

Escalera v R. Lapointe Concrete & Constr. Corp.

2010 NY Slip Op 31861(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 111328/2005

Judge: Joan A. Madden

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SCANNED ON 7/19/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

ESCALERA, FELICITA

INDEX NO.

111328/05

MOTION DATE

3-18-10

MOTION SEQ. NO.

04

MOTION CAL. NO.

- v -
R. LAPOINTE CONCRETE
& CONSTRUCTION CORP.

The following papers, numbered 1 to _____ were read on 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 ^{+ cross-motions are} ~~is~~ decided in accordance with the annexed Memorandum Decision + order

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

FILED

JUL 19 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 17, 2010

J
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

FELICITA ESCALERA,

Plaintiff,

Index No.:
111328/2005

-against-

R. LAPOINTE CONCRETE & CONSTRUCTION
CORP., UTB-UNITED TECHNOLOGY, INC.,
GKC INDUSTRIES, INC., NEW YORK CITY
HOUSING AUTHORITY and THE CITY OF
NEW YORK,

Defendants.

-----X

JOAN A. MADDEN, J.:

FILED
JUL 19 2010
NEW YORK
CLERKS OFFICE

This personal injury action arises out of plaintiff Felicita Escalera's alleged trip and fall as a result of an uneven portion of a walkway within a complex owned by the New York City Housing Authority (NYCHA).

Defendants NYCHA and GKC Industries, Inc. (GKC) together move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against them.

Defendants R. LaPointe Concrete & Construction Corp. (LaPointe) and UTB-United Technologies, Inc. (UTB) both cross-move separately, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against them.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, at approximately 5:45 P.M. on May 18, 2004, she sustained personal injuries when she tripped and fell on an uneven portion of the walkway within the NYCHA Smith Houses complex. Plaintiff is and was a resident of this housing complex at the time of the accident. Plaintiff testified that she tripped on the walkway due to a difference of one to one-and-a-half inches in the height of the contiguous concrete squares. At the time of her fall, plaintiff testified that there was sand all over the walkway and also in between the cracks of the concrete slabs. However, she also testified that she did not know whether the sand contributed to her fall. Plaintiff testified that she had traversed that particular walkway many times, however never noticed the uneven slabs of concrete. Since she never noticed the problem before, she did not complain to NYCHA about the condition. Plaintiff also testified that she noticed construction trucks all over the complex around the time of her accident, although she does not remember the names on the trucks. According to plaintiff, no one witnessed her accident.

Plaintiff commenced this negligence action on August 12, 2005. The City of New York is no longer a defendant in this action.

GKC was hired by NYCHA as a general contractor to replace concrete walkways section by section and perform other

improvements within the Smith Houses complex. LaPointe was the subcontractor retained by GKC to perform the concrete work on the walkways. According to the contracts between the NYCHA and GKC, although the work site area was to be kept clean by the contractors, any area of the complex outside the work area was to be maintained by NYCHA's maintenance department.

At his deposition, Michael Fazio, one of LaPointe's owners testified that his company had a contract with GKC to perform concrete work at the Smith Houses in 2003 and that, pursuant to the contract, LePointe removed old sidewalks and curbs and put in new sidewalks and curbs. He also testified that the work was complete in 2005. However, LePointe argues that its work on the particular walkway was not performed until after plaintiff fell.

NYCHA's inspector on record, Juan Pablo Garces (Garces), testified that he oversaw the work performed by GKC and LaPoint. He stated that GKC was not scheduled to perform work in the area where plaintiff allegedly fell until August 23, 2004. He testified that he clearly marked on the complex map "GKC started work on this area 8/23/04." NYCHA and GKC's Affirmation in Support, ¶ 17. In fact, plaintiff concedes that the sidewalk on which she fell was not recently replaced or in the process of being replaced.

NYCHA also submitted an affidavit from its Supervisor of Grounds, Jose Crespo (Crespo). Crespo states that he is

responsible for regularly inspecting the walkway where plaintiff allegedly fell. If there is a problem, he generates a work ticket for a workman to verify and repair the problem. Crespo indicates that, prior to May 18, 2004, there was no report of a problem on the walkway.

UTB was retained by NYCHA to remove and install fuel tanks around the complex. UTB performed no work on the walkways. As such, UTB concludes that it is not responsible for the defect in the walkway where plaintiff allegedly fell.

At his deposition, UTB's representative Mohan Sharma testified that all the work performed by UTB occurred behind fence which was surrounded by underground tanks. He also testified that any work it performed in the complex was completed prior to May 18, 2004, and that UTB was not on the site on the days leading up to and the day of plaintiff's fall.

In addition, Sharma testified that while, in connection with UTB's work, contaminated soil was removed from around the tanks and was replaced with sand, the sand was brought to the area by another company. With respect to the contaminated soil, he testified that his company rented the truck to take away the soil in accordance with EPA regulations and that the truck was specially lined to prevent the soil from falling out. He also testified that there were numerous contractors at the premises working on the walkways.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

It is well settled that, "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk [citation omitted]." *Perez v Bronx Park South Associates*, 285 AD2d 402, 403 (1st Dept 2001).

In a slip and fall case, the plaintiff must present evidence that the landowner defendant either created the defective condition which caused the accident, or that defendant had actual or constructive notice of it. *Mullin v 100 Church LLC*, 12 AD3d

263, 264 (1st Dept 2004). "In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the owner to discover and remedy it." *Perez v Bronx Park South Associates*, 285 AD2d at 403, citing *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

NYCHA and GKC's Motion

NYCHA and GKC now move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against them. NYCHA states that plaintiff presents no evidence which would suggest that NYCHA created the uneven walkway in its complex. With respect to actual notice, NYCHA maintains that neither plaintiff, nor anyone else, complained about the defective walkway. NYCHA argues that plaintiff cannot prove constructive notice since she provides no proof as to the amount of time that the defective condition existed prior to her accident.

