

**Devertieuil v New York City Tr. Auth.**

2008 NY Slip Op 33088(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 107963/03

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

DEVERTIEUIL, PHYLLIS

INDEX No. 107963/03

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 007

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

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

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

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: YES  NO

**FILED**  
NOV 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION WHICH IS ATTACHED.

Dated: 11/13/08

Donna M. Mills  
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X  
 PHYLLIS DEVERTIEUIL,

Plaintiff,

-against-

Index No.

THE NEW YORK CITY TRANSIT AUTHORITY,  
 THE CITY OF NEW YORK and METROPOLITAN  
 TRANSIT AUTHORITY,

107963/03

Defendants.  
 -----X

DONNA MILLS, J. :

Defendant The New York City Transit Authority (Authority) moves for summary judgment dismissing all claims and cross claims brought against it.

In her complaint, plaintiff alleges that on September 20, 2002 at about 10 a.m., she slipped and fell on a sidewalk on 8<sup>th</sup> Street, near Lafayette Street, New York, New York. She claims to have slipped on an oily substance on the sidewalk.

Authority moves for summary judgment on the grounds that plaintiff has failed to assert a prima facie case against it, and that there are no issues of fact with respect to liability. Authority first argues that the sidewalk with the oily substance is under the control and ownership of defendant the City of New York (City). Authority contends that City has the duty to maintain and repair public sidewalks. Authority assumes no responsibility for the maintenance of the sidewalk at bar.

Second, Authority claims that it did not create or have actual or constructive notice of the oily substance on the sidewalk. Authority submits a copy of deposition transcripts from an Authority employee, Steve Chang. He testified that there was a station rehabilitation occurring

on the 8<sup>th</sup> Street subway station underneath the street level. The entrances for the 8<sup>th</sup> Street station are located on Broadway, almost a block away from the accident location. Chang stated that there was one trailer located on 8<sup>th</sup> Street between Lafayette Street and Broadway. He also stated that there were no liquid substances kept in the trailer or used in the project and that he did not see any substance adjacent to the sidewalk area of the trailer in connection with the project. Chang testified that there were three superintendents who were safety engineers for the project. According to Chang, if there were any materials or debris such as tiles or chips from the project, they would be removed on a daily basis.

Authority submits the deposition transcripts from plaintiff. In her deposition, plaintiff stated that the accident happened closer to Lafayette Street. She testified that there was no portion of the sidewalk that was closed off on 8<sup>th</sup> Street between Lafayette Street and Broadway, that there was nothing stored on the sidewalk in the area where she fell. Plaintiff stated that she was not aware of the substance until she fell. She described the shape of the substance as “just splattered like something was thrown there or spilled there.” She stated that she did not know how long the substance was on the sidewalk and did not know how it got there.

Based on the deposition testimony, Authority claims that plaintiff has failed to demonstrate that the oily substance was visible and apparent and had been present for a sufficient length of time to permit Authority’s employees to discover and remedy it. Authority argues that in this case, plaintiff did not know of any witnesses, did not know where the oily substance came from or how long it had been there. Authority contends that plaintiff has supplied only speculation and conjecture to this case and that Authority should be dismissed from this action.

In opposition to this motion, plaintiff argues that the oily substance on the sidewalk might

have emanated from the trailer used by Authority's employees as the subway area was undergoing rehabilitation. Plaintiff submits an affidavit from a Sandra Berryman. Berryman states the following: two days before the accident and on the day before the accident, Berryman observed a black oily substance on the sidewalk on the south side of East 8<sup>th</sup> Street, between Lafayette Street and Broadway. She also observed an area on the sidewalk that was fenced in by orange mesh wiring. She noticed that the oily substance was coming from the fenced in area. The substance was more concentrated in the fenced in area. She observed that the substance went from the curb on the south side of East 8<sup>th</sup> Street, across about one half of the sidewalk toward the building line. The substance started near the corner of East 8<sup>th</sup> Street and Lafayette Street and continued going west on the south side of East 8<sup>th</sup> Street for approximately one half of the block towards Broadway. A photograph of the specific area is submitted.

Plaintiff refers to Chang's deposition testimony. Chang stated that Authority had four trailers in the vicinity of the 8<sup>th</sup> Street/Broadway subway station. When shown photographs of the area, he indicated that Authority maintained installations like those in the photographs. He testified that Authority used rebar in connection with the rehabilitation project. He stated that Authority would store rebar within the type of installation shown in the photographs. Chang testified that Authority had a storage box together with the trailers. According to him, the box is used to store materials such as tiles, cement and architectural material. He stated that Authority would store the materials outside of the storage box and within the area that was fenced in.

Plaintiff asserts that Authority has failed to show a prima facie case for entitlement to summary judgment. She claims that Authority has offered no evidence to establish when the area in question was last inspected on the day of the accident. Alternatively, plaintiff argues that the

motion should be denied as premature. Plaintiff states that she has not had the opportunity to obtain relevant documentary evidence from Authority. This court, by Order dated July 15, 2008, compelled Authority to provide plaintiff said documentary evidence in the course of discovery. Plaintiff claims that Authority has not provided this evidence.

In its reply papers, Authority request that plaintiff's opposition papers not be considered by this court. Authority states that the opposition papers were sent in an untimely manner and served on the wrong party. Should the court accept and consider the opposition papers, Authority requests that the court accept and consider the reply papers.

As plaintiff opposes the motion on the ground that discovery responses to her demands are outstanding, Authority asserts that plaintiff filed a note of issue and a certificate of readiness dated March 10, 2008 stating that all discovery is complete. Authority is willing to allow plaintiff her chance to complete discovery provided that the case is removed from the trial calendar. Should the court deny the motion on this ground, Authority requests that the denial be without prejudice, and that Authority be allowed to renew its motion upon the completion of discovery.

Authority requests that this court disregard the affidavit of Berryman because Authority was never given information regarding her as a witness. Authority states that it lacked any opportunity to depose Berryman prior to this time. Authority contends that the affidavit, if accepted as evidence, would be prejudicial to Authority.

Authority argues that plaintiff has not shown that the oily substance emanated from the trailers and that plaintiff's accident occurred at a separate area. Authority asserts that it has met its burden of proof with respect to the granting of its motion.

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. Ayotte v Gervasio, 81 NY2d 1062 (1993). Upon the presentation of a prima facie case by the movant, the burden shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986).

CPLR 3212 (f) provides that this court has the discretion to deny a motion for summary judgment so as to allow discovery that is relevant to the matter at bar. Plaintiff has shown that Authority has not complied with a court order prior to the making of this motion. Authority has not denied this failure to comply. The items sought by Plaintiff in her demand for discovery are to be submitted by Authority within 45 days of receiving a copy of this order with notice of entry. In addition, the court orders Plaintiff to produce the non-party witness Sandra Berryman for deposition by Authority's counsel within the same 45 day parameter. Upon completion of discovery, Authority may renew its motion for summary judgment.

Accordingly, it is

ORDERED that the motion for summary judgment is denied without prejudice pending the completion of discovery by the parties.

DATED: 11/13/08

**FILED**  
 NOV 19 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

\_\_\_\_\_  
 J.S.C.

**DONNA M. MILLS, J.S.C.**