

Green v Tully Constr. Co. Inc .

2010 NY Slip Op 33223(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 116002/2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 116002/2009

GREEN, ALAN R.

VS.

TULLY CONSTRUCTION

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

_____ in this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*and PC scheduled for
December 16, 2010 @ 9:30 am
in Part 10 Rm 232*

Dated: 11/9/10
HON. JUDITH J. GISCHE



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: IAS PART 10

-----X

ALAN R. GREEN and KATHLEEN GREEN,

Plaintiffs,
- against -

Decision and Order
Index No.: 116002/09
Seq. No.: 001

TULLY CONSTRUCTION CO. INC.,

Hon. Judith J. Gische
J.S.C.

Defendant.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers
considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m (3212) w/LAC affirm, WU affid, exhs	1
Pltff's opp w/MG affirm	2
Def's reply w/BJJ affirm	3

*Based upon the foregoing papers, the court's decision and
order is as follows:*

Gische J.;

This is a personal injury action. Issue was joined by
defendant Tully Construction Co. Inc. ("defendant") who now moves
for summary judgment before plaintiff has filed the note of
issue. Since summary judgment relief is available once issue has
been joined, the motion will be decided on its merits CPLR
3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d
42 [1st Dept 2001]). The court's decision and order is as
follows:

Arguments

Plaintiff alleges that on June 27, 2008, he tripped and fell

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in the roadway on East 49th Street, where it intersects with the northeast corner of Park Avenue. He claims to have sustained injuries that were proximately caused by the defendant's negligence.

At the time of the incident, defendant had a contract with the City of New York (City) entitled "Grinding Existing Asphaltic Concrete Wearing Course in Preparation of Resurfacing ...", contract number HW2CR05B (Affirmation in Support, Ex. C) ("contract"). A copy of this contract has been provided to the court but it contains blanks and is unexecuted copy (see *id.*).

In November 2004, defendant entered into a subcontract with Fleet Trucking, Inc. (Fleet) for milling and removal of the top layer of existing asphalt on the roadway at various locations in New York pursuant to defendant's contract with the City (Affirmation in Support, Ex. D). According to the affidavit of William Urig, defendant's project manager ("Urig"), the accident location identified by plaintiff, i.e., the intersection of East 49th Street and Park Avenue, was never milled by Fleet on behalf of defendant or by defendant (Affirmation in Support, Ex. E, ¶¶ 7, 11).

Defendant submits a computerized report entitled "Status of Milled Locations." The report indicates that eight months before the accident, Fleet had milled the roadway one block east of the accident location, at the intersection of East 49th Street and

Lexington Avenue (*id.*, ¶¶ 8, 10). It is not clear from the record who created this document. Defendant claims that thereafter, the City paved East 49th Street from the Franklin D. Roosevelt East River Drive (FDR Drive) to Lexington Avenue, in mid-October 2007 (*id.*, ¶ 9).

In opposition, plaintiff offers a projected street opening permit, issued to the defendant on August 2, 2007, valid from August 6, 2007 through to November 3, 2007 (see Affirmation in Opposition, Ex. A). According to the permit, defendant was given permission to open the roadway on East 49th Street from Park Avenue for milling a maximum length of 300 feet (*id.*). The permit was issued in connection with the aforementioned contract between defendant and the City (*id.*). Plaintiff also claims that he obtained this permit through a FOIL request, not discovery, and that there may be further information and documents out there that will shed light on the work done.

Discussion

For the movant to prevail on its motion for summary judgment, it must show that there are no material or triable issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Esteva v City of New York*, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 [b];

see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Esteva*, 30 AD3d 212). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman*, 49 NY2d at 560; see also *Sheridan v Bieniewicz*, 7 AD3d 508 [2d Dept 2004]).

In order to prove that defendant was negligent, plaintiff must prove that: (1) defendant owed a duty to him; (2) the duty was breached; (3) the breach of the duty proximately caused plaintiff's injuries; and (4) plaintiff sustained damages as a consequence of defendant's negligence (see *Kenney v City of New York*, 30 AD3d 261 [1st Dept 2006]).

Defendant claims that it did not owe a duty to plaintiff. According to defendant, neither it nor its subcontractor, Fleet, performed any milling work where the accident allegedly occurred. Urig's affidavit states on behalf of his employer, that defendant did not mill the section of the roadway in question. Urig is the project manager for the work performed under the applicable contract. His contention, however, is factually disputed by plaintiff, who has come forward with evidence that defendant obtained a street opening permit for that very section. While defendant denies that it ever did work in accordance with the

permit, the permit raises a material issue of fact which must be decided at trial. At the very least it provides a good faith basis for the continuation of discovery at this early stage of the litigation.

Tully's subcontract with Fleet to perform milling work under its contract with the City does not identify the specific locations where the work would be performed. In addition, while defendant contends that any work Fleet did perform near the area occurred eight months prior to plaintiff's accident, the subcontract shows that since this was an ongoing contract, work could easily have been performed after that date by either defendant or its subcontractor.

Defendant's reliance on the document entitled "Status of Milled Locations" is equally unavailing. It is unclear who prepared the document or whether it is accurate (see e.g. *Post Traumatic Medical Care, P.C. v Travelers Home & Marine Ins. Co.*, 23 Misc 3d 145[A], 2009 NY Slip Op 51149[U] [App Term, 2d, 11th & 13th Jud Dists 2009]).

While the street opening permit is not decisive of whether Tully actually performed work at the site in question, it is sufficient to warrant further discovery, pursuant to CPLR 3212 (f) (*Botros v Flamm*, - AD3d -, 2010 NY Slip Op 07131 [2d Dept 2010]).

Accordingly, defendant's motion for summary judgment is

[* 7] ,
denied for the reasons stated. Since this case was adjourned without a date due to the pending motion which has now been decided, the court hereby restores this case to the calendar for a Preliminary Conference in Part 10 on December 16, 2010 at 9:30 a.m.

Conclusion

Accordingly,

It is hereby

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

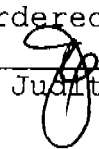
ORDERED that the court hereby restores this case to the calendar for a **Preliminary Conference in Part 10 on January 6, 2011 at 9:30 a.m.**; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
November 9, 2010

So Ordered:



Hon. Judith J. Gische

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