As correctly argued by plaintiff, on a motion for summary judgment, it is not plaintiff's burden to establish that NYCHA had actual or constructive notice of the dangerous condition. It is NYCHA's burden, as a matter of law, to establish the lack of notice. As the Court held in *Giuffrida v Metro North Commuter R.R. Co.* (279 AD2d 403, 404 [1st Dept 2001]), "[w]here the defendant neither created the condition nor had actual notice, a

defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." As set forth below, NYCHA does not establish that it lacked constructive notice.

NYCHA argues that plaintiff's photographs, which are not attached to the motion papers, "are of poor quality and do not depict a condition which can be characterized as dangerous." NYCHA and GKC's reply affirmation, ¶ 13. It is undisputed that the walkway where plaintiff allegedly fell had not yet been repaired or replaced. This case presents facts similar to those in *Polo v New York City Housing Authority* (303 AD2d 238, 239 [1st Dept 2003]), where the Court held that a chipped step in a NYCHA-owned stairwell "permitted an inference that it came into being over a period of time sufficiently lengthy that defendant should have known of and corrected it." Accordingly, a question of fact remains for a jury to decide whether constructive notice could be found, based on the plaintiff's description of the defect, and NYCHA's motion for summary judgment is denied.

Plaintiff alleges that GKC may be liable for her injuries, since GKC had a contract with NYCHA to perform renovations within the complex, such as replacing the concrete, installing new benches and performing other improvements to the grounds. In

general, independent contractors, such as GKC, do not owe a duty of care to third parties. *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002).

However, three exceptions occur, which include the following:

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [internal citations omitted].

Id. at 140.

In the present case, as in *Espinal (supra)*, GKC did not "launch an instrument of harm," since no evidence indicates that it started work on the walkway prior to May 18, 2004.

Accordingly, the first exception does not apply to GKC.

Plaintiff did not detrimentally rely on GKC's continued performance, since it had not yet started its repairs on the walkway where plaintiff had her alleged fall. Therefore, the second exception does not apply.

GKC did not "entirely displace[d] [NYCHA's] duty [as a landowner] to maintain the premises safely." *Id.* Although GKC was required to perform renovations to the walkways in the complex, GKC was under no contractual obligation to monitor the walkways in the complex for defects. As such, the third exception cannot be satisfied.

Accordingly, GKC's actions do not fall into the three

exceptions where it would be liable in tort for plaintiff's injuries. Accordingly, GKC's motion for summary judgment is granted.

LaPointe and UTB's Cross Motions for Summary Judgment

LaPointe and UTB separately cross-move, pursuant to CPLR 3212, for orders granting them summary judgment dismissing plaintiff's claims, as well as any cross claims as against them. Plaintiff argues that both LaPointe and UTB may be liable for her injuries, based on her testimony that sand may have fallen off their trucks without properly being cleaned up.

As a preliminary matter, at her deposition, plaintiff testified that it was the inch or inch-and-a-half difference in height between the uneven pieces of concrete which led to her alleged accident, and that she was unsure that the sand caused or contributed to her fall. However, even assuming *arguendo* that the sand could be said to be a proximate cause of plaintiff's injuries, summary judgment is appropriately granted in favor of LaPointe and UTB. See *Febesh v. Encejay Inn Corp*, 157 AD2d 102 (1st Dept 1990); *Arrucci v. City of New York*, 45 AD2d 617 (2d Dep't 2007).

With respect to LaPointe, there is no evidence in the record that any work that it did at the complex resulted in the sand being on the relevant walkway. In particular, while there is evidence that LaPointe hired others to remove sand or soil from

the walkways, the record has no evidence to link this work to the sand at issue. Furthermore, LaPointe's work replacing the walkway where plaintiff fell had not begun before the accident.

As for UTB, the evidence shows that it did not contract to perform any work on the walkways at the complex. Instead, the record shows that it was responsible for removing fuel tanks at the complex. Moreover, while there is evidence that its work involved the removal of contaminated soil and its replacement with sand, putting aside the fact that this work appear to have been performed by other companies, the record is devoid of any evidence linking this soil and sand to the condition on the walkway where plaintiff fell. In addition, the record reveals that there were numerous contractors at the complex, some of which were working on the walkways. Under these circumstances, summary judgment is appropriately granted in UTB's favor since, beyond speculation, there is no evidence of a casual connection between UTB's work and plaintiff's injuries.

CONCLUSION

Accordingly, it is

ORDERED that the motion and the cross motions for summary judgment brought by defendants GKC Industries, Inc., R. LaPointe Concrete & Construction, and UTB-United Technology, Inc. are granted; and it is further

ORDERED that the motion for summary judgment brought by

defendant New York City Housing Authority is denied; and it is further

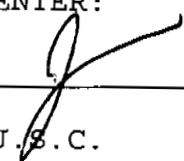
ORDERED that the complaint is hereby severed and dismissed as against defendants GKC Industries, Inc., R. LaPointe Concrete & Construction, and UTB-United Technology, Inc., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that all remaining claims and cross claims shall continue; and it is further

ORDERED that a pre-trial conference will be held on September 16, 2010 at 3:00 pm in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: July 12 2010

ENTER:



J.S.C.

FILED
JUL 19 2010
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