

Fritsch v City of New York

2009 NY Slip Op 30566(U)

March 12, 2009

Supreme Court, New York County

Docket Number: 111749/06

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 111749/2006

FRITSCH, THERESA W.

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

This motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

IS DECIDED IN

*ACCORDANCE WITH THE ACCOMPANYING MEMO
DECISION.*

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

FILED

MAR 17 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/12/09

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
THERESA W. FRITSCH,
Plaintiff,

Index. No.
111749/06

-against-

THE CITY OF NEW YORK and ALBERT W. TAYLOR,
Defendants.

-----X
ALBERT R. TAYLOR,
Third-party Plaintiff,

Index. No.
590308/08

-against-

JUMPER PLUMBING & HEATING GENERAL
CONTRACTORS, INC., RELLAH HEATING & CONSULTING
CO., INC. and J&M CONSTRUCTION,

Decision and
Order

Mot. Seq. No.:
002

Third-party Defendants.

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

Third-Party Defendant Jumper Plumbing & Heating General Contractors, Inc. ("Jumper") moves this court pursuant to CPLR §3212 for an order granting summary judgment and dismissing Third-Party Plaintiff Albert R. Taylor's ("Taylor") Third-Party Complaint against Jumper. Third-Party Plaintiff opposes. No other party files papers.

In support of its motion, Jumper has submitted a Notice of Motion and Affirmation in Support with Taylor's Third Party Summons and Complaint, Jumper's Verified Answer with Cross Claim, and an Affidavit of Jumper President Karl Haller annexed as exhibits. Taylor filed an Affirmation in Opposition which included as Exhibits Taylor's deposition testimony, twelve color photographs of the location of the accident at issue in this lawsuit, and the 50-h transcript of Theresa Fritsch with attached exhibits. Jumper has submitted a Reply Affirmation in response to Taylor's opposition papers.

On December 20, 2005 at approximately 6:30 in the evening, while walking westbound on the south side 20th Street in New York, NY, Plaintiff Theresa Fritsch ("Plaintiff") tripped and fell on the sidewalk abutting the premises of 326 West 20th

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Street, New York, NY, sustaining injuries to her right eye and face (Taylor's Exhibit C at 10-11, 18). Plaintiff tripped when her right foot came into contact with a crack in the sidewalk which was raised "at least an inch" above the ground (*id.* at 13-14).

The premises of 326 West 20th Street ("the premises" or "the Taylor premises") is a three-family row house owned by Taylor (Taylor's Exhibit A at 8, 9). Taylor has resided in the premises since 1979 (*id.* at 15). In the time that Taylor has owned the premises, he has had the sidewalk abutting the premises repaired on two occasions.

The first repair took place in or around 1988, and involved the sidewalk flag which contained the crack that Plaintiff tripped over (*id.* at 10). The second repair to the sidewalk abutting the premises occurred in or around 1998, when Taylor hired a plumber to "do some work on the water line coming into" the premises (*id.* at 21). Taylor did not mention the plumber by name or organization in his deposition (indeed, he was not asked at any point during the deposition). This plumbing work involved cutting open a piece of the sidewalk abutting the premises, and restoring it after the work was completed (*id.* at 22). Taylor's recollection is unclear as to whether the plumber's work on and subsequent repair to the sidewalk involved the sidewalk flag adjacent to the tree (which contained the crack upon which Plaintiff tripped); or involved a sidewalk flag closer to the center of the driveway of the premises (*id.* at 23-24).

Taylor testified in his deposition that he did not know how long the crack upon which Plaintiff tripped had existed, but that the crack became larger in time as a tree adjacent to the flag containing the crack grew over the years (*id.* at 11-12).

Plaintiff commenced the instant action on or around September 6, 2006 against Taylor and the City of New York ("City") to recover damages for injuries allegedly sustained as a result of the trip and fall.

On April 21, 2008, Taylor commenced a third-party action naming several third-party defendants, including Jumper, and alleging that, to the extent that Taylor is found liable for Plaintiff's injuries, he is entitled to recover from the third-party defendants for contribution and/or indemnification.

Jumper now moves for summary judgment dismissing Taylor's third-party complaint against it. In its Affirmation in Support, Jumper relies upon two principal arguments. First, Jumper claims that, while Jumper did in fact perform plumbing services at the Taylor premises, all work performed by Jumper took place in the interior of the premises and did not involve work on the abutting sidewalk or roadway outside the premises; relying on the sworn Affidavit of Karl Haller, President of Jumper (Jumper's Exhibit C). Second, Jumper claims that, since the City has a non-delegable duty to maintain public sidewalks within the City, Taylor's third-party complaint fails as

a matter of law. Jumper's Affirmation in Support further states that Taylor has failed to serve his Bill of Particulars upon Jumper. Jumper's Demand for a Bill of Particulars was served upon Taylor on May 22, 2008 (*see* Jumper's Exhibit B).

