

Romer v City of New York

2010 NY Slip Op 33981(U)

August 17, 2010

Supreme Court, New York County

Docket Number: 109911/06

Judge: Karen S. Smith

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

PRESENT: KAREN S. SMITH
Justice

PART 62

CYRILLE ROMER,

Plaintiff,

- v -

CITY OF NEW YORK, 1511 THIRD AVENUE
ASSOCIATES, LLC, VIACOM OUTDOOR, INC.,
SHELTER EXPRESS, CORP., and SHELTER
EXPRESS, INC.,

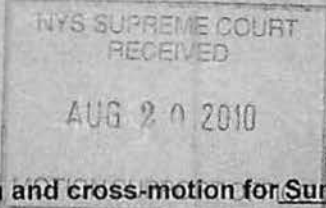
Defendants.

INDEX NO. 109911/06

MOTION DATE 7/8/10

MOTION SEQ. NO. 002

MOTION CAL. NO. _____



The following papers, numbered 1 to 8 were read on this motion and cross-motion for Summary judgment

8/23/10
ec

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

- Notice of Motion — Affidavits — Exhibits _____
- Answering Affidavits — Exhibits _____
- Reply _____
- Notice of Cross-Motion — Affidavits — Exhibits _____
- Answering Affidavits — Exhibits _____
- Reply _____

PAPERS NUMBERED

1
2, 3
4
5
6, 7
8

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion by defendant CBS Outdoor, Inc. f/k/a Viacom Outdoor, Inc., for summary judgment dismissing plaintiff's complaint and all cross-claims as against it pursuant to CPLR § 3212, and the cross-motion by defendant City of New York for summary judgment dismissing plaintiff's complaint and all cross-claims against it pursuant to CPLR § 3212, are both denied for the reasons discussed below.

Plaintiff commenced this action to recover for injuries she alleges she suffered on October 18, 2005, when she was caused to trip and fall by a defect in the sidewalk near the northeast corner of East 85th Street and Third Avenue, New York, New York. Defendant CBS Outdoor, Inc. f/k/a Viacom Outdoor, Inc. (hereinafter "Viacom") now moves for summary judgment dismissing plaintiff's complaint and all cross-claims as against it, contending that it bears no responsibility for the defect plaintiff alleges caused her accident. Defendant City of New York (hereinafter "City") cross-moves for summary judgment also contending it cannot be held liable for plaintiff's accident, but on different grounds.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

According to Viacom, it entered into a franchise agreement with the City to install, maintain and remove bus shelters throughout the five boroughs. Viacom subcontracted the work to remove bus shelters to co-defendant Shelter Express, Inc. (hereinafter "Shelter Express"). Removal of a bus shelter pursuant to the franchise agreement included taking certain steps to make sure that the sidewalk was in a reasonably safe condition after the shelter was gone. According to the records of Shelter Express and confirmed by Viacom's witness and a City witness at deposition, there had been a shelter in the location of plaintiff's accident which was removed by Shelter Express at the direction of the City's Department of Transportation on April 5, 2003, more than two years prior to plaintiff's accident.

The photos annexed to Viacom's motion and relied on by all parties at their depositions show an area of the sidewalk with a long "L-shaped" depression and a circular depression adjacent to the "L-shaped" depression. Glen A. Herskowitz testified on behalf of Viacom and opined that it appeared from the photos presented that there had been a bus shelter at the location and that the photos indicated that the sidewalk had been patched after the shelter was removed, rather than the entire sidewalk flag being replaced, which was done under some circumstances.¹ Herskowitz testified that the circular "divot" in the sidewalk next to the "L-shaped" depression, which was referred to as a "trench," appeared to be where a support column for the shelter had gone. The "trench" was where the electrical wiring would have gone to provide electricity to the bus shelter, according to Herskowitz. He identified a metal square at the end of the "L-shaped trench" and stated that it was either there or in the circular "divot" next to the trench where one of the four shelter legs would have gone. Herskowitz also stated, in response to a question, that it was possible the circular depression could have been caused by a bus stop or other type of pole independent of the bus shelter.

Shelter Express produced Amauris Reynoso as its deposition witness. Although he did not personally do so, Reynoso confirmed that Shelter Express removed a "Universal"-style bus shelter on April 5, 2003 and that the "L-shaped trench" had been created for the installation of electrical supply to the shelter when it was initially installed some time before Shelter Express's involvement. Reynoso testified that after removal of a shelter, workers would typically patch any damage to the sidewalk left by the shelter or caused by its removal, but would not have patched any other defects in the sidewalk. Reynoso testified that the circular depression, sometimes referred to as a "hole," had nothing to do with the shelter that Shelter Express removed. He identified a metal square in the "L-shaped trench" as the location where a mounting plate would have been, and where one of the legs of a "Universal" bus stop shelter would have been bolted into the ground by four bolts, which are visible in the photographs. Consistent with the photograph of the location of plaintiff's accident, Reynoso stated that patchwork would have to be done on the one leg through which the electrical conduits ran because it would be connected to the trench, but that the other three legs would simply be removed and the bolts ground down to be flush with the surrounding sidewalk, so no concrete patch would be required. Reynoso also testified that the DOT inspection of the shelter would likely have been prior to, not after, its removal and that Shelter Express did not routinely send inspectors to review removal work.

