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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 110788/2007

ROJAS, CARMEN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. 110788/07

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-I Notice of Cross-motion	1
Answering Affidavits — Exhibits + Plaintiff's Aff. in Opp.	2, 3
Replying Affidavits	4, 5

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JAN 14 2009

MARTIN SHULMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----------X

CARMEN ROJAS,

Plaintiff,

-against- Index No. 110788/07

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, XEITO REALTY CORP., CBS OUTDOOR, INC., CEMUSA, INC., SHELTER EXPRESS CORP., TRANSPORTATION DISPLAYS, INC., PETER & MONTY CONTRACTORS CORP., and COLUMBUS CONSTRUCTION CORP.,

Defendants.

----------X

MARTIN SHULMAN, J.:

Defendant Columbus Construction Corp. ("Columbus") moves, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims against it. Defendants CBS Outdoor, Inc. ("CBS") and Transportation Displays, Inc. ("Displays") jointly cross-move, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims against them. The branch of the cross motion seeking dismissal of the complaint against CBS has been rendered moot by plaintiff's September 19, 2008 discontinuance of her action, without prejudice, against this defendant (*see* Plaintiff's Affirmation in Opposition, Stipulation of Discontinuance).

These motions stem from a personal injury action in which plaintiff Carmen Rojas ("Rojas" or "plaintiff") claims that at approximately 4:30 P.M., on November 9, 2006, she was caused to trip and fall on defective sidewalk-pavement near the intersection of Broadway and West 159th Street, New York, New York. More specifically, Rojas alleges that she was walking toward a sheltered bus stop when her

right foot "contacted a hole" in the cracked, broken and defective sidewalk, causing her to fall forward and hit her forehead on a structural pole at the adjacent bus stop shelter ("bus shelter"). According to her complaint and verified bill of particulars, Rojas sustained a series of serious injuries to her head and back as a result of her accident.

On February 14, 2007, Rojas testified at a hearing, pursuant to Sections 50-e and 50-h of the General Municipal Law, and thereafter, commenced the instant action to recover monetary damages from nine different entities for the injuries she allegedly sustained, including movants Columbus, CBS and Displays.

In her complaint and verified bill of particulars, plaintiff charges Columbus with performing certain repair work, pursuant to a permit, at or near the location of her accident, and with failing to maintain the location in a safe and proper condition. Similarly, plaintiff charges both CBS and Displays with performing work in and around the bus shelter and with failing to maintain the location in a safe and proper condition. It is claimed that CBS performed work pursuant to a Franchise Agreement with defendant The City of New York ("The City"), and that Displays was and is a subdivision of CBS with responsibilities to perform certain work in and around the bus shelter. Through their motion and cross motion, movants explain their respective work responsibilities in and around the bus shelter and offer work-related documents in their attempt to show that there is no basis for plaintiff's causes of action against them.

Addressing first the motion by Columbus, the litigants do not dispute that Columbus had a bid-contract with The City to grind, or "mill," the existing asphaltic concrete on certain areas of New York City roadway in preparation for resurfacing by other entities. Pursuant to the bid-contract, the grinding work included the roadway on

Broadway between West 155th and West 165th Streets in Manhattan which runs alongside the defective portion of sidewalk which purportedly caused plaintiff to trip and fall. Acknowledging that it performed work in that vicinity, Columbus, nevertheless, seeks summary judgment on the grounds that it did not perform work on the sidewalk, that it was not responsible for maintaining the subject sidewalk and because there is no evidence that it caused or contributed to the defective condition of the sidewalk.

Among the documents submitted in support of its motion, Columbus submits a copy of the signed "Bid Booklet" for "Project ID: HW2CR02B." The Bid Booklet describes the grinding job as pertaining solely to the roadway (Notice of Motion, Exhibit G), and it contains a "Project Description" which, on page A-2, provides, in relevant part:

> [t]his project is an engineered capital improvement for the preparation of designated streets to be resurfaced by others. The preparatory work consists of:
>
> 1. The removal, by grinding, of sections of the existing asphaltic roadway pavement wearing course, as necessary, to provide suitable gutter line grades and curb reveals and to facilitate storm water runoff after the pavement has been resurfaced.

Absent from the Project Description is any reference to repair work, maintenance or otherwise, to any sidewalk, including that involved in this action.

Also annexed to the motion is a copy of "Status of Milled Locations HW2CR02B" (Notice of Motion, Exhibit H), the document which, pursuant to the sworn affidavit of its chief of operations, Michael Gallagher ("Gallagher"), is The City's spreadsheet indicating the dates and locations of Columbus' work under the bid-contract. An examination of the spreadsheet reflects that Columbus performed the mill-work on

Broadway, between West 155th and West 165th Streets, on the dates of August 30, 2005 and September 1, 2005. Finally, Columbus submits copies of permits issued to it by the New York City Department of Transportation ("DOT") pertaining to Columbus' work in the area of plaintiff's accident (Notice of Motion, Exhibit I). The permits do not contain an authorization for Columbus to do any work on the subject sidewalk.

Columbus has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" *(Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Having demonstrated that Columbus performed work only on the roadway, the burden shifts to Rojas, as the party opposing the motion for summary judgment, to "produce evidentiary proof in admissible form sufficient to require a trial of material question of fact on which [s]he rests [her] claim or must demonstrate acceptable excuse for [her] failure" to do so (*Zuckerman v City of New York*, 49 NY2d at 562).

