

Falcones v Gray Line N.Y. Tours

2010 NY Slip Op 31759(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 100175/04

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla

PART 19

Index Number : 100175/2004
FALCONES, SERGIO
vs.
GRAY LINE
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED
JUL 12 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/7/10

Saliann Scarpulla
SALIANN SCARPULLA 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: CIVIL TERM: PART 19

----- X
SERGIO FALCONES,

Plaintiff,

- against-

Index No.: 100175/04
Submission Date: 4/7/2010

GRAY LINE NEW YORK TOURS, ISAAC
RUSSELL, THE CITY OF NEW YORK,
THE CONSOLIDATED EDISON COMPANY
OF NEW YORK, FELIX INDUSTRIES, INC.,
JUDLAU CONTRACTING, INC. AND
GRACE INDUSTRIES, INC.

DECISION AND ORDER

FILED
JUL 12 2010
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

----- X

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White Plains, NY 10606

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12 Metrotech Center, 28th Floor
Brooklyn, NY 11201

For Defendant Judlau Contracting,
Inc.:
Rafter and Associates PLLC
29 Broadway, 14th Floor
New York, NY 10006

For Defendant Consolidated Edison Company of New York, Inc.:
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New York, NY 10003

For Defendant The City of New York:
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100 Church Street
New York, NY 10007

For Defendants Gray Line New York Tours and Isaac Russell:
McMahon, Martine & Gallagher
55 Washington Street, 7th Floor
Brooklyn, NY 11201

For Defendant Grace Industries, Inc.:
Torino & Bernstein, PC
200 Old Country Road, Suite 220
Mineola, NY 11501-4236

Papers considered in review of these motions and cross motion for summary judgment:

Notice of Motion 1
Notice of Motion 2
Notice of Cross Motion 3
Affs in Opp 4-10
Replies 11-16

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Felix Industries, Inc. (“Felix”) moves for summary judgment dismissing the complaint and cross claims insofar as asserted against it and defendant Judlau Contracting, Inc. (“Judlau”) moves to reargue and/or renew its prior motion for summary judgment dismissing the complaint insofar as asserted against it, or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against it. Defendant The Consolidated Edison Company of New York (“Con Ed”) cross moves for summary judgment dismissing the complaint insofar as asserted against it.

On October 25, 2002, plaintiff Sergio Falcones (“Falcones”) slipped and fell while walking on the roadway intersection of Canal Street and Broadway. In or about October 2004, Falcones commenced this action seeking to recover damages for the injuries he sustained as the result of his fall. The defendants answered the complaint, denied all material allegations, and interposed cross claims.

In his bill of particulars, Falcones indicated that he slipped and fell as a result of “oil that was on a metal plate in the roadway.” Allegedly, a metal plate in the roadway intersection of Canal Street and Broadway was struck by the oil pan of a passing bus, which caused oil to leak from the pan onto the plate. It is undisputed that several of the metal plates in the area are marked with the initials “F.I.” which stands for “Felix Industries.”

At his examination before trial, Falcones testified that he started crossing Broadway at its intersection with Canal Street. He walked about five feet when he slipped and fell. When asked, "can you describe what caused you to slip, trip and fall?" he responded, "I just slipped, I don't know why, I slipped and fell." His entire body landed on a metal plate. After he fell, his clothing was covered in oil. He did not see the oil before he fell. When asked, "do you know what you slipped on?" he answered, "not until I was on the floor. I was covered in oil."

Falcones was shown a photograph of the alleged location of his fall. He was asked to mark the metal plate upon which he fell. In response, he testified, "I really don't recall on what plate itself, I mean I don't know if it's, I could say the area, I don't know which plate exactly it is, I don't recall...I really don't recall which one of those plates it is though." He explained that the location of his fall was in between two people depicted in the photograph.

Judlau moved for summary judgment dismissing the complaint insofar as asserted against it, arguing that it did not own, control or install any metal plates in the area of Falcones' fall and therefore, can not be held liable for his injuries. On September 16, 2009, this court denied Judlau's motion, finding an issue of fact as to whether Judlau installed any metal plates in the area where Falcones fell. At that time, the court also granted leave to all of the defendants to make motions for summary judgment solely on the ground that Falcones can not make out a *prima facie* case because he is unable to identify the specific area where he fell.

Judlau now moves to reargue and/or renew its prior motion for summary judgment dismissing the complaint insofar as asserted against it, or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against it.¹

Judlau seeks renewal of its prior motion for summary judgment dismissing the complaint on the ground that it did not own, control or install the metal plates in the area of Falcones' fall. Judlau re-submits an affidavit from its utility manager Paul Critelli ("Critelli") submitted in support of its prior motion, in which Critelli explains his prior examination before trial testimony that Judlau would "not typically" place its plates next to plates belonging to another entity. He maintains that by stating "not typically," he meant that it was Judlau's custom and practice to not place its plates next to plates belonging to another entity and that to the best of his recall, Judlau did not place its plates next to the plates of any other entity at the subject project. Judlau further argues that the contractor referred to in the NYC Department of Design and Construction work record document submitted in support of its prior motion is clearly Felix and not Judlau.

