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

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DAVID MARCUS,

Plaintiff,

Index No.
105145/06

- against -

Decision and
Order

THE CITY OF NEW YORK, CONSOLIDATED
DELANEY ASSOCIATES, LP and HYLAN DATACOM
ELECTRICAL CONTRACTING,

Mot. Seq. No.:
004

Defendants.

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DELANEY ASSOCIATES, LP

Third-Party
Index No.
590964/07

Third-Party Plaintiff

-against-

EDITH J. MARCUS and CHARLES MARCUS,

Third-Party Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained while he was a passenger in his mother's car which was "traveling westbound on W23rd Street, at or near its intersection with 10th Avenue" in the County and State of New York on February 2, 2005. Specifically, plaintiff testifies that he "heard a loud noise" and the car was thrown "like five feet" to the right and "about twenty feet" forward

before it came to a stop. Plaintiff testifies that after the accident he saw that the car had run over a "a loose manhole cover" that was lying in the street. Defendant Consolidated Edison ("Con Ed") is alleged to have, among other things, owned the subject manhole cover and plaintiff claims that Con Ed failed to remove said cover from the street. Con Ed now moves for summary judgment pursuant to CPLR 3212. Defendant /third-party plaintiff Delaney Associates, LP ("Delaney") is also alleged to have owned/maintained the subject manhole. Delaney opposes and cross-moves for summary judgment. No party opposes Delaney's cross-motion. Third-party defendants Edith J. Marcus, the driver, and Charles Marcus, owner/lessor of the vehicle (the Marcus'), also cross-move for summary judgment on the basis that they "bear no liability for the subject accident." Defendant the City of New York ("City") opposes the Marcus' cross-motion. Defendant Hylan Datacom Electrical Contracting ("Hylan") does not submit papers.

Con Ed, in support of its motion, submits: plaintiff's supplemental bill of particulars; the deposition transcript of plaintiff; ten black and white photocopies of photographs; the deposition transcript of Tom Marrama, Superintendent for the Department of Environmental Protection in the Borough of Manhattan; 6 documents labeled "Service Request Inspection Detail;" the deposition transcript of George Canzaniello, record searcher for Con Ed; a document titled "Emergency Control System Electric Job Inquiry/Update;" and several street opening permits appended to an affidavit by Mario E. Smith, Senior Coordinator for Con Ed.

Con Ed argues that it did not own, maintain or operate the subject manhole. Rather, it was owned by the City. Con Ed points to the deposition testimony of Mr. Marrama:

> Q: If you look at the photographs . . .can you identify the manhole that is shown in that photograph?
> A: Yes.
> Q: What manhole is it?
> A: It's a water manhole.
> Q: Is that owned by the City of New York?
> A: Yes, it is.

Con Ed also argues that it did not perform any work involving the subject manhole. Referring to the testimony of both Mr. Smith and Mr. Canzaniello, Con Ed claims

that plaintiff cannot connect any permits issued to it with the subject manhole cover or the manhole itself.

Delaney, in opposition and in support of its cross-motion, submits the following, not duplicative of Con Ed's submissions: nine color photocopies of a photograph; a Demand for Discovery and Inspection, dated July 24, 2009; Con Edison's Response to Delaney's Demand for Discovery and Inspection, dated August 5, 2009; the deposition transcript of Frank Forte, Partner at Delaney; a copy of a document titled "City of New York Department of Environmental Protection Bureau of Water&Sewer Operations Division of Engineering & Construction 'As Built'" diagram; the deposition transcript of Edith Marcus; and a copy of the Police Accident Report.

Delaney first argues that Con Ed's motion should be denied as premature because discovery is still outstanding. Delaney claims that Mr. Canzaniello testified that there may be records indicating who may have used the subject manhole, but that he did not search for them. Delaney asserts that Con Ed's response to their request for such documents is insufficient. Next, Delaney argues that it did not perform any work in the area of plaintiff's accident which involved the use of any manholes. Rather, the work consisted of filling in a depression in the street at the southeast corner of the intersection, whereas plaintiff's accident occurred in the northwest corner. Mr. Forte testifies:

> Q: Could you just tell me who the supervisor was for this work?
> A: Frank Forte.
> . . .
> Q: So you are personally familiar with the work that was performed there?
> A: Yes.
> Q: Based on your recollection . . . do you know where this work was performed?
> A: It was on the southeast quadrant of the intersection.
> Q: Is there anything in this document . . . indicating exactly what they did at the southeast quadrant at the intersection?
> . . .
> A: We were doing restoration work which is just to remove the pavement. The pavement had sunk, so were just removing the pavement

and resurfacing . . .

. . .

Q: Was any of that work performed in the west crosswalk between the north and west crosswalk between 23rd and 10th?
A: No.

. . .

Q: Based on your knowledge, do you know if the work that was performed by Delaney required accesses any manholes at the intersection of 10th and 23rd?
A: No.

. . .

Q: You did not work on any manhole covers?
A: No.

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]).

It is undisputed that the displaced manhole cover was a sewer cover owned by City. Further, Con Ed has shown that it did not perform work in the area of plaintiff's accident. Thus, Con Ed has made a prima facie showing of its entitlement to judgment as a matter of law. Delaney's opposition does not raise a question of fact sufficient to defeat the motion. Nor would the discovery it claims is outstanding serve to raise such a fact.

Delaney shows that any work it perform did not involve manhole covers. Additionally, the work it performed was outside of the area where the manhole cover was located, entitling it to summary judgment. No party opposes Delaney's motion. Where the movants have established a prima facie showing of entitlement

to summary judgment, the motion, unopposed on the merits, shall be granted. (See, *Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]).

The Marcus' cross-move for summary judgment on the basis that they "bear no liability for the subject accident." This is premised on their assertion that Edith Marcus had "no warnings about the subject defective manhole and that the subject defective manhole did not constitute an open and dangerous condition." It is well settled that a jury must resolve issues of comparative negligence. (*Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69, 72[1st Dept. 2004]). "The question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." (*Id.* at 72). The Marcus' have failed to meet their initial burden to show, as a matter of law, that Edith Marcus bore no liability for the subject accident.

Wherefore, it is hereby

ORDERED that the motion is granted and the complaint is hereby severed and dismissed as against defendant Consolidated Edison, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that any and all cross-claims as against defendant Consolidated Edison are hereby dismissed; and it is further

ORDERED that Delaney Associates, LP's cross-motion is granted without opposition and the complaint is hereby severed and dismissed as against defendant Delaney Associates, LP, and the clerk is directed to enter judgment in favor of said defendant ; and it further

ORDERED that any and all cross-claims as against defendant Delaney Associates, LP are hereby dismissed; and it is further

ORDERED that Edith J. Marcus and Charles Marcus' cross-motion is denied[1]; and it is further

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[1]Because all pleadings are not provided by movants, the Court is unable to determine what, if any, cross claims exist as against the Marcus'.

ORDERED that the remainder of the action shall continue.

DATED: November 18, 2009

EILEEN A. RAKOWER, J.S.C.