In her opposition to the motion, Rojas does not dispute the accuracy of defendant's exhibits. Rather, Rojas points out that "the distance separating the defendants [sic] alleged work and the defect which was a proximate cause of the plaintiff's accident was a mere 5 inches or less" (Affirmation in Opposition, ¶ 7). She argues that, based on the proximity of movant's work to the accident site, there are questions of material fact necessitating discovery as to the actual work performed by Columbus' employees, precluding summary judgment (CPLR 3212 [f]). Annexed to her opposition papers are copies of photographs depicting the defective sidewalk, the curb

and the adjacent roadway, together with copies of what appear to be street opening permits relative to the subject location.

A review of plaintiff's opposition papers, including exhibits, fails to reveal evidentiary proof in admissible form sufficient to preclude judgment in movant's favor. Neither the permit copies nor the photograph copies yields evidence that the mill-work performed by Columbus either pertained to, or involved, the subject sidewalk. Pointing out the proximity of the broken pavement to the roadway does not substitute for evidence that Columbus is responsible, in whole or in part, for the defect which allegedly caused plaintiff to catch her foot and fall (*see Perriconi v St. John's Preparatory High School*, 290 AD2d 546 [2nd Dept 2002]). Furthermore, plaintiff's discovery argument, in which she attempts to forestall summary judgment by invoking CPLR 3212 (f), is unpersuasive. CPLR 3212 (f) states:

> [s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"[A]lthough determination of a summary judgment motion may be withheld where discovery is incomplete (*see* CPLR 3212 [f]), there must be some evidentiary showing suggesting that completion of discovery will yield material and relevant evidence" (*Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1001 [3rd Dept 2007]). The submission of an attorney's affirmation stating, essentially, that the motion is premature because discovery may yield evidence implicating Columbus, constitutes mere speculation and conjecture, and falls short of the statutory requirement of evidentiary proof.

Furthermore, contrary to plaintiff's assertion, dismissing the complaint against Columbus does not foreclose avenues of discovery with respect to this contractor. The CPLR, including sections 3106 (b), 3111 and 3120, provides the mechanisms for Rojas and/or any other party to this action to obtain discovery from Columbus as a non-party. Judgment is therefore granted in movant's favor as the pertinent, competent evidence confirms that plaintiff's cause of action against Columbus is fatally deficient.

Displays' cross motion, likewise, contains competent evidence that neither it nor CBS was responsible for the defective sidewalk which was the proximate cause of plaintiff's accident *(Winegrad v New York Univ. Med. Ctr., supra)*. Attached to the cross motion are two sworn affidavits, one from David Posy ("Posy"), who identifies himself as a senior vice president and general counsel for North American Operations for CBS, and one from Glen Herskowitz ("Herskowitz"), who identifies himself as the Manager of Transit Media Development for CBS. Posy's affidavit states, in relevant part:

> CBS Outdoor, Inc., formerly held a Franchise Agreement with The City of New York for the operation, maintenance, and repair of the bus shelters located throughout the five boroughs of The City of New York. The Franchise Agreement with The City of New York has been terminated as of June 26, 2006. CBS Outdoor, Inc., no longer has any responsibility for the operation, repair, and/or maintenance of the bus shelters since the termination date of June 26, 2006.

In his affidavit, Herskowitz states, in relevant part:

> [p]rior to June 26, 2006, CBS Outdoor, Inc., held a Franchise Agreement with [The City] to maintain and repair the bus shelters throughout the five boroughs . . . Pursuant to these responsibilities . . . they retained Shelter Express to maintain, repair, and perform work on the shelters on occasion. [Displays] was a predecessor company of CBS Outdoor and they acquired a permit for work to be done on the [subject] bus shelter . . . on or about August 16, 2004. Based on my experience . . . [Displays] did not do work on the bus shelters. All work that may have been done on the bus shelter or surrounding sidewalks would have been done by Shelter

> Express pursuant to a separate maintenance and repair agreement. Similarly [Displays] would have no responsibility for the area where plaintiff's accident is claimed to have occurred on November 9, 2006, since CBS Outdoor, Inc., ceased being the franchise holder as of June 26, 2006. Any and all responsibilities and obligations with respect to the bus shelter and its surrounding sidewalk would be the responsibility of the franchise holder on the date of plaintiff's accident, November 9, 2006.

By tendering these sworn affidavits, Displays has made a prima facie showing of entitlement to judgment as a matter of law, shifting the burden to Rojas, as the party opposing the motion, "to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [she] rests [her] claim" or an acceptable excuse for her failure to do so *(Zuckerman v City of New York*, *supra*).

A review of the motion papers and plaintiff's opposition thereto fails to reveal evidence precluding summary judgment. Rojas presents no evidence, probative or otherwise, tending to refute Displays' proof that it was not the party responsible for the defect or the party responsible for the maintenance of the subject sidewalk on or about November 9, 2006. Again, mere speculation or unsubstantiated allegations are insufficient to rebut Displays' prima facie entitlement to judgment (*ibid.*).

Accordingly, it is

ORDERED that the motion is granted, and the complaint is severed and dismissed as against defendant Columbus Construction Corp., and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the cross motion is granted to the extent that the complaint is severed and dismissed against defendant Transportation Displays, Inc., and the Clerk

is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the branch of the cross motion that pertains to CBS Outdoor, Inc., is denied as moot; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the parties are directed to appear for a compliance conference on February 17, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York. **Plaintiff's counsel is directed to notify counsel for all remaining defendants of the conference date scheduled herein.**

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for plaintiff and the moving defendants.

Dated: January 14, 2009

Hon. Martin Shulman, J.S.C.