Aranovich v City of New York

2008 NY Slip Op 33760(U)

August 27, 2008

Supreme Court, New York County

Docket Number: 107787/04

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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LUYDMILA ARANOVICH,

Plaintiff,

Index No. 107787/04

Seq No.: 005

- 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.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff

Third-Party Index No.: 591171/06

-against-

ROADWAY CONTRACTING, INC..,

Third-Party Defendant.

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COUNTY CLERK'S OFFICE
NEW YORK

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HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on the sidewalk "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 Empire City Subway Company (Limited) ("ECS") moves for summary judgment pursuant to CPLR 3212. Defendant Liro Program

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and Construction Management, P.C. ("Liro") cross-moves for summary judgment.[1] Plaintiff opposes the motion and cross-motion. Third-party defendant Roadway Contracting Inc. ("Roadway") also opposes the motion and cross-motion. Defendants the City of New York ("City"), Consolidated Edison, Inc. ("Con Ed") and Tully Construction Co., Inc ("Tully") do not submit papers.

ECS, in support of its motion submits the following: (1) the pleadings; (2) plaintiff's bill of particulars; (3) the deposition transcript of plaintiff; (4) the deposition transcript of Leonard Ferguson, Specialist for ECS; (5) Two street opening permits issued by the Department of Transportation; (6) two color photocopies of a photograph of the alleged defect; and (7) the affidavit of Mr. Ferguson. Plaintiff submits only an attorney affirmation in opposition. ECS argues that it is not liable for plaintiff's injuries because it did not create the subject defect. Plaintiff argues that summary judgment should be denied because "Clearly, work was being performed . . . in an area immediately at or very close to the area where plaintiff's accident occurred." Roadway adopts plaintiff's arguments.

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, in her deposition, describes that 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. Mr. Ferguson testifies that he conducted a search for work permits for a period of two years up to, and including the date of the accident. Mr. Ferguson testifies that he uncovered two work permits for the subject area. Initially, Mr. Ferguson testifies that Job Order -# 095185SF was for work that was performed on West Broadway. As plaintiff's accident occurred on Broadway, that work order is irrelevant to the instant action. Mr. Ferguson also testifies as to Job Order # 096184RT. That order was for the digging of two trenches, one which ran from the southeast corner of the intersection of Thomas Street and Broadway to the southwest corner of the intersection and the other ran east to west between two manholes at the same intersection. Mr. Ferguson personally visited the site where work

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[1] Liro states that it is incorrectly listed in the caption as "The Liro Group."

was performed and states in his affidavit that:

> . . . As per the foreman's diagram for Job Order 096184RT, this job involved two separate trenches. The first trench ran from the eastside of the intersection at Thomas St. And Broadway to the west side of the intersection. The trench was parallel to the northern curb line of Thomas St. and went from Manhole 19-85-1 to 19-85-2. Manhole 19-85-1 is on the east side of Broadway. The second trench was never closer than 14 feet from the eastern curb of Broadway and was no where near the sidewalk on the east side of Thomas St. and Broadway . . . According to my inspection of Manhole 19-85-1 and the ECS conduit map for that location, Manhole 19-85-1 is approximately 8 feet south of the cut depicted in the photos . . . I have further compared the above work records with the photos marked for identification at plaintiff's deposition. Based upon my review of the photos and the work records, the alleged defect was not created by ECS.

ECS has submitted proof in admissible form that it did not create the defect which plaintiff alleges caused her accident. Upon ECS's showing that it did not perform work at the location of plaintiff's accident, the burden shifts to plaintiff to produce some evidence connecting work permits issued for the area to the "situs of plaintiff's injury." *(Robinson v. City of New York*, 18 AD3d 255[1st Dept. 2005]) (*see also*: *Flores v. City of New York*, 29 AD3d 356[1st Dept. 2006]). In opposition plaintiff merely submits a attorney affirmation arguing that ECS was liable for plaintiff's injuries because "work was being performed . . . in an area immediately at or very close to the area where plaintiff's accident occurred." The affirmation of counsel alone is inadequate to sustain plaintiff's burden. (see *Zimmerman*). Thus, ECS's motion is granted.

Liro, in support of its cross-motion, submits: (1) the pleadings; (2) the deposition testimony of Cynthia Howard, Record Searcher for City; (3) a copy of a document called "Capital Project #HWMWTCA2;" (4)a document by the City Department of Design and Construction Division of Infrastructure titled "Bid Booklet Information for Bidders Contract Performance and Payment Bonds; (5) the deposition transcript of Sean McPartland, Project Engineer/Manager for Tully; (6) a document titled "sidewalk summary;" (7)the deposition transcript of Prem Singh, Chief Inspector for Liro; and (8) a document titled "New York City Department of Design and Construction WTC Paving Project-Contract No. HWMWTC A2/A3." Plaintiff submits only an attorney affirmation in opposition to the cross-motion. Liro argues that it contracted with the City only to inspect work done by Tully in connection with the milling and resurfacing of the roadway in the area of the former World Trade Center after September 11, 2001 and that no work was done on the sidewalk by Tully in the location of plaintiff's accident under the submitted contract.

The single document uncovered by Ms. Howard's search for the subject area in connection with Liro was called the Capital Project #HWMWTCA2. Mr. McPartland testifies that Tully was contracted to re-pave "Broadway from Thomas to Worth Street . . .Broadway, Duane to Thomas Street and Broadway, [and] Thomas to Worth Street" from April 2002 to July 2002. Mr. McPartland further testifies that Tully did not perform any sidewalk reconstruction along Broadway under that contract. Plaintiff's opposition consists of his attorney's affirmation in which the attorney states:

> . . . Their reasoning is that since it is alleged that TULLY CONSTRUCTION CO., INC. performed no work on the sidewalk, then there could be no liability attributed to THE LIRO GROUP. However, inasmuch as TULLY . . . did work in the roadway adjacent to the sidewalk, it is submitted that a reasonable jury could infer that the work actually performed involved the area of sidewalk where plaintiff's accident occurred.

Liro has shown, prima facie, that it was not liable for plaintiff's injuries. Plaintiff has failed to meet his burden, as required by both *Zimmerman* and *Robinson,* in opposing Liro's cross-motion. Therefore the cross-motion is also granted.

Wherefore it is hereby

ORDERED that the motion and the cross-motion are granted and the complaint is hereby severed and dismissed as against defendants Empire City Subway Company (Limited) and Liro Program and Construction Management, P.C. s/h/a The Liro Group, and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

DATED: August 27, 2008

EILEEN A. RAKOWER, J.S.C

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