

Aranovich v City of New York

2008 NY Slip Op 33033(U)

November 7, 2008

Supreme Court, New York County

Docket Number: 107787/04

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER

PART 5

Index Number : 107787/2004
ARANOVICH, LUYDMIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 107787/04

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/7/08

Eileen A. Rakower
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: 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: PART 5

-----X
LUYDMILA ARANOVICH,

Plaintiff,

Index No.
107787/04

Seq No.: 006&007

- against -

Decision and Order

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
EMPIRE CITY SUBWAY COMPANY
(LIMITED), TULLY CONSTRUCTION CO., INC.
and THE LIRO GROUP,

Defendants.

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

Third-Party Plaintiff

Third-Party
Index No.:
107787/06

-against-

ROADWAY CONTRACTING, INC.,

Third-Party Defendant.

FILED
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NEW YORK

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on the eastern sidewalk of Broadway "in front of the building believed to be known as 26 Federal Plaza . . . immediately east of the cross walk leading to Thomas Street" in the County and State of New York on September 2, 2003. Defendant Consolidated Edison Company of New York, Inc. ("Con Ed") brings

a third party action for indemnification as against Roadway Contracting, Inc. ("RCI"). Con Ed now moves for summary judgment dismissing the complaint and all cross-claims as against it pursuant to CPLR 3212. Defendant Tully Construction Co. Inc. ("Tully") cross-moves for summary judgment. By separate motion, third-party defendant Roadway Contracting, Inc. ("RCI") moves for summary judgment, dismissing the third party complaint against it. Plaintiff opposes the motions and the cross-motion. By Order of this court dated August 27, 2008, defendant Empire City Subway Company's motion for summary judgment and defendant Liro Program and Construction Management, P.C.'s cross-motion for summary judgment were granted.

Con Ed and Tully are alleged to have performed work in the subject area. RCI is a subcontractor of Con Ed's which performs electrical work and restoration of the openings created on behalf of Con Ed. Plaintiff, in her deposition, describes the defect that caused her accident as a black area of the sidewalk along Broadway that was raised approximately two to three inches above the regular pavement. The defect was located at "about the middle" of the sidewalk and was "crossing the sidewalk" and it was about two to three feet wide, and about eight feet long in size. Her right foot caught on the lip of the black asphalt area.

Con Ed, in support of its motion, submits the following: (1) the pleadings; (2) a copy of the "Big Apple Map"; (3) the deposition transcript of plaintiff; (4) ten black and white photocopies of photographs of the accident location; (5) the deposition transcript of Mario E. Smith, Senior Coordinator for Con Ed; (6) two emergency tickets generated by Con Ed and "Field Data Forms" as testified to by Mr. Smith; (7) a "Composite Purchase Order" form dated July 28, 2006; and (8) a copy of Con Ed's "Standard Terms and Conditions of Construction Contracts."

Con Ed argues that the description given by plaintiff of the offending defect does not match the actual cuts that it made in the area. Contrary to plaintiff's testimony, the cuts in question do not travel in the same direction as the defect, and they do not stop abruptly, but instead, extend to manholes. In any event, Con Ed states, if it is found that work was done in the specific location, all work was performed by its contractor, RCI.

Plaintiff, in opposition, submits: (1) nine color photocopies of the accident location; and (2) a copy of the Field Data Report. Plaintiff argues that a "Field Data Form" produced by Con Ed indicates that in January, 2001, two cuts were made in the sidewalk "in the precise area where plaintiff's accident occurred." Specifically,

plaintiff asserts that the second of these four cuts extends from the “roadway onto the eastern sidewalk of Broadway at or about the crosswalk leading to Thomas Street and appears to meet with the third cut, which is on the eastern sidewalk of Broadway at or about the crosswalk leading to Thomas Street, 10.5 feet in length, 8 feet wide and 4 inches in depth and the fourth cut which is also on the eastern sidewalk of Broadway, 10 feet in length, 4 feet wide and 4 inches in depth.”

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]).

