

Yjoe v New York City Tr. Auth.

2008 NY Slip Op 31932(U)

July 1, 2008

Supreme Court, New York County

Docket Number: 0111406/2007

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

YJOE, NANCY

Plaintiff,

-v-

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

INDEX No. 111406/07

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL No. _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1+2

Answering Affidavits- Exhibits 3

Replying Affidavits 4+5

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

JUL 10 2008

Dated:

7/1/08

COUNTY CLERK'S OFFICE
NEW YORK

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X

NANCY YJOE,

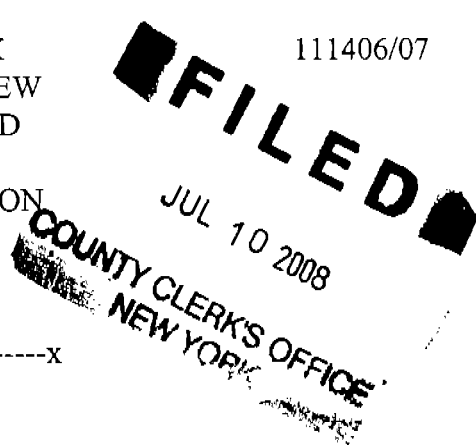
Plaintiff,

-against-

Index No.

CITY OF NEW YORK, MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY, 110-112 THIRD
AVE. REALTY CORP., HIGHRISE HOISTING &
SCAFFOLDING, INC. and TISHMAN CONSTRUCTION
INTERNATIONAL CORP.,

111406/07



Defendants.

-----X

DONNA MILLS, J. :

Defendants Manhattan and Bronx Surface Transit Operating Authority and New York City Transit Authority (hereinafter the Authorities) move for summary judgment dismissing all claims and cross claims brought against them. Defendants 10-112 Third Ave. Realty Corp. (Third Ave.), Highrise Hoisting & Scaffolding, Inc. (Highrise) and Tishman Construction Corp. (Tishman) cross-move for the same relief.

This is a personal injury action. The complaint alleges that on May 21, 2007, at 3:30 p.m., on the sidewalk near 118 Third Avenue, approximately one hundred feet from the southwest corner of Third Avenue and 14th Street, New York, New York, adjacent to a bus shelter, plaintiff sustained serious injuries after falling. She alleges that a tree had been removed from this location and that a portion of the concrete sidewalk and/or cobblestones were also removed.

Plaintiff testified at a deposition that she was standing on the sidewalk along with several other people at the designated M 101- 103 bus stop. When the M103 bus arrived, the bus

operator directed the waiting patrons to move so that he could assist a passenger off who was in a wheelchair. Plaintiff was one of the patrons who was directed to move. After moving, plaintiff testified that she fell in a hole that she had not seen.

The Authorities bring this summary judgment motion on the grounds that plaintiff and co-defendants have failed to state a cause of action against them and that there are no triable issues of material fact. They contend that they do not own, maintain, manage, operate, control or supervise the location of the accident. They state that the public streets are the responsibility of co-defendant City of New York (City) and that a carrier cannot be held responsible for an injury occurring on property it does not control. In addition, they state that there is no evidence that they created or caused the condition, or had prior notice of the condition that resulted in plaintiff's accident.

The Authorities claim that City did not serve them with an answer, which nullifies any cross claim brought by City.

The Authorities claim that plaintiff's action must be dismissed because she failed to comply with the requirements of section 1212 of the Public Authorities Law. Plaintiff commenced this action against them without first submitting herself to an oral examination. The Authorities assert that compliance with their demand for an oral examination is a statutory condition precedent to the commencement of an action against them. They argue that plaintiff's failure to comply should result in a dismissal of the complaint.

In opposition to the motion, plaintiff contends that the motion has been brought prematurely, prior to any significant discovery from defendants. Plaintiff asserts that certain evidence that is in the exclusive control of the Authorities has not been received by plaintiff.

Plaintiff states that a common carrier, like the Authorities, owes a duty to its passengers to stop at a place where they may safely disembark and leave the area.

Plaintiff asserts that she attended a 50-h meeting on August 15, 2007. She denies ever receiving a notification from the Authorities for an oral examination. Despite her failure to appear, plaintiff argues that the Authorities were not prejudiced by her absence. Plaintiff argues that dismissal of the complaint is not an automatic consequence of a claimant's failure to comply with a demand for an oral examination.

Third Ave., Highrise and Tishman cross-move for summary judgment based on the ground that they had no involvement with the location of the accident. These defendants argue that they were involved in construction work that was confined to 110-112 Third Avenue, not 118 Third Avenue. They argue that they were not involved in the removal of the tree at that location.

In opposition, plaintiff asserts that photographs submitted by the aforesaid defendants show that the construction which was being performed down the block was actually abutting the area where she fell. One photograph shows scaffolding erected by Highrise only inches from the missing sidewalk square which plaintiff marked and identified during her deposition.

Plaintiff also asserts that it is premature to grant summary judgment to these defendants since plaintiff has not completed discovery at this stage. According to plaintiff, such discovery might reveal that permits, work orders and contracts were issued to remove the tree so that scaffolding could be erected.

In reply, Third Ave, Highrise and Tishman contend that in every instance in which a tree existed in a tree bed below or adjacent to sidewalk sheds, the sheds were constructed in such a

fashion as to accommodate the tree. They claim that when construction takes place, trees were not removed to allow such construction.

The “transit company is under a duty to provide prospective passengers with a reasonably safe and direct entrance onto the vehicle, clear of any dangerous obstruction or defect which would impede that entrance.” Dobrowolski v City of New York, 29 AD3d 937 (2d Dept 2006). Since plaintiff alleges that the bus operator instructed her to move, there is an issue of fact as to the Authorities’ negligence.

The court finds that plaintiff is entitled to discovery from the Authorities. Plaintiff has raised an issue as to whether the Authorities had a duty to provide her as a prospective passenger a reasonably safe entrance on the bus at the time of the accident. At this stage, plaintiff should be allowed to depose these parties.

Compliance with the Authorities’ demand for an oral examination is a statutory condition precedent to the commencement of an action against the Authorities. See Lynch v New York City Transit Authority, 12 AD3d 644 (2d Dept 2004). However, as plaintiff contends that she failed to receive the demand, and the Authorities have failed to prove that they sent the demand to her, the court will not dismiss the complaint.

With respect to the cross motion, it is unclear whether a tree was actually removed from the sidewalk space. The cross moving defendants deny removing any trees from the premises. At this time, it is not shown that any tree may have existed in front of 118 Third Avenue. Since, the existence of such a tree as well as its removal remains an issue of fact, the cross motion shall be denied. Upon the completion of discovery, these defendants have the option of moving for summary judgment again.

Accordingly, it is

ORDERED that the Authorities' motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is denied.

DATED: 7/1/08

ENTER:

[Signature]

J.S.C.

FILED
JUL 10 2008
COUNTY CLERK'S OFFICE
NEW YORK