

Nunez v City of New York

2011 NY Slip Op 31656(U)

June 17, 2011

Supreme Court, New York County

Docket Number: 105344/09

Judge: Barbara Jaffe

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

JAFFE

BARBARA JAFFE

PART 5

Index Number : 105344/2009

J.S.C.

NUNEZ, IGDALIA

vs

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for ST + mt for SJ

PAPERS NUMBERED

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

1
2

Answering Affidavits — Exhibits + mt

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 21 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 6/17/11

JUN 17 2011

BJ

J.S.C.

BARBARA JAFFE

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
 IGDALIA NUNEZ,

Plaintiff,

-against-

Index No. 105344/09
 Motion Date: 5/31/11
 Motion Seq. No.: 004
 Cal. No.: 37

DECISION & ORDER

THE CITY OF NEW YORK, THE PORT AUTHORITY
 OF NEW YORK & NEW JERSEY, NEW YORK CITY
 DEPARTMENT OF TRANSPORTATION, NEW YORK
 CITY DEPARTMENT OF ENVIRONMENTAL
 PROTECTION, TULLY CONSTRUCTION CO. INC.,
 and CONSOLIDATED EDISON COMPANY OF NEW
 YORK, INC.,

Defendants.
 -----X

FILED

JUN 21 2011

NEW YORK
 COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For defendant Consolidated Edison:

Richard W. Babinecz, Esq.
 Consolidated Edison Company
 4 Irving Place
 New York, NY 10003-3598
 212-781-2111

For defendant Tully:

Edward J. White, Esq.
 Cartafalsa, Slattery, *et al.*
 165 Broadway, 28th Floor
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By notice of motion dated February 15, 2011, defendant Consolidated Edison (Con Ed) moves pursuant to CPLR 3212 and without opposition for an order granting it summary judgment. By notice of motion dated February 17, 2011, defendant Tully Construction Co., Inc. (Tully) cross moves pursuant to CLPR 3212 and without opposition for an order granting it summary judgment.

I. UNDISPUTED FACTS

At a 50-h hearing held on July 31, 2008, plaintiff testified that at 10 am on April 18, 2008, she tripped and fell on an uneven sidewalk at 180th Street and Cabrini Boulevard. (Affirmation of Charmaine L. Marlowe, Esq., dated Jan.12, 2011 [Marlowe Aff.], Exh. G).

At a deposition held on June 18, 2010, she testified that she tripped on a sidewalk outside and near a park. (*Id.*, Exh. I).

At a deposition held on January 14, 2011, George Canzaniello, an employee of Con Ed, testified that he conducted a search of Con Ed records for any opening tickets, paving orders, or emergency tickets related to the location of plaintiff's accident for the period of two years before, and including April 19. Canzaniello located one opening ticket relating to work performed on the east side of Cabrini Boulevard, north of the site of plaintiff's fall and performed one month after the accident, one paving order, and three permits, none of which relate to work performed on the sidewalk where the accident occurred. (*Id.*, Exh. K).

II. PROCEDURAL BACKGROUND

On or about April 15, 2009, plaintiff served on defendants a summons with notice. (*Id.*, Exh. A). On or about May 14, 2009, Con Ed served its verified answer and cross complaint. (*Id.*, Exh. B). On or about May 4, 2009, defendant Port Authority of New York & New Jersey served its verified answer with cross claims. (*Id.*, Exh. C). On or about May 13, 2009, Tully served its answer with cross claims. (*Id.*, Exh. D). On or about July 8, 2009, defendant City, City of New York s/h/a New York City Department of Transportation, and City of New York s/h/a New York City Department of Environmental Protection served their answer. (*Id.*, Exh. E).

By affidavit dated December 22, 2010, William Urig, Tully's project manager, stated that a Tully subcontractor performed work in September 2007 in the road on Cabrini Boulevard. (Affirmation of Edward J. White, Esq., dated Feb. 17, 2011 [White Aff.], Exh. C). By stipulation of the same date, plaintiff discontinued the action with prejudice as against Tully. (*Id.*, Exh. A).

III. CONTENTIONS

Con Ed argues that absent any records indicating that work was authorized or performed by it at the accident location or documentary evidence demonstrating that it owns the sidewalk, it is entitled to summary judgment. (Marlowe Aff.).

Tully, relying on plaintiff's deposition and accompanying photographs, alleges that as the accident occurred on the sidewalk along the west side of Cabrini Boulevard, approximately 15 feet south of the entrance to George Washington Park at West 180th Street (*id.*, Exhs. H, I), and in the absence of any evidence that it performed any work there (White Aff., Exhs. C, D), and, having been released from liability by plaintiff, Tully maintains that it too is entitled to summary judgment. (*Id.*, Exh. A).

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).

Absent any evidence that either Con Ed or Tully owns, maintains, controls, or operates the sidewalk at the accident site, or any evidence indicating that either party performed any work there, they may not be held liable to plaintiff. (See *Gross v Hertz Local Edition Corp.*, 72 AD3d 1518 [4th Dept 2010] [as defendant did not own, occupy, or have right to control or maintain parking lot where plaintiff fell, it owed no duty of care to

plaintiff]; *Smith v Guiffre Hyundai, Ltd.*, 60 AD3d 1040 [2d Dept 2009] [complaint dismissed against defendant as it did not own, operate, control or manage premises where plaintiff fell]; *Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57 [1st Dept 2006] [same]).

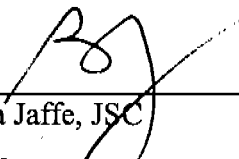
V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment is granted and the complaint is hereby dismissed as against defendant Consolidated Edison Company of New York, Inc, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that defendant Tully Construction Co. Inc.'s cross motion for summary judgment is granted and the complaint is hereby dismissed as against defendant Tully Construction Co. Inc., and the clerk is directed to enter judgment in favor of said defendant.

ENTER:



Barbara Jaffe, JSC

DATED: June 17, 2011
New York, New York
JUN 17 2011

BARBARA JAFFE

J.S. FILED

JUN 21 2011

NEW YORK
COUNTY CLERK'S OFFICE