Initially, although plaintiff opposes Tully’s cross motion, her attorney’s affirmation states: “In light of the Court’s recent decision dated August 27, 2008 . . . which effectively found that TULLY CONSTRUCTION CO. INC. cannot be held responsible for work performed on the sidewalk, the Court is advised that plaintiff is willing to discontinue this matter against defendant TULLY CONSTRUCTION CO. INC. . . as such the cross-motion of TULLY . . . is moot.

Con Ed’s contention that the cuts were in a different location than the subject defect is without merit as it is clear from examination of the diagram and the photographs of the defect that they correspond with one another. The relevant cuts that Mr. Smith testified to were cuts three and four, which were made on the sidewalk. The other two cuts were made in the roadway and do not affect the accident location. According to the Field Data Form, cut three produced an opening that was 10.5 feet in length and 2.5 feet in width. The diagram on that form depicts cut three starting slightly west of the curblin in the street and ending in the middle of the sidewalk at an area which is north of a manhole cover. Cut four appears to start at the curblin and extends easterly until it also ends slightly north and west of the same manhole cover. Both cuts are on the east sidewalk of Broadway just east of the “T” intersection with Thomas Street (meaning that Thomas Street does not extend to the east side). The

Field Data Form shows that the material type used on the surface of the opening was "A" or asphalt. The material used for the final restoration is not specified. Rather, under Material Type for cuts three and four it merely says "sidewalk." The photographs submitted by plaintiff show an asphalt area extending from the curb and traveling east and ending slightly north and west of a manhole cover on the sidewalk. Thus, there is a question of fact as to whether the defect which caused plaintiff's accident was created by Con Ed.

Like Con Ed, RCI argues that the cuts did not run in an easterly direction, perpendicularly to Broadway, as does the patch of asphalt depicted in plaintiff's photographs. Further, RCI argues that "there are clearly no manholes depicted in plaintiff's pictures." RCI, like Con Ed, appears to ignore cuts three and four. As stated previously, cuts one and two do not affect the accident area as they were made in the street and ran diagonally onto the eastern sidewalk. However, cuts three and four, as depicted in the Field Data Form diagram, are located in the precise area and are similar in size and location to the subject defect.

RCI also submits an affidavit by its General Manager, John Roman, who attests that he conducted a five year search for records pre-dating plaintiff's accident and that his search revealed that "Roadway Contracting, Inc has performed no work at the sidewalk on the eastern side of Broadway between Worth and Duane Street." However, by the testimony of RCI's own superintendent, Clemente Perrotta, RCI performed electrical work at the precise location of plaintiff's accident. Upon being shown the Field Data Form, Mr. Perrotta testifies:

Q: Now, what does that reflect? In other words, cut one, two, three, four, what do they reflect in terms of what was done at that location?

A: That would be the exact location where I excavated and installed electric conduits.(Perrotta Deposition, Page 29).

It is well settled that a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded. (*Lupinsky v. Windham Const. Corp.*, 293 AD2d 317[1st Dept. 2002]). Further, the Field Data Form Itself states "opened by: RCI." and the "Gas Line Clearance Report" annexed to the Field Data Form contains handwriting across the entire page which states: "As Constructed Per RCI." Mr. Smith testifies about the handwriting on the Gas Line Clearance Report. Mr. Smith states: "it's constructed that RCI, the subcontractor doing the work, showing that this was the layout they worked from to do the job that

they did.”Thus, RCI has failed to make a prima facie showing that it is entitled to summary judgment as a matter of law.

Wherefore it is hereby

ORDERED that defendant Consolidated Edison Company of New York, Inc.’s motion for summary judgment is denied; and it is further

ORDERED that third party defendant Roadway Contracting Inc.’s motion for summary judgment is denied; and it is further

ORDERED that defendant Tully Construction Co., Inc.’s cross- motion is moot in light of plaintiff’s voluntary discontinuance, and the complaint is hereby severed and dismissed as against defendant Tully Construction Co., Inc and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATED: November 7, 2008


EILEEN A. RAKOWER, J.S.C.

FILED
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