

Hanberry v City of New York

2011 NY Slip Op 30349(U)

February 7, 2011

Supreme Court, New York County

Docket Number: 103093/07

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 : 103093/2007
HANBERRY, ROSANNE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL # 42

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1

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

FILED

FEB 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/7/11

FEB 07 2011

BARBARA JAFFE J.S.C.
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
ROSANNE HANBERRY,

Plaintiff,

-against-

Index No. 103093/07

Motion Date: 1/4/10
Motion Seq. No.: 003
Calendar No.: 42

DECISION & ORDER

THE CITY OF NEW YORK, CONSOLIDATED
EDISON, L.E.S. SUB-SURFACE PLUMBING, INC.
and TURNER CONSTRUCTION COMPANY,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:
Philip J. Sporn, Esq.
Philip J. Sporn & Associates
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718-828-9101

For Turner Construction Co.:
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By notice of motion dated September 14, 2010, defendant Turner Construction Company (Turner) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes. Co-defendants City of New York and Consolidated Edison of New York do not oppose.

I. FACTS

Plaintiff alleges that on January 11, 2006, she fell due to a road surface crater as she was exiting a bus at the curb line on the south side of East 68th Street between York and First Avenues and opposite 401 East 68th Street. (Affirmation of Ralph A. Foertsch, Esq., dated Sept. 14, 2010 [Foertsch Aff.]).

Turner had been the construction manager for a project located between 417 and 435 East

68th Street, at least three buildings from 401, and across the street from the curb at which plaintiff fell. (*Id.*, Exh. J, L). Turner submits the affidavit of its project manager who maintains that Turner hired and supervised subcontractors to do the work, that this project involved no work at the site where plaintiff fell, and that it performed no work in the area adjacent to 401 East 68th Street. (*Id.*).

II. PERTINENT PROCEDURAL BACKGROUND

On March 5, 2007, plaintiff commenced an action by serving a summons and complaint on City (*id.*, Exhs. A) and on July 31, 2008, commenced an action by serving a summons and complaint on Turner and co-defendants (*id.*, Exh. C). By order dated September 15, 2009, the actions were consolidated. (*Id.*, Exh. G). On May 16, 2008, plaintiff was deposed in the action against City (*id.*, Exh. H), and on December 18, 2009 she served Turner with her verified bill of particulars (*id.*, Exh. F).

III. CONTENTIONS

Turner contends that it is entitled to summary dismissal because it performed no work or maintenance at the location of plaintiff's fall, and does not own the location. (Foertsch Aff.). In support, it annexes the pleadings indicating the location of plaintiff's fall (*id.*, Exhs. A, C, F), evidence produced by plaintiff indicating the location of her fall (*id.*, Exhs. I, J), its project manager's affidavit (*id.*, Exh. L), and unverified New York City operation permits (*id.*, Exh. K). In opposition, plaintiff argues that the motion is premature as discovery is incomplete and movant has not yet been deposed. (Affirmation of Philip J. Sporn, Esq., dated Oct. 14, 2010). In response, Turner maintains that the record evidence demonstrates that it performed no work at the location of plaintiff's fall, and plaintiff has not established that further discovery would lead

to evidence reflecting a legitimate dispute of a material fact. (Reply Affirmation of Ralph A. Foertsch, Esq., dated Oct. 22, 2010).

IV. ANALYSIS

The party seeking summary judgment must show *prima facie* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, denial of the motion is required, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

In order to establish a cause of action for negligence, a plaintiff must establish a duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). A contractor who performed no work at the accident location and exercised no responsibility for the construction work owes no duty to a plaintiff. (*Id.*).

Through the affidavit of its project manager, Turner has established that it performed work on the side of the street opposite from the situs of plaintiff's fall, and performed no work at or immediately adjacent thereto. Thus, Turner has satisfied its burden of demonstrating that it cannot be held liable for plaintiff's injuries. (See *Kenney*, 30 AD3d at 262; *Manson v Consolidated Edison Co. of New York, Inc.*, 220 AD2d 374 [1st Dept 1995] [summary judgment where contractor shown to have performed work on opposite side of the street]). Plaintiff's speculation that further evidence may prove otherwise, is insufficient to resist the motion. (See

Gruppo v London, 25 AD3d 486, 487 [1st Dept 2006] [defendant's speculation that discovery might reveal grounds to impugn plaintiff's expert's credential and basis of his knowledge insufficient to avoid summary judgment]; *White v New York City Trans. Auth.*, 308 AD2d 341, 343 [1st Dept 2003] [plaintiff's speculation insufficient basis for court to conclude that discovery will yield information inconsistent with affidavits provided by defendants-respondents]).

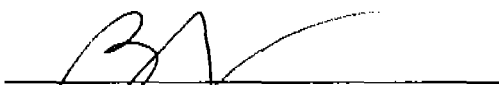
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, and the claims dismissed against it with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the remainder of this action shall continue

This constitutes the decision and order of the court.


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: February 7, 2010
New York, New York

FEB 07 2011

FILED

FEB 15 2011

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