

Cooper v Michael P. Costelloe, Inc.

2009 NY Slip Op 32040(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 108895/07

Judge: Marilyn Shafer

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

PRESENT: Hon. Marilyn Shaper
Justice

PART 8

Index Number : 108895/2007

COOPER, SUSAN

vs

MICHAEL P. COSTELLOE, INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*is decided in
accord with the annexed
memorandum*

FILED

SEP 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAPER
J.S.C.

Dated: 9/2/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----x
SUSAN COOPER,

Plaintiff,

Index No. 108895/07

-against-

MICHAEL P. COSTELLOE, INC., ROBERT L.
TEITELBAUM, INC., 55 EAST 66TH STREET
CORPORATION and DAVID FRANKEL REALTY,
INC.,

Defendants.

FILED
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NEW YORK

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MARILYN SHAFER, J.:

Defendants Michael P. Costelloe, Inc. and Robert L. Teitelbaum, Inc. (collectively referred to as Teitelbaum) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against them.

Defendants 55 East 66th Street Corporation (55 East) and David Frankel Realty, Inc. (Frankel) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and cross claims asserted as against them.

This is a "trip and fall" action. The complaint alleges that, on March 29, 2007, plaintiff was caused to sustain serious injuries when she tripped and fell on an unattended concealed hose left lying across the public sidewalk in front of a residential co-op apartment house located at 53-55 East 66th Street, New York, New York (the Premises).

55 East is the owner of the Premises. Frankel is a professional property management company and is the managing agent for 55 East. Teitelbaum is in the business of cleaning boilers for commercial and residential properties. On the day of the incident, Teitelbaum was hired by 55 East to clean the boiler inside the Premises.

Generally, "[i]n order to impose liability upon a defendant in a slip-and-fall case, there must be evidence tending to show the existence of a dangerous condition and that the defendant either created the defect or had actual or constructive notice of it" (Medina v Sears, Roebuck & Co., 41 AD3d 798, 799 [2d Dept 2007]). Here, plaintiff's theory of liability is predicated on the belief that the large hose placed across the public sidewalk where the fall occurred was "inherently dangerous" (see Guyot v Al Charyn, Inc. 69 AD2d 79, 84 [1st Dept 1979]). Thus, defendants, in order to succeed on their motion for summary judgment, are required to show that the placement of the hose was not, as a matter of law, inherently dangerous (see William Iselin & Co. v Mann Judd Landau, 71 NY2d 420, 425 [1988]; CPLR 3212). If the evidence presented by the defendants demonstrates, as a matter of law, that the condition over which the plaintiff tripped was readily observable by those employing the reasonable use of their senses, it is not considered inherently dangerous (see Sclafani v Wahington Mutual, 36 AD3d 682 [2d Dept 2007]).

At her deposition, dated April 8, 2008, plaintiff testified that it was a clear and sunny day on the day of the accident. However, she further stated that, at around 11:00 a.m., she noticed darkness as she was turning onto the street of the Premises because of scaffolding which covered a portion of the block on East 66th Street where she was walking. She noted a truck parked at the beginning of where the scaffolding began, and began walking under the scaffolding.

Plaintiff stated that she could see the slabs in front of her on the sidewalk, but did not see the hose until after she fell because she was looking straight ahead. She described the circumstances leading up to the fall as follows: she "walked part of the way down, and then all of a sudden [she] felt something, [her] foot on something, and then [she] went flying" Plaintiff testified that, after she fell, she saw a big hose, around three to four inches coming out of the truck. She then went by taxicab to an emergency room at a hospital near her home.

In support of its motion for summary judgment, Teitelbaum argues that the subject hose was not inherently dangerous because it was not concealed but was open, obvious, and readily observable by the plaintiff. It is undisputed that Teitelbaum's employee, Gustavo Rojas (Rojas), laid the subject hose across the sidewalk prior to beginning work cleaning the boiler.