The testimony of both Reynoso and Herskowitz is important, as it makes clear that there is no evidence that the circular depression was connected to the Universal-type bus stop shelter that was removed by Shelter Express pursuant to its contract with Viacom, on April 5, 2003. These witnesses' testimony makes it equally clear that the shelter removed by Shelter Express was, in fact, located where that "L-shaped" depression existed at the time of plaintiff's accident. In support of its motion for summary judgment, Viacom relies entirely on the assertion that plaintiff's accident was caused by the existence of this circular depression adjacent to the "L-shaped" depression. As a review of plaintiff's EBT testimony makes clear, however, there are issues of fact as to the precise defect that caused plaintiff's accident.

¹ There is some dispute as to whether, pursuant to Viacom's franchise agreement with the City, the entire flag was required to be replaced or if patchwork was sufficient. As it is unnecessary to determine Viacom's entitlement to summary judgment here, the Court makes no finding in this regard.

Plaintiff testified that she was caused to fall when her foot became caught in a hole in the sidewalk. When asked to describe the defect, she testified, "It appeared to be a large hole with, like, a metal square in the inside." Plaintiff believes that her foot became caught on the metal square, which was approximately six inches square and jutting out from the sidewalk approximately half to three-quarters of an inch. When shown the same photographs that would later be shown to the defense witnesses, plaintiff identified the location of the defect as the large hole with a metal square inside, but the transcript does not reflect to which "hole" she was referring, and she did not mark the photograph.

Later, however, at the end of her deposition, plaintiff is again referred to the photographs by counsel for 1511 Third Avenue Associates, LLC, the abutting property owner. Counsel notes that plaintiff had already described "the circular hole" in the photograph, then says,

Q: I guess there was one reference to something else in this photograph which looks like a trench that may have been dug and filled up again. It's almost L-shaped along the left side and bottom of the photograph. Do you see that?

A: Yes, I do.

Q: Was that involved in your fall in any way or was just the circular hole near that?

A: It was just the hole near it.

Q: Just to clarify, the L-shaped trench was not involved in this?

A: No.

As the Court has been given color copies of presumably the same photographs shown to plaintiff at her deposition, in which there is a visible metal square at the end of the "L-shaped trench" and no visible metal inside the "circular" depression or hole, which is consistent also with the testimony of Reynoso, this sudden shift in plaintiff's testimony and description of the defect that caused her accident raises issues of fact which preclude a finding of entitlement to summary judgment at this time, even though at the time of trial the burden will be on plaintiff to prove the cause of her accident.

Defendant City cross-moves for summary judgment dismissing plaintiff's complaint and all cross-claims as against it, and, in the alternative, seeks summary judgment in its favor on its cross-claim for indemnification against Viacom. Plaintiff and Viacom both oppose the City's cross-motion as untimely, noting that the Note of Issue was filed on December 7, 2009 and the City's cross-motion was made by service on April 26, 2010, more than 120 days later. The City argues that the First Department, Appellate Division, has long held that a cross-motion may be considered, even if it was made beyond the time permitted, where there is then pending a timely-made summary judgment motion by another party and the cross-motion seeks relief "nearly identical" to the pending motion. (*Filannino v Triborough Bridge & Tunnel Authority*, 34 AD3d 280 [1st Dept 2006]). Here, the City argues, *inter alia*, that because both it and Viacom are asserting that they did not affirmatively cause or create the alleged condition, because Viacom's contract with the City of New York was an issue raised by Viacom on its motion, and because Viacom points to the abutting land owner as the party responsible for maintaining the sidewalk, the same essential issues are raised by the cross-motion as by Viacom in its motion.

A review of the cases cited by the City in its papers demonstrates why this is not the type of instance in which the Appellate Division, First Department has held that an untimely cross-motion should still be considered. While the City cites to *Hinton v City of New York*, 2010 NY Slip Op 3766 (1st Dept May 4, 2010), that case involved a motion by a property owner and a cross-motion by its tenant for summary judgment on the issue of premises liability, where the substantive issues were virtually identical and dismissal of one would necessitate dismissal of the other. Also in *Wilinski v 334 E 92nd Housing Development Fund Corporation*, 2010 NY Slip Op 2412 (1st Dept 2010), plaintiff moved for summary judgment on her Labor Law § 240 causes of action, which were also the subject of the cross-motion by defendant seeking summary judgment in its favor. As the Court in *Filannino* explained, "An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross

motion (CPLR 3212 [b]; see Connors, *CPLR 3212 [a]'s Timing Requirement for Summary Judgment Motions*, 71 Brook L Rev 1529, 1541-1542 [Summer 2006])" (*id.*).

Thus, courts have considered untimely summary judgment motions that rely on the same legal theories and the same evidence advanced in the motion-in-chief, because even without the cross-motion, the court would have the authority to search the record and, where appropriate, grant the cross-moving party summary judgment notwithstanding the lateness of the motion. Such is not the case here, where the City is moving based on evidence not submitted with Viacom's papers and law not even applicable to Viacom, such as New York City Administrative Code § 7-201(c), and alternatively seeks summary judgment on its claim for indemnification, an issue not raised anywhere in Viacom's motion. Accordingly, the City's cross-motion must be denied as untimely.

Accordingly, it is

ORDERED that this motion by defendant CBS Outdoor, Inc. f/k/a Viacom Outdoor, Inc., for summary judgment pursuant to CPLR § 3212, is denied; it is further


ORDERED that this cross-motion by defendant City of New York for summary judgment pursuant to CPLR § 3212, is denied; it is further

ORDERED that the parties appear for Mediation before J.H.O. Leibovitz on October 21, 2010 at 11:00 a.m., as previously scheduled.

This constitutes the decision and order of the Court.

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 17, 2010



Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST