Lewis v City of New York
2010 NY Slip Op 31367(U)
May 28, 2010
Supreme Court, New York County
Docket Number: 113626/06
Judge: O. Peter Sherwood
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[* 1]
SCANNED ON 6/2/2010

6-2-10

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

PRESENT: O. PETER SHERWOOD, Justice — PART 61

JAMES LEWIS,

Plaintiff,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

INDEX NO. 113626/06

MOTION DATE Feb. 4, 2010

MOTION SEQ. NO. 004

MOTION CAL. NO. 48

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4 5
Replying Affidavits	6
Correspondence	7 8

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the motion of defendants the City of New York, the New York City Department of Education, The New York City School Construction Authority and Alps Mechanical Inc. for an order pursuant to CPLR § 3212 granting summary judgment in their favor dismissing the claims and cross claims against them is decided in accordance with the accompanying decision and order.

FILED
JUN 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 28, 2010

O. PETER SHERWOOD, 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 : PART 61
---X

JAMES LEWIS,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, ALPS MECHANICAL INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK,

Defendants.
---X

DECISION AND ORDER

Index No. 113626/2006

FILED
JUN 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

O. PETER SHERWOOD, J.:

This is an action to recover damages for personal injuries alleged to have been sustained in a trip and fall accident on a sidewalk adjacent to Park West High School. Defendants the City of New York (the "City"), the New York City Department of Education ("DOE"), the New York City School Construction Authority ("NYCSCA") and Alps Mechanical Inc. ("Alps") (collectively "the moving defendants") move for summary judgment dismissing plaintiff's complaint and co-defendant Consolidated Edison Company of New York's ("Con Ed") cross claim for common law indemnification and contribution and granting their cross claim for common law indemnification and contribution against Con Ed. The motion is opposed by plaintiff and Con Ed. For the reasons that follow, the motion is denied.

Background

Plaintiff James Lewis ("Lewis" or "plaintiff") alleges that on April 10, 2006, at approximately 5:45 p.m., he sustained injuries in the course of his employment with TBS Controls ("TBS") while working on a construction project at Park West High School ("Park West" or the "premises"), located at West 51st Street, between 10th and 11th Avenues, New York, New York (Affirmation in Support of Mary J. Joseph, Esq. [Joseph Affirm.] ¶ 3, Ex. "D", Pl's 50-h hearing at 18), when the wheels of the dolly he was using to transport boxes of materials hit a hole in the sidewalk, causing plaintiff to fall and dislodging the load from the dolly which landed on top of him. Plaintiff commenced this action against the City defendants as owners of the premises and Alps Mechanical Inc. ("Alps") as the general contractor on the construction project. The complaint

alleges that the City of New York had actual notice of the sidewalk defect. The complaint further alleges that the accident occurred as a result of defendants' negligent maintenance of the sidewalk and cites violations of specific sections of the Industrial Code in support of plaintiff's Labor Law § 241 (6) claim. The complaint contends that defendants made special use of the sidewalk or created the dangerous condition.

Plaintiff testified at a 50-h hearing and at a deposition. He testified that TBS's work at the premises involved replacing the entire heating and air-conditioning ("HVAC") systems (Ex. "D" at 18). In addition to TBS, there were other trades working at the premises (*id.*). Defendant Alps was the general contractor (*id.* at 19; Pl's EBT, Ex. "E" at 20). TBS's project manager was Bill Wieman and its lead foreman was Steven Kritzberg (Ex. "D" at 22-23). During the time he was working at the premises, plaintiff did not interact with the moving defendants except to ask the custodian for access to a locked room where work needed to be performed and such moving defendants did not supply him with tools or materials (*id.* at 20-22). Plaintiff received directions concerning the work he was to perform at the site only from Kritzberg or Wieman (*id.* at 23-24).

On Monday, April 10, 2006, plaintiff was working the 3:00 p.m. to 11:00 p.m. shift (*id.* at 25). About two hours and 40 minutes into his shift, Krtizberg and Weiman instructed plaintiff to unload materials from a box truck onto a dolly that they provided for the job, and wheel the dolly bearing the materials down the sidewalk into a side entrance to Park West located on 51st Street (*id.* at 24, 28, 35). Plaintiff had never used that particular dolly before (Ex. "E" at 124) nor had he ever taken the particular designated route (Ex. "D" at 36). He described the dolly as a four-wheel flat dolly, approximately two feet wide and three feet long, with no handles and only a four-foot long rope available to pull it (Ex. "D" at 37-38; Ex. "E" at 123). Plaintiff and two co-workers unloaded seven boxes, each weighing about 56 pounds and containing damper motors, onto the dolly (Ex. "D" at 34; Ex. "E" at 122-123). Plaintiff then pulled the dolly along the 10-12 foot wide cement sidewalk using the four-foot long rope while his two co-workers pushed the load from behind (Ex. "D" at 38, 40). Embedded in the middle of the sidewalk were two Con Ed transformer grates about four feet wide and ten feet long separated from each other by a twelve-inch space (*id.* at 40-41). Plaintiff pulled the dolly about fifteen feet along the sidewalk without incident (*id.* at 43). When the dolly passed over the grates, the two front wheels got stuck in a hole, causing the dolly to stop, propelling plaintiff's body forward to the left, and toppling the load onto plaintiff as his co-workers

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continued to push the boxes forward (*id.* at 44-46). Plaintiff tried to brace his fall with his left hand and right elbow (*id.* at 47). His body came to rest on the ground in a twisted position with the load of boxes on top of him (*id.* at 47-49).

Kampta Bishum, a Con Ed distribution splicer responsible for splicing cable and working on switches and transformers, testified at a deposition that he was familiar with the Con Ed transformer grates in the area of West 51st Street between 10th and 11th Avenues. He was shown a photograph of the area of plaintiff's accident and identified a Con Ed grid and transformer grate and vault depicted therein (Bishum EBT, Ex. "H" at 9). He further testified that Con Ed conducted regular inspections of transformer vaults approximately every three years and of the equipment and vault grates about every two years (*id.* at 15, 17-19). Based upon his review of Con Ed's inspection reports, Mr. Bishum stated that on September 20, 2005, he personally conducted a routine inspection of the vault and grate in the area of plaintiff's accident (*id.* at 32, 38-39). In the course of an inspection, Mr. Bishum or his partner would enter the vault, inspect the grate to see if it is clogged, and the surrounding area to determine if there are any defects (*id.* 42-43). Any defects or problems found in the course of the inspection would be listed on the inspection report (*id.* at 43-44). All that Mr. Bishum noted on his report of September 20, 2005 was excessive debris inside the vault. No defect in the grating was noted (*id.* at 43). Although Mr. Bishum testified that in 2006 Con Ed made repairs to the concrete slabs surrounding the grates on its vaults, he did not know if in the six months prior to plaintiff's accident any repairs had been done to the area surrounding the vaults where plaintiff's accident occurred (*id.* at 52-53).

Gerard Burns, Park West's custodian engineer and a DOE employee, was produced at a deposition on behalf of the City defendants (Joseph Affirm. Ex. "F" at 6). His duties at Park West included supervising staff in the cleaning, maintenance and repair of the premises (*id.* at 7). He testified that there are two parking facilities adjacent to the premises which are enclosed by cyclone fencing (*id.* at 11). In addition to being a facility with a combined capacity for 30 cars to be parked, that area also contains a loading area used for loading and unloading trucks and is designated for dumpsters and garbage pick-up (*id.* at 12-14). Ingress and egress for these parking areas was through a gate and over the sidewalk from or onto 51st Street (*id.* at 27). Access to the smaller parking area was over the sidewalk where the Con Ed grates were located (*id.* at 34-35). Mr. Burns and his staff generally parked in the smaller parking lot (*id.* at 90) though, on occasion DOE

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contractors might also park there (*id.*). At times, the parking lot would be open, but at others it was closed with a locked padlock to prevent neighborhood residents from parking there (*id.* at 102-103).

In June 2005, Mr. Burns prepared a work order to have the entire sidewalks adjacent to Park West on both the 50th and the 51st Street sides replaced due to the poor conditions he found during an inspection of the sidewalks (*id.* at 40-42). He was aware that at some point asphalt patch work had been performed between the two Con Ed grates on 51st Street but he did not know who had performed the repair (*id.* at 75-76). To date, no action has been taken on Mr. Burns' work order for replacement of the sidewalks (*id.* at 92-93). A couple of times a year Mr. Burns' staff would hose down and clean the entire sidewalk adjacent to the premises, including the area where the Con Ed grates are located (*id.* at 101).

Summary Judgment Motion/Parties' Contentions

The moving defendants seek summary judgment in their favor dismissing the claims and cross claims against them upon the ground that they did not owe Lewis a duty of care. They contend that plaintiff's accident occurred completely within the area of the Con Ed grate and surrounding concrete slab which were owned, maintained, inspected and repaired by Con Ed and that they had no control over or authority to maintain or repair such grate and vault. Accordingly, they cannot be held responsible for plaintiff's accident and injuries.

