

Brizard v City of New York

2011 NY Slip Op 31043(U)

April 21, 2011

Supreme Court, New York County

Docket Number: 108126/2009

Judge: Barbara Jaffe

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

PRESENT: JAFFE

PART 5

Index Number : 108126/2009

BRIZARD, MARTHA

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL # 24

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

APR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/21/11

3-1
BARBARA JAFFE 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 5

-----X
 MARTHA BRIZARD,

Plaintiff,

-against-

THE CITY OF NEW YORK and PADILLA
 CONSTRUCTION SERVICES, INC.,

Defendants.
 -----X

BARBARA JAFFE, J.S.C.:

For plaintiff:

Douglas Herbert, Esq.
 26 Court Street, Suite 2505
 Brooklyn, New York 11242
 718-855-0200

Index No.: 108126/09
 Motion Date: 3/1/11
 Motion Seq. No.: 001
 Motion Cal. No.: 24

DECISION AND ORDER

FILED

APR 25 2011

NEW YORK
 COUNTY CLERK'S OFFICE

For defendant Padilla:

Gregory N. Harris, Esq.
 Segal McCambridge Singer, *et al.*
 850 Third Avenue, Suite 1100
 New York, New York 10022
 212-651-7500

By notice of motion dated October 27, 2010, defendant Padilla Construction Services, Inc. (Padilla) moves pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's complaint against it. Plaintiff opposes the motion; defendant City does not.

I. BACKGROUND

On February 6, 2008, the New York City Department of Parks and Recreation (Parks) awarded Padilla Contract No. M098-107M to perform construction and renovation in Union Square Park between East 15th and East 17th Streets in Manhattan. (Affirmation of Gregory N. Harris, Esq. dated Oct. 27, 2010, Exh. A). On March 11, 2008, plaintiff was allegedly injured when she tripped and fell on a defect in the sidewalk in the median at the intersection of East 17th Street and Union Square East, near 200 Park Avenue South. (*Id.*, Exh. B). On March 31, 2008, Parks issued an "Order to Work" letter directing Padilla to commence construction and

renovation of the Park on April 3, 2008. (*Id.*, Exh. A). Pursuant to the letter, Padilla began its work on April 3, 2008. (*Id.*).

On June 8, 2009, plaintiff commenced this action by filing a summons and complaint, alleging that defendants' negligent construction and maintenance of the median caused her to trip and fall and sustain personal injuries. (*Id.*, Exh. B). Padilla served its answer on February 8, 2010. (*Id.*, Exh. C).

II. CONTENTIONS

Padilla argues that it could not have caused or created the dangerous condition at issue as it was not authorized to work and did not begin any work at the location until 20 days after plaintiff's accident. (*Id.*, Affidavit of Alexander Holuka, dated Aug. 1, 2010, Exh. A.).

In opposition, plaintiff maintains that Padilla's motion is premature as discovery is ongoing and City has yet to produce any documentation pertaining to the construction and maintenance of the median that would permit plaintiff to determine whether Padilla was working there when she fell. (Affirmation of Douglas Herbert, Esq., dated December 13, 2010). Plaintiff also claims that photographs of the median, taken shortly after March 28, 2009, raise an issue of fact because they show that construction work was being performed on March 28. (*Id.*, Exh. C). Additionally, plaintiff asserts that having relied on an unsworn letter from Parks to show that it was not working on the site at the time of the alleged incident and failed to annex the contract to its motion, Padilla should be precluded from obtaining the relief it seeks. (*Id.*).

Padilla argues in reply that plaintiff fails to show that its motion is premature absent any demonstration that additional discovery would yield evidence relevant to Padilla's alleged negligence. Padilla denies that the pictures on which plaintiff relies raise factual issues as they

are unauthenticated and do not reflect Padilla personnel or equipment. Indeed, Padilla asserts, even if the pictures reflected its presence at the location, they would still fail to create an issue of fact because they were taken at least seventeen days after plaintiff's accident. (Reply Affirmation, dated December 21, 2010).

III. ANALYSIS

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d 557, 562).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the

plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

To establish a *prima facie* case of negligence, a plaintiff must show a duty owed, a breach thereof, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). A contractor "who has not performed or is not responsible for any construction work on an accident site owes no duty to a plaintiff injured at the site." (*Id.*).

Here, Padilla has submitted proof sufficient to establish that it had not yet worked on and was not working on the median when plaintiff allegedly tripped and fell. Thus, Padilla has negated, *prima facie*, an essential element of plaintiff's negligence claims. (*See Kenney*, 30 AD3d 261 [granting summary judgment in favor of contractor that submitted proof it did not work on accident site]).

The photographs of the intersection submitted by plaintiff, taken after the accident occurred, do not raise any issues of fact as they are unauthenticated and thus inadmissible. (*See Alaverez*, 68 NY2d 320, 324; *Zuckerman*, 49 NY2d 557, 562; *Rivera v GT Acquisition I Corp.*, 72 AD3d 525 [1st Dept 2010] [unauthenticated photographs constituted inadmissible hearsay; while court can consider hearsay in opposition to summary judgment, it may not be only evidence submitted]; *Burns v City of Poughkeepsie*, 293 AD2d 435 [2d Dept 2002] [unauthenticated photographs inadmissible]). Even if the photographs were admissible, they do not demonstrate that Padilla was working on the median when the accident occurred and thus do not contradict Padilla's evidence. Plaintiff has also failed to show that facts essential to her opposition may exist but have yet to be discovered. (*See White v New York City Trans. Auth.*, 308 AD2d 341, 343 [1st

Dept 2003] [plaintiff's speculation insufficient for court to conclude that discovery will yield information inconsistent with affidavits provided by defendants]).

Padilla's reliance on the affidavit of its vice-president is sufficient to show that it did not owe a duty to plaintiff. Thus, the unsworn letter and contract need not be considered.

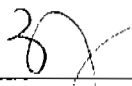
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Padilla's motion to dismiss is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant Padilla Construction Services, Inc., with costs and disbursements to Padilla Construction Services, Inc., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Padilla Construction Services, Inc.; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 21, 2011
New York, New York

APR 21 2011

FILED

APR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE