Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Janice Hill,

Plaintiff,

- against -

The New York City Transit Authority, The City of New York, C.A.C. Industries, Inc., And JR Cruz Corp.,

Defendants.

----------X

Index Number: 17753/08

Motion Date: 2/1/11

Motion Cal. Number: 9&10

Motion Seq. No.: 1&2

The following papers numbered 1 to 14 read on this motion by defendant, C.A.C. Industries, Inc., for summary judgment; motion by defendants, JR Cruz Corp. and The City of New York, for summary judgment; and cross-motion by plaintiff to compel discovery.

| | Papers Numbered |
|---|---|
| Notice of Motion(CAC)-Affirmation-Exhibits..... | 1-4 |
| Notice of Motion(JR Cruz,City)-Affirmation-Exhibits | 5-8 |
| Notice of Cross-Motion-Affirmation-Exhibits..... | 9-12 |
| Affirmation in Partial Opposition..... | 13-14 |

Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by CAC for summary judgment dismissing the complaint and all cross-claims against it is granted. Motion by JR Cruz and the City for summary judgment dismissing the complaint against them is denied. Cross-motion by plaintiff to strike the answers of JR Cruz and the City or, in the alternative, to preclude them from offering evidence at trial or, in the alternative, to compel them to comply with plaintiff's discovery demands is granted, there appearing no opposition by JR Cruz, the City or the New York City Transit Authority (TA), and no substantive opposition by CAC, to the extent that JR Cruz shall produce all work site photographs and progress notes, all subcontracts it entered into with respect to the work it was hired to perform at the subject location in July 2007 and a copy of the entire contract entered into by it and the City for said work, to the extent not already provided, within 30 days from the date of service of a copy of this order with notice of entry. Additionally JR Cruz shall produce its foreman, Cidalio Pais, for a deposition within 60 days from the date of service of a copy of this order with notice of entry. The City shall produce a witness for a deposition within 60 days from the date of service

of a copy of this order with notice of entry.

Plaintiff allegedly sustained injuries when loose wooden planks used as a temporary walkway over the sidewalk that had been excavated in connection with construction work on the west side of 59th Street between Rockaway Freeway and Rockaway Beach Boulevard in Queens County caused her to step down between them into the excavated street and onto a piece of metal in the street on July 18, 2007.

CAC has proffered unrebutted evidence that it did not perform any work in the area of the accident on or before July 18, 2007, the date of the accident, and, therefore, did not create the condition that allegedly caused plaintiff to trip and fall.

Tim Ganun, project supervisor for CAC, averred in his affidavit in support of CAC's motion that CAC entered into a contract on May 8, 2007 for construction work involving storm sewers, catch basins and water main work from Beach 60th Street to Beach 62nd Street and from Rockaway Beach Boulevard to the boardwalk. The work did not encompass Beach 59th Street between Rockaway Freeway and Rockaway Beach Boulevard. He also averred that CAC did take out a permit for Beach 59th Street between Rockaway Freeway and Rockaway Beach Boulevard because the work that it was to do would be in close proximity to that location, but CAC, in fact, did not do any work at that location. Moreover, he averred that the work that CAC did perform at the other stated locations was not commenced until February 21, 2008.

In addition, Evaristo Cruz, president of JR Cruz, testified in his deposition that JR Cruz had a contract with the City to do work involving storm sewers, catch basins, sidewalks and curbs, that such work encompassed the subject location, and that the work was, in fact, done in July 2007. Cruz also testified that he is familiar with CAC because it is a competitor that does similar work and stated that CAC did not perform any work at the subject location in 2007.

No opposition to the granting of CAC's motion has been interposed by plaintiff or co-defendants. Indeed, a stipulation of discontinuance was executed by counsel for plaintiff and CAC on October 4, 2010, stating that the attorneys for all parties "stipulate and agree that the complaint, and all cross-claims, counterclaims and third-party claims" against CAC are discontinued with prejudice. The stipulation also had signature lines for the Transit Authority, JR Cruz and the City. However, no signatures of counsel for these defendants appear on the stipulation. Counsel for JR Cruz and the City does not dispute the representation by counsel for CAC in his affirmation in support of the motion that counsel for co-defendants have refused to sign the stipulation, despite several requests to do so. Moreover, the Transit Authority has not appeared to oppose CAC's motion. Thus, CAC was compelled to make

the instant needless motion.

Therefore, the complaint and all cross-claims must be dismissed as against CAC.

Motion by JR Cruz and the City for summary judgment dismissing the complaint against them is denied.

JR Cruz does not deny creating the condition that allegedly caused plaintiff to trip and fall. Counsel for said defendants merely contends that JR Cruz is entitled to summary judgment because the condition was open and obvious and because plaintiff's intoxication was a superceding cause that absolved JR Cruz of any liability.

