

Cendoma v City of New York

2010 NY Slip Op 32913(U)

October 13, 2010

Sup Ct, NY County

Docket Number: 101085/2004

Judge: Saliann Scarpulla

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

----- *Saliann Scarpulla* -----

PART 19

Index Number : 101085/2004

CENDOMA, CYNTHIA D.

vs

EMPIRE CITY SUBWAY CO.LTD.

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

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

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

FILED
OCT. 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/13/10

Saliann Scarpulla

J.S.C.

SALIANN SCARPULLA

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 19

-----X
CYNTHIA CENDOMA and ROBERT B.
SHERWOOD,

Plaintiffs,

Index No.: 101085/2004
Submission Date: 9/1/2010

-against-

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
EMPIRE CITY SUBWAY COMPANY (LIMITED),
JAB CONSTRUCTION INC., TROCOM
CONSTRUCTION CORP., VERIZON
COMMUNICATIONS INC., WESTMORELAND
CONSTRUCTION INC. and VERIZON NEW
YORK, INC.,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff:
Levine & Slavit
60 East 42nd Street
New York, NY 10165

For Defendant Westmoreland Construction Inc.:
Gallo Vitucci & Klar
90 Broad Street, 3rd Floor
New York, NY 10004

Papers considered in review of this motion for summary judgment and cross motion to strike:

- Notice of Motion 1
- Notice of Cross Motion 2
- Affs in Opp 3, 4
- Reply 5

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OCT 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Westmoreland Construction Inc. ("Westmoreland") moves for summary judgment dismissing the complaint insofar as asserted against it, and plaintiffs Cynthia D. Cendoma ("Cendoma")

and Robert B. Sherwood (“Sherwood”) cross-move, pursuant to CPLR 3126, for an order striking Westmoreland’s verified answer to the second amended verified complaint.¹

Cendoma alleges that, at approximately 11:25 a.m. on June 24, 2003, she sustained personal injuries when she tripped and fell on a purportedly raised metal roadway plate located in the crosswalk leading from the southwest corner to the northwest corner of the intersection of East 45th Street and Third Avenue. The heel of her right shoe got caught in the edge of a large metal raised plate and she fell to the ground striking her right ankle, left knee and lower back. Cendoma and her husband, Sherwood, commenced this action seeking to recover damages for the injuries sustained by Cendoma as the result of her fall and for Sherwood’s loss of consortium as a result of Cendoma’s accident.²

Westmoreland is a construction company that performs “small general contracting site work, and utility work; various site work and utility work.” In the second amended complaint, Cendoma and Sherwood allege that Westmoreland “performed certain construction, excavation and back–filling work on the roadway of East 45th Street and Third Avenue... .” They further allege that Westmoreland was negligent in permitting the crosswalk and roadway to remain in a raised and uneven condition that created a tripping

¹Besides the defendant Jab Construction Inc., which is, upon information and belief, in default, all of the other defendants have been granted summary judgment dismissing plaintiff’s complaint.

²According to Sherwood, although he went to the scene of the accident three days after the accident occurred, the metal plates had been removed. As such, Cendoma was unable to produce photographs of the subject metal plate.

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hazard, with a portion of a metal plate projecting over and above the level of the adjacent surface.

Westmoreland now moves for summary judgment dismissing the complaint insofar as asserted against it, on the grounds that (1) Cendoma can not identify the owner of the subject metal plate, in that she has not identified any markings on the subject plate and has not presented any photographs of said metal plate; and (2) it was not responsible for the alleged accident because it did not install the metal plate that allegedly caused the accident, nor was it working in the accident location at the time of the accident.

Westmoreland claims that it was installing a new conduit on June 14, 2003 at the direction of AT&T/Verizon and that all work materials were removed on that date.³

In support of its contentions, Westmoreland provides testimony from its president and general superintendent, Michael Paletta (“Paletta”). Paletta testified that, although Westmoreland was performing work in the vicinity of the accident, all work was completed by June 14, 2003. The work included excavating two small pits or trenches to repair a conduit for AT&T. Steel plates would be placed down on the pits, which was done by Westmoreland. After repairs were made, or in this case, a new conduit was installed, the trench would be covered with asphalt and the metal plates would be removed. Paletta concedes that metal plates owned by Westmoreland were put down on the trenches as late as June 14, 2003, but claims that they were removed that same day.

³AT&T is not a defendant in this action and in an order dated March 31, 2008, Justice Feinman explained that Westmoreland was performing work in the area for AT&T, not Verizon.

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Paletta testified that every job, including the job that Westmoreland was performing on or around the date of the accident, would have a job folder, in which "daily reports" would be kept recording the progress of the job. He further testified that these daily reports would indicate when the steel plates were removed from the roadway or work site. He did not find any daily reports in the subject job folder. Paletta further testified that the job was supposed to be performed only on the weekends and that, while Westmoreland was performing work, no other entities were also working. He also noted that the plates owned by Westmoreland contained the initials WCC. When asked if he had been to the work site from the period of when the test pits were excavated to when the job was complete, Paletta responded "I don't recall."

In opposition, Cendoma and Sherwood maintain that issues of fact exist as to whether Westmoreland installed the subject plate upon which Cendoma tripped and fell. They maintain that Westmoreland was performing work that entailed covering trenches with metal plates as late as June 14, 2003. While Paletta testified that the plates were removed on June 14, 2003, he had no personal knowledge of this fact. Westmoreland did not produce any daily reports for that date nor did it ever provide a report to document the removal of the metal plates. Cendoma and Sherwood note that Westmoreland was given a permit to work at the accident location from May 31, 2003 through June 22, 2003 and no other entity was given a permit to work at the accident site in the entire month of June 2003. Cendoma and Sherwood further note that Westmoreland's original application for

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a permit actually had the completion date listed as June 27, 2003, but it was crossed out, and a hand-written June 22, 2003 was written in its place. Paletta could not explain the discrepancy.

Cendoma and Sherwood cross-move, pursuant to CPLR 3126, for an order striking Westmoreland's verified answer to the second amended complaint on the grounds of spoliation of evidence and engaging in dilatory tactics. Among other things, Cendoma and Sherwood allege that Westmoreland failed to produce discovery multiple times when it was demanded. Although Paletta testified that every job would have daily reports, no daily reports were produced for the subject job. They also note that, when they were finally able to inspect some of the records, they found certain relevant documents which were never previously exchanged. One such document was a correspondence from Paletta to the Chair of the Community Board #6, dated May 27, 2003. In this letter, Paletta documented that his company would be performing work in the location of Third Avenue and 45th Street. Paletta explained the nature of the work and that the working hours would be week nights and weekend days, with a projected estimated length of two weeks. Cendoma and Sherwood assert that this letter directly contradicts Paletta's testimony that the job around 45th Street and Third Avenue was a two-day job, performed on two consecutive weekends.

In opposition, Westmoreland argues that it complied with all discovery demands. Paletta signed an affidavit stating that he did not have daily reports for this job and that Cendoma and Sherwood received all the documents in Westmoreland's possession. Specifically, he maintained, "[u]pon my review of the job folder, after my deposition, there were no daily reports contained in that folder ... I have no recollection of ever seeing such a report for this project."

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." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie 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.'" *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the light most favorable to the opponent of the motion. *See Marine Midland Bank, N.A. v. Dino and Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2nd Dept. 1990).

In support of its summary judgment motion, Westmoreland claims that Cendoma and Sherwood can only speculate that Westmoreland installed the subject plate upon which Cendoma tripped and fell. However, as Cendoma and Sherwood argue, pointing to

“gaps” in their proof is an insufficient way for Westmoreland to meet its burden of proof on a motion for summary judgment. *Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 525 (1st Dept 2009). Among other things, Cendoma and Sherwood have provided evidence that Westmoreland was the only party working with metal plates in the area of the accident close to the date of the accident. Westmoreland has failed to produce any evidence proving that it did not own, install and/or remove the metal plate upon which Cendoma tripped and fell.

Further, it is well settled that “[i]ssues of credibility in particular are to be resolved by trial, not by summary judgment.” *Shapiro v. Boulevard Housing Corp.*, 70 A.D.3d 474, 475 (1st Dept 2010). While Westmoreland may believe that Paletta’s deposition testimony is sufficient to establish its entitlement to summary judgment, this court does not agree. Paletta testified that every job should have a daily report which would indicate the job’s progress and if/when the metal plates were removed. However, for the job performed on or around the date of the accident, apparently no such daily report could be found. Paletta himself, although he was the deponent, does not appear to have even witnessed when and how the metal plates were removed, and points to no documentary evidence supporting his statement that the job was completed and the plates were removed on June 14, 2003. Also, Paletta testified that the job was performed in two days, despite a letter sent to the community board explaining otherwise. Finally, Westmoreland’s original application for a permit had the completion date for the work

listed as June 27, 2003, but it was crossed out, and a hand-written June 22, 2003 was written in its place. Paletta could not explain the discrepancy.

As such, the court finds that Westmoreland has not met its of showing the absence of triable issues of fact as to whether Westmoreland installed the metal plate upon which Cendoma allegedly tripped. Accordingly, Westmoreland's motion for summary judgment is denied.

CPLR 3126 provides that "a court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure. A court may strike an answer when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith." *Rodriguez v. United Bronx Parents, Inc.*, 70 A.D.3d 492, 492 (1st Dept 2010). However, "mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading." *De Socio v. 136 East 56th Street Owners, Inc.*, 74 A.D.3d 606, 608 (1st Dept 2010). Additionally, "there is a strong preference in our law that matters be decided on the merits." *Catarine v. Beth Israel Medical Center*, 290 A.D.2d 213, 215 (1st Dept 2002).

Here, Cendoma and Sherwood believe that Westmoreland willfully engaged in dilatory tactics, such as not providing the entire contents of the job folder when it was requested, and withholding some of the evidence, specifically, the daily reports. In an affidavit, Paletta asserts that Cendoma and Sherwood were given access to all of the documentation and that a daily report for the job in question was never created.

Westmoreland also claims that it eventually complied with all discovery requests and that there does not appear to be any more outstanding discovery demands. Based on the evidence presented, the court does not find that Cendoma and Sherwood have made a clear showing that any failure by Westmoreland to comply with discovery demands was willful, contumacious or in bad faith. *See De Socio v. 136 East 56th Street Owners, Inc.*, 74 A.D.3d 606 (1st Dept 2010). As such, Cendoma and Sherwood's cross motion is denied.

In accordance with the foregoing, it is

ORDERED that defendant Westmoreland Construction Inc.'s motion for summary judgment is denied; and it is further

ORDERED that plaintiffs Cynthia D. Cendoma and Robert B. Sherwood's cross motion to strike defendant Westmoreland Construction Inc.'s answer is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 13, 2010

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OCT. 19 2010
NEW YORK
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J.S.C.
SALIAN SCARPULLA