

Sarna v City of New York
2010 NY Slip Op 31540(U)
June 15, 2010
Supreme Court, New York County
Docket Number: 106676/07
Judge: Barbara Jaffe
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6-21-10

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

PRESENT: JAFFE BARBARA JAFFE
Justice J.S.C.

PART 5

Index Number : 106676/2007

SARNA, MARIA

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

SUMMARY JUDGEMENT

CAL # 107

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUN 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/15/10

JUN 15 2010

BJ
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 5

-----X
 MARIA SARNA,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED
 EDISON COMPANY OF NEW YORK, INC.,
 EMPIRE CITY SUBWAY COMPANY (LIMITED),
 and DELANEY ASSOCIATES, LP,

Defendants.
 -----X

BARBARA JAFFE, JSC:

For plaintiff:

Charles E. Green, Esq.
 Friedman, Levy, Goldfarb & Green, P.C.
 250 West 57th St.
 New York, NY 10107
 212-307-5800

For defendant Delaney:

Matthew J. Roe, Esq.
 Law Office of James J. Toomey
 485 Lexington Ave., 7th Fl.
 New York, NY 10017
 917-778-6600

By notice of motion dated September 24, 2009, defendant Delaney Associates, LP

(Delaney) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross-claims against it. Plaintiff opposes the motion.

I. BACKGROUND

On August 3, 2006, plaintiff was allegedly injured when she tripped and fell in a hole in the roadway at the intersection between Mulberry and Grand Streets in Manhattan. (Affirmation of Matthew J. Roe, Esq., dated Sept. 24, 2009, Exh. A). On or about May 14, 2007, plaintiff commenced the instant action. (*Id.*). On or about July 5, 2007, Delaney served its answer. (*Id.*).

In a verified bill of particulars, plaintiff alleged that the accident occurred within the crosswalk between the southwest and southeast corners of Mulberry and Grand Streets,

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Motion Argued: 5/11/10

DECISION AND ORDER

approximately one to two feet east of the sidewalk at the southwest corner. (*Id.*, Exh. B). On September 16, 2009, plaintiff testified at a deposition that she was three feet into the crosswalk when she fell and that she stepped into a hole that was one foot wide and six to seven inches deep. (*Id.*, Exh. C).

On March 19, 2010, Frank Forte, Delaney's partner and project manager, testified at a deposition that he was contacted by defendant City of New York's Department of Environmental Protection (DEP) to repair a depression in the roadway in the middle of the intersection of Mulberry and Grand Streets, that Delaney's cut into the roadway was at most 10 ½ feet from the southwest corner of the intersection, and that he could not recall having seen the hole in which plaintiff allegedly fell when Delaney worked at the location. (Affirmation of Charles E. Green, Esq., dated Apr. 14, 2010 [Green Aff.], Exh. A).

II. CONTENTIONS

Delaney denies liability for plaintiff's accident as it performed no work at the location. While it concedes having performed work in the roadway which was completed by August 27, 2005, it denies doing any work thereafter or having received any complaints about its work. It also denies having performed any work at or near the corner or curb where plaintiff fell, relying on Forte's affidavit, in which he states that Delaney's work was confined to the middle of the roadway between Mulberry and Grand Streets, and a DEP diagram showing that in 2005, Delaney's work was confined to the roadway between Mulberry and Grand Streets. (*Id.*, Exh. E). Forte also denies having received any complaints or notifications about the project since its completion.

In opposition, plaintiff argues that summary judgment is premature as defendant City

has not yet turned over DEP documents pertaining to the condition of the roadway or produced a witness for a deposition, and that the cause of the condition is unknown. Plaintiff also contends that Forte's affidavit is undermined by his deposition testimony that he could not recall many details about Delaney's work on the roadway. (Green Aff.).

III. ANALYSIS

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A defendant moving for summary judgment in a slip and fall case bears the initial burden of establishing that it neither created the condition which caused the accident nor had actual or

constructive notice of the condition for a length of time sufficient to discover and correct it.

(*Bruinsma v Simon Prop. Group, Inc.*, NYS2d , 2010 NY Slip Op 04942 [2d Dept 2010]; *Garcia v Good Home Realty, Inc.*, 67 AD3d 424 [1st Dept 2009]).

Here, Delaney established, *prima facie*, that it performed no work at the location of plaintiff's accident or in the crosswalk, that any work it performed in the area was completed one year before the accident, and that it received no complaints regarding its work. (See *Loughlin v City of New York*, NYS2d , 2010 NY Slip Op 04750 [2d Dept 2010] [through depositions, work permits, and photograph depicting subject location, defendant established that prior to plaintiff's accident, it had not performed work at or on portion of sidewalk where plaintiff fell]; *Cacciatore v City of New York*, 49 AD3d 271 [1st Dept 2008], *lv denied* 11 NY3d 705 [contractor established that it never performed work on side of street where plaintiff fell]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006] [absent some evidence connecting contractor's work to situs of plaintiff's injury, contractor entitled to summary judgment]).

As Forte's deposition testimony does not contradict his affidavit, plaintiff has failed to raise any triable issue as to Delaney's liability. Although he was unable to recall some details of Delaney's work, he remembered the location and extent of it, which was consistent with the DEP diagram.

Moreover, plaintiff's belief that she may yet uncover relevant information through discovery does not, in and of itself, preclude summary dismissal in Delaney's favor. (*Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]). Moreover, Forte has already been deposed.

IV. CONCLUSION

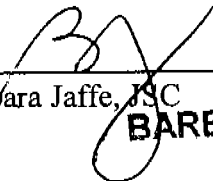
Accordingly, it is hereby

ORDERED, that Delaney's motion for summary judgment is granted and the complaint and all cross-claims are 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 is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 15, 2010
New York, New York

JUN 15 2010

FILED
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NEW YORK
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