Counsel's argument that the condition was open and obvious is unavailing. The question of whether a condition is open and obvious merely goes to the issue of comparative negligence (see Cupo v Karfunkel, 1 AD 3d 48 [2nd Dept 2003]). A defendant would be entitled to summary judgment upon the ground that the condition was open and obvious only if it were also established that the condition was not inherently dangerous (see id.). JR Cruz does not argue and there has been no showing, on this record, that the condition was not inherently dangerous as a matter of law. Therefore, the issue of whether the condition was open and obvious would only serve to raise a question of fact for the jury in apportioning fault.

Also without merit is counsel's argument that plaintiff's intoxication was a superseding cause that absolved JR Cruz of any liability. In the first instance, JR Cruz has failed to proffer any admissible evidence that plaintiff was intoxicated at the time of the accident and that she tripped as a result of her intoxication. The only purported evidence proffered by JR Cruz in this regard is a copy of a hospital report annexed to JR Cruz' motion papers which relates that plaintiff complained of ankle pain after she twisted it on a rock while intoxicated. Said report lacks probative value and is inadmissible, since it is not certified (see Wang v Harget Cab Corp., 47 AD 3d 777 [2nd Dept 2008]). Moreover, even were this report in admissible form, and even if it constituted evidence that plaintiff tripped while in a state of intoxication, plaintiff, in her 50-h hearing and her deposition, denied making said statement to hospital personnel and denied drinking any alcohol in the 12-hour period before the time of the accident. Therefore, even if JR Cruz had presented admissible evidence that plaintiff was drunk at the time of her accident, which it has failed to do, plaintiff's denial that she made any statements to that effect or that she had consumed any alcohol raises a question of fact as to whether she was intoxicated at the time of the accident, precluding the granting of summary judgment on the issue of superseding cause.

Moreover, even if, arguendo, there was unrebutted proof that plaintiff tripped and fell while intoxicated, JR Cruz has still

failed to demonstrate that plaintiff's condition constituted a superseding cause.

"An intervening act constitutes a superseding cause sufficient to relieve a defendant of liability if it is 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct'" (Fahey v A.O. Smith Corp., 77 AD 3d 612, 616 [2nd Dept 2010] [citations omitted]). JR Cruz has failed to demonstrate, on this record, that there is no issue of fact as to whether plaintiff's purported injury from tripping and falling was a foreseeable result of the creation by it of a hazardous condition of the sidewalk. Moreover, the record on this motion does not establish, as a matter of law, that plaintiff's alleged culpable conduct "was of such an extraordinary nature that it was not foreseeable in the normal course of events or that it so attenuated [JR Cruz'] conduct from the ultimate injuries as to constitute a superseding cause absolving [JR Cruz] from liability" (id. at 616). Even if the statement purportedly made by plaintiff to hospital staff and related in the uncertified medical report that she twisted her ankle while intoxicated was admissible, the report does not indicate what her level of intoxication was or to what degree her motor skills were impaired, and it does not suggest that there was a causal nexus between her intoxication and the alleged accident. No evidence is presented that her intoxication, even if admitted, was the sole proximate cause, or even a proximate cause, of the accident, much less that it was so extraordinary as to eclipse entirely JR Cruz' negligence in creating a dangerous condition.

Therefore, since JR Cruz has failed to establish a prima facie entitlement to summary judgment as a matter of law, its summary judgment motion must be denied.

With respect to the City, although the notice of motion and the second paragraph of the affirmation in support of the motion state that JR Cruz and the City seek summary judgment dismissing plaintiff's claims against them, no grounds are set forth for dismissal of the complaint against the City. Indeed, in his legal arguments set forth in his affirmation, counsel for JR Cruz and the City only contends that summary judgment should be granted in favor of JR Cruz. Therefore, that branch of the motion by the City for summary judgment is denied.

Finally, with respect to plaintiff's cross-motion against JR Cruz and the City to compel them to provide discovery, neither JR Cruz not the City deny being in violation of the prior orders of the Court or of not complying with plaintiff's demands and notices of deposition heretofore served. Moreover, plaintiff has demonstrated, again, without any opposition by Jr Cruz or the City, that Cidalio Pais, foreman for JR Cruz, was the employee most knowledgeable and was the one who should have been produced for a deposition.

Accordingly, CAC's motion for summary judgment dismissing the complaint and all cross-claims against it is granted, JR Cruz' and

the City's motion for summary judgment dismissing the complaint against them is denied and plaintiff's cross-motion to compel JR Cruz and the City to produce witnesses for a deposition and to furnish discovery is granted to the extent hereinabove provided.

Dated: February 24, 2011

KEVIN J. KERRIGAN, J.S.C.