Taylor opposes Jumper's motion for summary judgment on two grounds. First, Taylor claims that the Haller Affidavit is contradicted by Taylor's deposition testimony, which states that the plumber who performed work on the premises worked on the sidewalk abutting the premises; and that this testimony creates a material issue of fact sufficient to defeat summary judgment. Taylor next argues that Jumper's motion should be denied by the court as premature pursuant to CPLR §3212(f) since no discovery has taken place between Jumper and Taylor.

In Jumper's Reply Affirmation, Jumper attacks Taylor's deposition testimony on procedural and substantive grounds. First, Jumper argues that Taylor's deposition is unsigned and is thus inadmissible. Next, Jumper asserts that, even if Taylor's deposition were admissible, it fails to raise an issue of material fact since Taylor's testimony does not identify the plumber who performed work on the sidewalk, while the Haller Affidavit unequivocally states that Jumper never performed work on the sidewalk abutting the Taylor premises.

Jumper acknowledges that no discovery has taken place between Taylor and Jumper. Jumper also alleges – for the first time in its Reply Affirmation – that Taylor has failed to exchange copies of the discovery previously held in this action. Accordingly, Jumper requests that, if the instant motion is denied, that the third party action be severed, or that an expedited discovery schedule set by the court.

“To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118, 92 N.E.2d 918 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019, 116 N.Y.S.2d 857 [3rd Dept. 1952]), or where the appeal is “arguable” (*Barrett v. Jacobs*, 255 N.Y. 520, 522, 175 N.E. 275 [1931]); “issue-finding, rather than issue-determination, is the key to the procedure” (*Esteve v. Abad*, 271 App.Div. 725, 727, 68 N.Y.S.2d 322 [1st Dept. 1947]).’ (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).” (*Ramsammy v. City of New York*, 216 A.D.2d 234, 236-237, 628 N.Y.S.2d 693 [1st Dept. 1995].)

In addition, “[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.” (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg.*

Corp., 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252, 538 N.Y.S.2d 249 [1st Dept. 1989]).

Jumper's assertion that it cannot be held liable for Plaintiff's trip and fall because the City had a non-delegable duty to maintain the public sidewalk can be dispensed with rather quickly, as it is well settled that the breach of a non-delegable duty does not preclude apportionment of liability among joint tortfeasors (*see Rangolan v. County of Nassau*, 96 N.Y.2d 42, 48; 749 N.E.2d 178, 183; 725 N.Y.S.2d 611, 616 [2001]). Thus, even if the City were liable for its failure to maintain the sidewalk where Plaintiff tripped,¹ the City would be able to seek contribution from Taylor and/or Jumper to the extent that they are responsible for the crack that caused Plaintiff to trip and fall (*see Breger v. City of New York*, 297 A.D.2d 770, 771; 747 N.Y.S.2d 577, 578; 2002 N.Y. App. Div. LEXIS 8873, *2 [2nd Dept. 2002] (abutting landowners are liable for a defect in a public sidewalk when they either (1) created the defective condition or caused it to occur because of a special use;² or (2) a statute or ordinance confers a duty to maintain the sidewalk and liability for any breach of that duty)).

The next question before the court is whether Jumper is entitled to summary judgment against Taylor based upon the parties' affirmations and their respective exhibits.

The court rejects Jumper's argument that the testimony of Taylor is inadmissible as a matter of law based upon the fact that it is not signed by Taylor. CPLR §3116 provides in pertinent part that a deposition which is properly certified by the officer who took the deposition and is sent to the witness "may be used as fully as though signed" if the witness fails to sign and return the deposition within sixty days of its receipt. Here, it is abundantly clear that the Taylor transcript is a "deposition" within the meaning of CPLR §3116 because: (1) the transcript is duly certified by the officer who took the deposition (*see Taylor's Exhibit A at 32*); and (2) Taylor clearly received the transcript, since he is now submitting it as evidence. Moreover, even transcripts which do not necessarily meet the criteria of CPLR §3116 may nevertheless be considered in a motion for summary judgment since written admissions constitute proof in an admissible form (*see R.M. Newell Co., Inc. v. Rice*, 236 A.D.2d 843, 844; 653 N.Y.S.2d 1004, 1005; 1997 N.Y. App. Div. LEXIS 1778, *1-2 [4th Dept. 1997]; *Arnold v. Schmittau*, 2008 NY Slip Op 50184U; 18 Misc. 3d 135A; 856 N.Y.S.2d 496; [2nd Dept. 2008]).

¹ While NYC Administrative Code §7-210 generally relieves the City of the duty to maintain public sidewalks, the uncontroverted testimony of Taylor establishes that the Taylor premises is a three-family owner-occupied residential property, and thus falls within an exception to the ordinance.

² Indeed, the City may escape liability entirely since the accident occurred on a portion of the sidewalk that was used as a driveway (*see Taylor's Exhibit B*), and the use of a sidewalk as a driveway constitutes a "special use" of the property (*see Campos v. Midway Cabinets, Inc.*, 2008 NY Slip Op 4640; 51 A.D.3d 843; 858 N.Y.S.2d 742 [2nd Dept. 2008]). Accordingly, Taylor would bear the burden of demonstrating that the alleged defect was neither created by Taylor nor caused by his use of the driveway (*id.*).