Alternatively, Judlau argues that summary judgment is warranted in light of Falcones' examination before trial testimony that he can not identify the specific location of his fall.

Felix moves for summary judgment dismissing the complaint and cross claims insofar as asserted against it and Con Ed cross moves for summary judgment dismissing the

¹ At oral argument on April 7, 2010, the court denied the motion to reargue.

complaint insofar as asserted against it.² The parties each argue that summary judgment is warranted in light of Falcones' examination before trial testimony that he can not identify the specific location of his fall.

In opposition, Falcones argues that the motions for summary judgment must be denied because he clearly identified the location and cause of his fall. He also submits an affidavit, in which he avers that he "slipped and fell on oil that was present on a metal street plate."

Con Ed opposes the branch of Judlau's motion seeking renewal, arguing that issues of fact exist as to whether the subject plates were owned, controlled or installed by Judlau.

Defendants Gray Line New York Tours and Isaac Russell oppose the motions, arguing that Falcones has clearly identified the cause of his fall and summary judgment should be denied to the moving defendants because an issue of fact exists as to which metal plate caused the oil to leak from the bus.

Discussion

A motion to renew requires a showing of new facts not offered on the prior motion that would change the prior determination and a reasonable justification for the failure to present such facts on the prior motion. CPLR 2221(e); *see Ramos v. City of New York*, 61 A.D.3d 51 (1st Dept. 2009). Here, Judlau has not presented any new facts to establish that it did not own, control, or install metal plates in the subject area. Rather, Judlau merely asks the court to review and re-interpret evidence that was already before the court at the time of

² Defendant The City of New York ("City") submits an affirmation to "support and join" Con Ed's cross motion.

Judlau's prior motion. At that time, the court carefully considered all of the evidence presented and determined that issues of fact exist as to whether Judlau owned, controlled, or installed metal plates in the subject area. Given that no new facts have been presented at this time, the court's September 16, 2009 determination will not be disturbed.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

As directed by the court at oral argument on April 7, 2010, the only issue on these summary judgment motions is whether Falcones is able to identify the specific area of his fall sufficient to make out a *prima facie* case. In his bill of particulars, he provided that he slipped and fell as the result of "oil that was on a metal plate in the roadway." He testified that he did not know what caused him to slip until he was on the floor. He explained that after he fell, his clothes were covered in oil. He submitted an affidavit in which he averred that he slipped and fell on oil that was present on a metal plate. While he could not identify the exact metal plate upon which he fell, he testified that he fell approximately five feet from

the curb. Based on the evidence presented, Falcones is able to identify the approximate location of his fall, and more importantly, that his fall was caused by a slip on oil. The court finds that sufficient evidence as to the location and cause of Falcones' fall has been presented to raise an issue of fact for trial.

The court notes that although Falcones can not identify the specific metal plate upon which he fell, such is not fatal to his case. There is no allegation that he tripped and fell on a defect within one of the metal plates. Rather, it is alleged that one or more of the metal plates damaged the oil pan on the passing bus, thus releasing the oil, which was the dangerous condition upon which Falcones slipped and fell. The issue in this case is not which metal plate Falcones slipped and fell on, rather the issue is whose metal plate created the dangerous condition – the oil release – upon which Falcones slipped and fell. Such is an issue of fact for a jury to determine.

In accordance with the foregoing, it is

ORDERED that defendant Felix Industries, Inc.'s motion for summary judgment dismissing the complaint and cross claims insofar as asserted against it is denied; and it is further

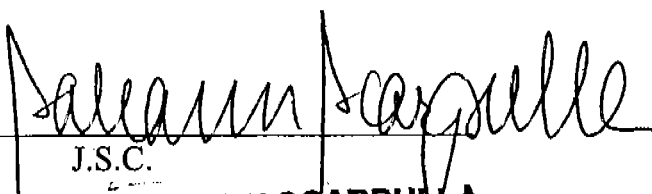
ORDERED that defendant Judlau Contracting, Inc.'s motion to reargue and/or renew its prior motion for summary judgment dismissing the complaint insofar as asserted against it, or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against it is denied; and it is further

ORDERED that defendant The Consolidated Edison Company of New York's cross motion for summary judgment dismissing the complaint insofar as asserted against it is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 7, 2010

ENTER:


J.S.C.
SALJANN SCARPULLA
J.S.C.

FILED
JUL 12 2010
COUNTY CLERK'S OFFICE
NEW YORK