such entitlement. Finally, as the main action as against RCN is dismissed.

Felix cross moves to dismiss. RCN does not oppose. Consistent with this court's dismissal of the action as against RCN, the third party action against Felix is also dismissed.

Wherefore it is hereby

ORDERED that defendant Dacosta Landscaping Contractors, Corp.'s motion for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that defendant RCN Telecom Services, Inc.'s motion is granted without opposition and the complaint is hereby severed and dismissed as against said defendant and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the cross- motion of Felix Equities, Inc. is granted without opposition and the third-party complaint is hereby dismissed; and it is further

ORDERED that the remainder of the action shall continue.

DATED: July 7, 2008

EILEEN A. RAKOWER, J.S.C.