With respect to plaintiff's Labor Law § 241 (6) claim, the moving defendants assert that section 23-1.7 (d) and (e) of the Industrial Code upon which plaintiff relies concern slipping and tripping hazards on floors of a construction site and are wholly inapplicable to the facts and circumstances of this case. Therefore, summary judgment must be granted dismissing the Labor Law § 241 (6) claim.

Plaintiff recognizes that Con Ed made special use of the sidewalk where the accident occurred, but also opposes the motion to the extent of arguing that the City defendants also made special use of the sidewalk where the accident occurred to provide access into a parking facility over which they exercised exclusive control. On that basis, plaintiff contends that the City defendants could be held liable for his injuries. At the very least, plaintiff contends that a material issue of fact regarding such special use has been raised which the moving defendants have failed to address.

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With respect to the Labor Law § 241 (6) claim, plaintiff concedes that the moving defendants' position concerning the inapplicability of this statutory provision to the circumstances of this case is correct. Accordingly, the Labor Law 241 (6) claim must be dismissed.

Con Ed also submits opposition to the motion. Con Ed acknowledges that the defect in the sidewalk where plaintiff's accident occurred is between the two Con Ed grates which are owned, operated and maintained by Con Ed and is located entirely within the 12-inch area for which a duty to maintain is imposed upon Con Ed by the New York City Administrative Code. However, Con Ed agrees with plaintiff's position that issues of fact exist concerning the moving defendants' liability based upon its heavy use of the sidewalk for ingress and egress to their parking areas. Annexed to the affirmation in opposition of Con Ed's attorney is an unsworn report of an engineer retained by Con Ed who reviewed the pleadings, deposition transcripts, photographs of the accident site and other documentary evidence produced at the depositions and, based upon such review concluded that the sidewalk defect was caused by a number of factors including the heavy vehicle and equipment traffic.

In reply, the attorney for the moving defendants contends that the special use doctrine in inapplicable to the facts of this case as the accident occurred within an area of the sidewalk owned by Con Ed, not by the City. Moreover, the City notes that Con Ed's engineer's report is unsworn and, therefore, of no probative value on the issue of causation and insufficient to defeat the motion for summary judgment. They contend also that such report relies upon inadmissible hearsay, namely a Con Ed inspection report, and is clearly speculative and conclusory.

In a letter to the Court subsequent to the submission of the moving defendants' reply affirmation, Con Ed's attorney acknowledged that its engineer's report was inadvertently submitted unsworn due to law office failure and sought the court's permission to substitute an affidavit of the engineer together with his report in lieu of the unsworn report. The moving defendants oppose Con Ed's application on the ground that such request is made *ex parte*, but, in any event, is untimely. They urge the court to deny Con Ed's request or, in the alternative, to permit them to submit additional papers in response to the affidavit should the court exercise its discretion in accepting the expert affidavit.

It is clear that an unsworn expert's report would not be sufficient to satisfy Con Ed's burden of proof in raising a triable issue of fact as it is not in admissible form (*see, e.g., Figueroa v West*

170th Realty, Inc., 56 AD3d 299 [1st Dept 2008]; *Charlton v Almaraz*, 278 AD2d 145, 146 [1st Dept 2000]; *see also, Gedney v Atcosta*, 5 AD3d 542 [2d Dept 2004]). Although the court initially granted Con Ed's request to the extent of permitting substitution of the sworn expert report for the unsworn version, the court has now determined, in light of the lateness of the submission, to reject Con Ed's expert affidavit and not consider it in determining the summary judgment motion.

Discussion

Turning then to the merits, the necessary elements of a cause of action in negligence are: (1) the existence of a duty on the part of the defendant to the plaintiff; (2) a breach of that duty; and (3) that such breach was the proximate cause of the events which produced the plaintiff's injury (*see, Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *Rodriguez v Budget Rent-A-Car Systems*, 44 AD3d 216, 221 [1st Dept 2007]). Without a duty, there can be no breach and, therefore, no liability (*Pulka v Edelman, supra*). Thus, for the moving defendants to prevail on their summary judgment motion, they must make a prima facie showing of entitlement to judgment as a matter of law, by tendering evidentiary proof in admissible form to demonstrate that the elements necessary to impose liability upon them are not present (*see, Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). In deciding the motion, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]).

Prior to 2003, the City of New York, as owner of the public sidewalks, generally remained liable for injuries sustained by pedestrians caused by defective conditions in the sidewalk, subject to the requirements of the prior written notice law (*see,* Administrative Code of the City of N.Y. § 7-201 [c]; *Vucetovic v Epsom Downs*, 10 NY3d 517, 520 [2008]; *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]). An abutting landowner could only be held liable if such landowner affirmatively created the condition, voluntarily but negligently made repairs to the sidewalk, or created the dangerous condition through a special use of the sidewalk for its own benefit (*Id.* at p. 453). When both the City and the abutting landowner breached their respective duties to members of the public,

both could be held responsible to those injured as a result of the defective condition, with the loss being apportioned between the City and the abutting landowner in accordance with general principles of indemnity and contribution (*see, D'Ambrosio v City of New York*, 55 NY2d 454, 463 [1982]).

Section 7-210 (a) of the New York City Administrative Code ("the Administrative Code"), effective September 14, 2003, transferred to the abutting landowner, with limited exceptions not applicable here, "the duty . . . to maintain such sidewalk in a reasonably safe condition," and provides that such landowner "shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (Administrative Code of the City of N.Y. § 210 [a], [b]). The liability of the abutting landowner under section 7-210 is not absolute, but rather is limited to the "negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags" (Administrative Code of the City of N.Y. § 210 [b]).

The movants here do not dispute that the premises falls within the purview of section 7-210. Nevertheless, the moving defendants contend that the defective portion of the sidewalk where Lewis's accident occurred was within the area of Con Ed's vault. Since they did not own, install, maintain or repair the sidewalk over the vault, they were not liable for any injuries caused by defects within the sidewalk area belonging to Con Ed. Section 2-07 (b) (1) of the Administrative Code, which governs underground street access covers, transformer vault covers and gratings, provides that "the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the gratings and the area extending twelve inches outward from the perimeter of the hardware." Neither Con Ed nor plaintiff dispute that the defective area of the sidewalk where plaintiff fell was inside the twelve-inch zone of responsibility, but they contend that the deposition and documentary evidence raise a triable issue of fact as to whether liability for plaintiff's accident must be apportioned between the moving defendants and Con Ed based upon their respective special uses of the sidewalk abutting the premises and, thus, their respective degrees of fault.

The use of a sidewalk as a driveway may constitute a special use (*see, Marino v Parish of Trinity Church*, 67 AD3d 500, 501 [1st Dept 2009]; *Torres v City of New York*, 32 AD3d 347, 348 [1st Dept 2006]; *see also, Campos v Midway Cabinets, Inc.*, 51 AD3d 843 [2d Dept 2008]; *Nunez*

v City of New York, 41 AD3d 677 [2d Dept 2007]). "Where a defect that causes an accident occurs in a part of a sidewalk which is used as a driveway, the abutting landowner on a motion for summary judgment, bears the burden of establishing that it did nothing to either create the defective condition or to cause the condition through the special use of the property as a driveway" *Campo,* 51 AD3d at 844 (internal quotations omitted). (*See also Torres*, 32 AD3d at 348-49). Based upon a review of the record, the court concludes that the moving defendants have failed to meet their burden of establishing their *prima facie* entitlement to judgment as a matter of law by demonstrating that they neither created the allegedly defective condition in the sidewalk nor caused it to occur through a special use of the sidewalk. The testimony of Park West's custodian engineer, Gerard Burns, as well as photographs depicting the area of the sidewalk where the accident occurred, including that a construction trailer was situated in the parking lot, raise questions as to whether the moving defendants use of the area of the sidewalk that served as a driveway caused or contributed to the defective condition. As plaintiff notes in opposition to the summary judgment motion, more than one defendant may be held responsible for plaintiff's injuries under a special use theory of liability (*see, Feldman v King Hero Restaurant,* 270 AD2d 1 [1st Dept 2000]). Since the moving defendants failed to meet their prima facie burden, the sufficiency of the plaintiff's and Con Ed's opposing papers need not be considered (*see, Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Conclusion

Based upon the foregoing discussion, it is

ORDERED that the motion of defendants the City of New York, the New York City Department of Education, the New York City School Construction Authority, and Alps Mechanical Inc. for summary judgment dismissing the claims and cross claims against them is granted only to the extent that plaintiff's cause of action predicated upon violation of Labor Law § 241 (6) is severed and dismissed and in all other respects the motion for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the Court.

FILED
JUN 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

DATED: May 28, 2010

E N T E R,

O. PETER SHERWOOD
J.S.C.