Even considering the Taylor deposition transcript, however, Jumper is entitled to judgment as a matter of law. Jumper has offered proof that it has never performed any work on the sidewalk or roadway adjacent to the Taylor premises at any time in the form of the Affidavit of Karl Haller, President of Jumper (*see* Jumper's Exhibit C). The Haller Affidavit was sufficient to "make a prima facie showing of entitlement to judgment as a matter of law;" and thus it became incumbent upon Taylor to provide "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324; 501 N.E.2d 572, 574; 508 N.Y.S.2d 923, 925 [1986]).

In opposition to Jumper's motion, Taylor relies principally upon his own deposition testimony, wherein he makes reference to an unnamed plumber who performed work on the abutting sidewalk of the Taylor premises in or around 1998, which entailed the cutting open and restoring of a piece of the adjacent sidewalk (Taylor's Exhibit A at 22). Moreover, construing the Taylor deposition charitably, Taylor's testimony indicated that the unnamed plumber *might* have performed work on the area containing the crack which caused Plaintiff to trip (*id.* at 22-26).

In light of the Haller Affidavit, which unequivocally states that Jumper never performed work in the vicinity of Plaintiff's trip and fall, Taylor was required to provide competent proof that Jumper was in fact the unnamed plumber referenced in his deposition (*see Alvarez*, 68 N.Y.2d at 324; 501 N.E.2d at 574; 508 N.Y.S.2d at 925). Instead, Taylor's opposition rests upon his attorney's *ipse dixit* assertion that Jumper either (1) was the unnamed plumber; or (2) was the entity who contracted the unnamed plumber's services (*see Taylor's Affirmation in Opposition* at ¶4). Since Taylor's opposition amounts to little more than surmise, conjecture, and speculation, he has failed to create an issue of material fact and Jumper is entitled to summary judgment (*see Grullon v. City of New York*, 297 A.D.2d 261, 264; 747 N.Y.S.2d 426, 428; N.Y. App. Div. LEXIS 8178, *7 [1st Dept. 2002]).

Nor is Taylor entitled to a holding that Jumper's motion for summary judgment should be denied as premature pursuant to CPLR §3212(f) based upon existing facts which are currently unavailable to him. While both parties acknowledge that no discovery has taken place between Jumper and Taylor, it is well settled that "[s]ummary judgment may not be defeated on the ground that more discovery is needed, where the side advancing such argument has failed to ascertain the facts due to its own inaction" (*Karakostas v. Avis Rent A Car Systems*, 301 A.D.2d 632, 633; 756 N.Y.S.2d 61, 63; 2003 N.Y. App. Div. LEXIS 577, *4-5 [2nd Dept. 2003] (*quoting Meath v. Mishrick*, 68 N.Y.2d 992, 994; 510 N.Y.S.2d 560, 503 N.E.2d 115 [1986])).

Here, Taylor was made aware of Plaintiff's allegations when it received Plaintiff's Summons and Complaint – to which Taylor submitted an Answer on November 20,

2006 (see Jumper's Exhibit A). The fact that Taylor hired a plumber some time in or around 1998 who performed repairs on the sidewalk abutting the Taylor premises was quite clearly within Taylor's own personal knowledge from the very outset, and Taylor is not entitled to now claim that the fact that an unnamed plumber performed work on the sidewalk was a revelation elicited by his own deposition testimony in the instant action. It follows that Taylor was free to conduct an investigation as to whether Jumper was the plumber who performed this work from the very outset of this litigation; and if Jumper was uncooperative with any such investigation, Taylor was free to provide an affidavit to that effect in his opposition (see *Karakostas*, 301 A.D.2d at 633; 756 N.Y.S.2d at 63; 2003 N.Y. App. Div. LEXIS 577 at *3). Further still, Taylor could have obtained disclosure from Jumper at any stage in the litigation, irrespective of whether Jumper was a formal party to the action (see CPLR §§3101(a)(4), 3106(b); see also *Hoag v. Chase Pitkin Home and Garden Center*, 252 A.D.2d 953, 954; 675 N.Y.S.2d 724, 725; 1998 N.Y. App. Div. LEXIS 8445, *2-3 [4th Dept. 1998]). Accordingly, Taylor's request to deny the instant motion for summary judgment as premature pursuant to CPLR §3212(f) is denied.³

Wherefore it is hereby

ORDERED, that the motion for summary judgment is granted and the third party complaint is hereby severed and dismissed as against defendant Jumper Plumbing & Heating General Contractors, 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.

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: March 12, 2009

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 EILEEN A. RAKOWER, J.S.C.

³ The court is also mindful of Jumper's allegation – neither rebutted nor explained by Taylor – that, as of the date of Jumper's initial moving papers (dated September 18, 2008), Taylor has failed to serve his Bill of Particulars upon Jumper, despite being served with Jumper's demand for same on May 22, 2008.