

Ferguson v City of New York

2010 NY Slip Op 32321(U)

August 25, 2010

Supreme Court, New York County

Docket Number: 102113/06

Judge: Barbara Jaffe

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

PRESENT. JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 102113/2006

FERGUSON, NORRIELL

vs
CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL # 41

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/25/10
AUG 25 2010

[Signature]
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
NORRIELL FERGUSON,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., and
PETROCELLI ELECTRIC CO., INC.,

Defendants.
-----X

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Index No. 102113/06

Motion Seq. Nos.: 001,
Motion Cal. Nos.: 41,
Motions arg.: 8/3, 8/17/10

DECISION AND ORDER

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion dated May 3, 2010, defendant Petrocelli Electric Co., Inc. (Petrocelli) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross-claims against it. Plaintiff opposes the motion. By notice of motion dated May 17, 2010, defendant Consolidated Edison of New York, Inc. (Con Ed) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross-claims against it. Defendant City opposes. The motions are consolidated for decision.

I. BACKGROUND

On December 3, 2004, at approximately 11 pm, plaintiff was allegedly injured when he tripped and fell into a hole in the sidewalk at the northeast corner of 50th Street and Park Avenue in Manhattan. (Affirmation of Joseph Horowitz, Esq., dated May 3, 2010 [Horowitz Aff.], Exh. G). On or about February 6, 2006, plaintiff commenced the instant action. (*Id.*). On or about April 7, 2006, plaintiff served a supplemental summons and amended verified complaint. On or about April 27, 2006, Con Edison served its answer (Affirmation in Support of Elizabeth A. Burkland, Esq., dated May 18, 2010 [Burkland Aff.]), and on or about May 19, 2006, Petrocelli served its answer (Horowitz Aff.).

In a verified bill of particulars, plaintiff alleged that he had stepped into an open utility hole on the sidewalk at the northeast corner of 50th Street and Park Avenue. (Burkland Aff., Exh. B). At a deposition held on October 6, 2008, plaintiff testified that he tripped and fell in a hole in the sidewalk near a pole with a yellow wooden box around it. (*Id.*, Exh. C).

At a deposition held on June 9, 2009, George Canzaniello, a record searcher for Con Edison, testified that he searched for opening tickets, paving orders, complaints and emergency tickets for work on Park Avenue and 50th Street during the two-year period prior to and including December 3, 2004 and only found records pertaining to locations near the site of plaintiff's accident, none of which were on the sidewalk or involving the utility hole. (*Id.*, Exhs. D, E).

At a deposition held on January 10, 2010, David Ferguson, Petrocelli's Director of Outside Installations, testified that Petrocelli's business includes the installation of electrical systems throughout the City of New York, that the utility hole in which plaintiff fell contained an electric cable, and that he searched for records created during the two-year period prior to and

including the date of plaintiff's accident and relating to the installation of electrical systems or maintenance of any electrical system that may have been performed by Petrocelli at the location of plaintiff's accident, and found none. (Horowitz Aff., Exh. J).

II. CONTENTIONS

Based on the deposition testimony of their witnesses, Petrocelli and Con Edison assert that absent any prior written notice of the condition that allegedly caused plaintiff's accident, they have established, *prima facie*, that they did not perform work at the location of plaintiff's accident and thus cannot be held liable for it. (Horowitz Aff.; Berkland Aff.).

In opposition to Petrocelli's motion, plaintiff maintains that Petrocelli relies on an unexecuted deposition transcript in support of its motion, and that it has thus failed to establish, *prima facie*, its right to dismissal and that even if the transcript were executed, the evidence that plaintiff fell into a hole containing an electric cable, in conjunction with the "well known" fact that Petrocelli "does not always obtain permits from the City of New York Department of Transportation when performing work," reveals that the absence of such permits is not probative and thus, insufficient to sustain Petrocelli's burden of proving, *prima facie*, that it is not responsible for the utility hole. (Affirmation of Jason S. Krakower, Esq., dated July 21, 2010).

In reply, Petrocelli observes that the Ferguson deposition, on which it relies to establish its *prima facie* case, is duly signed and notarized. It also argues that Ferguson's testimony that Petrocelli performs electrical work throughout the City does not mean that it performs all electrical work in the City, and that the assertion that it does not always obtain permits is unsupported by admissible evidence. (Reply Affirmation of Joseph Horowitz, Esq., dated July 28, 2010).

In opposition to Con Edison's motion, City objects to the use of Canzaniello's unexecuted deposition absent compliance with CPLR 3116(a). (Affirmation of Peter C. Lucas, Esq., dated June 24, 2010).

In reply, Con Edison provides an executed copy of Canzaniello's deposition. (Reply Affirmation of Elizabeth A. Berkland, Esq., dated June 30, 2010).

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]). 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]).

Here, each defendant established, *prima facie*, that it performed no work at the location of plaintiff's accident. (See *Loughlin v City of New York*, 74 AD3d 757 [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 Petrocelli relied only on the executed deposition of its principal, and Con Edison has submitted an executed copy of the deposition of its witness, there is no violation of CPLR 3116(a) which would preclude summary dismissal here. (*Cf Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2d Dept 2008] [no prejudice where certified and executed deposition submitted on reply]; *Washington Mut. Bank v Hickey*, 2008 WL 4903858, 2008 NY Slip Op 33028[U] [Sup Ct, Suffolk County] [although movant failed to provide complete transcript with original motion papers, stenographer's certification and cover page submitted with reply papers along with movant's explanation that after forwarding transcript to opponent for signature, opponent never returned signed original; thus, opponent not prejudiced by original omission]). My decision denying reargument and renewal in *Rosa v City of New York*, 27 Misc 3d 1234 (Sup Ct, New York County 2010), is distinguishable as there, City argued that an unexecuted transcript that has been certified by the court reporter may be affirmatively used as evidence, and offered plaintiff's letters to it seeking the signatures of City's witnesses.

IV. CONCLUSION


Accordingly, it is hereby

ORDERED, that defendants Petrocelli Electric Co., Inc. and Consolidated Edison of New York, Inc.'s motions for summary judgment are granted and the complaint and all cross-claims are hereby severed and dismissed as against them, and the Clerk is directed to enter judgment in favor of said defendants; 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: August 25, 2010
New York, New York

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE