

Urena v New York City Tr. Auth.

2008 NY Slip Op 32185(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0115797/2006

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

URENA, ANA

Plaintiff,

-v-

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

INDEX No. 115797/06

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

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

FILED
AUG 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7/31/08

[Signature]
J.S.C.

Check one: _____ FINAL DISPOSITION NON-FINAL DISPOSITION

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

ANA URENA,

**INDEX NO.
115797/06**

Plaintiff,

- against -

**THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY, HALCYON CONSTRUCTION
CORP., AND TROCOM CONSTRUCTION CORP.,**

Defendants.

DONNA M. MILLS, J:

BACKGROUND

**DECISION/ORDER
FILED
AUG 05 2008
COUNTY CLERK'S OFFICE
NEW YORK**

In this action for personal injuries, plaintiff Ana Urena seeks damages allegedly resulting from a slip and fall on the public sidewalk located at Amsterdam Avenue between West 145th Street and West 146th Street in the County and City of New York. Plaintiff alleges that on October 15, 2005, as she was disembarking from a New York City Transit Authority (hereinafter "NYCTA") bus, she was caused to trip and fall due to a defective street condition. Defendant Halcyon Construction Corp. (hereinafter "Halcyon") now moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that it performed no construction work at the location where plaintiff allegedly fell, and in no way caused or contributed to the creation of the defect that caused the fall. The plaintiff and co-defendants NYCTA, The City of New York, and Trocom Construction Corp. (hereinafter "opposing parties") oppose the summary judgment motion.

APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1978). “But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated.” Andre v. Pomeroy, 35 NY2d 361 (1974). “To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it. Gregg v. Key Food Supermarket, 50 AD3d 1093 (2nd Dept. 2008).

In support of its motion, Halcyon argues that it performed no construction work at the location where plaintiff allegedly fell. Halcyon submits an affidavit of Charles Casarella, Vice President of Halcyon, to establish that Halcyon’s work area was actually on the opposite side of the street from where plaintiff alleged that she fell.

In opposition, the opposing parties contend that Halcyon’s motion is premature as there has been no discovery. Furthermore, the opposing parties contend that Mr. Casarella’s affidavit is based on business records maintained in the ordinary course of business and has no personal knowledge of Halcyon’s activities at the site. Additionally, the opposing parties contend that Halcyon’s business records do not clearly denote on which side of the street work was performed and the Street Opening Permit - # M01-2005196-009 provides for an area that encompasses the site of the accident. As such, they should be allowed to depose a knowledgeable representative from Halcyon.

Halcyon argues that its motion should not be denied so that a deposition can be conducted because “[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212 (f), for postponing a decision on a summary judgment motion.” Kennerly v. Campbell Chain Co., 133 AD2d 669, 670 (2nd Dept. 1987). In that case, the plaintiff did not present evidence, in evidentiary form, sufficient to create a triable issue of fact. Here, the opposing parties offer the street opening permit, which encompasses the site of the accident, and point to Mr. Casarella’s lack of personal knowledge regarding the work site, demonstrating that there is a triable issue of fact.

Additionally, in deciding a motion for summary judgment, the court should not make a determination as to the relative strengths of the parties’ claims, but should focus only on whether there are disputed issues of material fact. Amatulli v. Delhi Constr. Corp., 77 NY2d 525, 532 (1st Dept. 1991). Where there exists any issue of material fact that is in dispute and a defendant fails “to establish their defense sufficiently to warrant a court directing judgment in their favor as a matter of law”, a motion for summary judgment must be denied. New Jersey Steel Acquisition Corp. v. Von Roll, A.G., 162 AD2d 297 (1st Dept. 1990).

Viewing the submission in the light most favorable to the opposing parties, this court finds that Halcyon has failed to make a prima facie showing that it is entitled to summary judgment as a matter of law. Since the location the work performed by Halcyon is in dispute, Halcyon’s motion for summary judgment should be denied.

Accordingly, it is

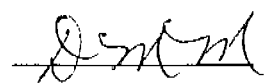
ORDERED that the co-defendant Halcyon’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated:

7/31/08

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
AUG 05 2008
COUNTY CLERK'S OFFICE
NEW YORK