On July 16, 2008, Rojas testified at his deposition that, prior to the incident, he attached four hoses together to get one 30-foot-long hose; that the hose was a "blueish" color, two and one-half inches thick; that he connected the 30-foot-long hose to four 50-foot hoses and one 25-foot hose; that one end of the hose was connected to his truck which was parked in front of the Premises; and that the hose lay across the sidewalk through the service entrance of the Premises so that it would reach the boiler in the basement of the Premises. Rojas stated that he set two orange safety cones down on the sidewalk next to the hose at the same time that the hose went down, in order to let pedestrians know that work was being done.

Plaintiff attaches a copy of a video, allegedly of the incident, and three duplicate photograph stills pulled from the video. Plaintiff claims that this "proves" that one hose was removed prior to the incident, and replaced after plaintiff fell. However, after reviewing the video tape and photos, this court finds that it does not clearly show what happened.

Moreover, despite the fact that Teitelbaum may have placed either one or two safety cones on either side of the hose prior to the incident, considering plaintiff's testimony that the lighting was poor due to the scaffolding overhead and that she was looking straight ahead and not down, a jury would not be precluded from finding that the placement of the hose created or

contributed to an inherently dangerous condition existing in the area of the fall (see *Eidlitz v Village of Dobbs Ferry*, 97 AD2d 747, 748 [2d Dept 1983]).

Based upon the record, this court cannot conclude as a matter of law, on the basis of clear and undisputed evidence, whether Teitelbaum's placement of the hose on the sidewalk created an inherently dangerous condition (see *Tagle v Jakob*, 97 NY2d 165 [2001]). Accordingly, Teitelbaum's motion for summary judgment is denied.

55 East's and Frankel's cross motion for summary judgment is likewise denied. Although the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts (*Whitaker v Norman*, 75 NY2d 779, 782 [1989]), there are exceptions. For public policy reasons, the employer's duty is sometimes held to be nondelegable. The exceptions include situations where the employer (1) has a statutory or contractual duty to perform or control the work, (2) has a duty to keep the premises safe, or (3) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which the employer should have anticipated (see *May v 11 1/2 E. 49th St. Co.*, 259 App Div 180, 182 [1st Dept 1945], *affd* 296 NY 599 [1946]; see also *McDonald v Shell Oil Co.*, 20 NY2d 160, 166 [1967]). In the instant case,

this court is concerned with the fourth exception involving "inherently dangerous" work.

Neil Rosenberg (Rosenberg), the superintendent of the Premises, testified at a deposition on behalf of 55 East, on October 6, 2008. He stated that neither he nor his staff supplied any materials, including safety cones, hoses, machinery or tools, to Teitelbaum in connection with the boiler work. Rosenberg further stated that neither he nor his staff were involved in the boiler-cleaning process. After he was told about the incident involving plaintiff, Rosenberg recounted that he went immediately outside and noticed the hose running from the truck across the sidewalk into the Premises, and that there were two orange cones placed on the sidewalk, one on each side of the hose. He saw a Teitelbaum employee with the plaintiff prior to her leaving by taxi.

This court has already determined that issues of fact exist regarding whether there was an inherently dangerous condition at the accident site, which was directly in front of the Premises. Plaintiff testified that the lighting conditions were poor due to the scaffolding erected directly above where she fell. 55 East and Frankel cannot avoid vicarious liability for Teitelbaum's alleged negligence if it is determined by a jury that there was danger to pedestrians inherent in the work, and that 55 East and Frankel knew or should have known about the inherent danger to

the work (see e.g. Wright v Tudor City Twelfth Unit, 276 NY 303 [1938]).

Accordingly, it is

ORDERED that defendant Michael P. Costelloe, Inc.'s and Robert L. Teitelbaum's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that defendant 55 East 66th Street Corporation and David Frankel Realty, Inc.'s cross motion for summary judgment dismissing the complaint is denied.

DATED:

9/2/09

ENTERED IN CHAMBER
J.S.C.

J.S.C.

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