

Colon v City of New York
2011 NY Slip Op 34326(U)
September 13, 2011
Supreme Court, New York County
Docket Number: 108715/09
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
EUSEBIA COLON,

Index No. 108715/09

Plaintiff,

Argued: 6/21/11
Motion Seq. No.: 002

-against-

DECISION & ORDER

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION
and THE NEW YORK CITY DEPARTMENT OF
PARKS,

Defendants.

FILED

-----X
BARBARA JAFFE, JSC:

SEP 16 2011

For plaintiff:
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For defendants: NEW YORK
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By notice of motion dated March 31, 2011, defendants move pursuant to CPLR 602(a) for an order consolidating the instant action with two other actions for the purposes of a joint trial, discovery, and the motion, and pursuant to CPLR 3211 for an order dismissing the complaint against defendant City of New York. Plaintiff opposes only the motion to dismiss.

I. BACKGROUND

On January 11, 2009, plaintiff was allegedly injured after she tripped and fell on the sidewalk in front of 168-170 Forsyth Street a/k/a 36-38 Rivington Street in Manhattan (premises). (Affirmation of Andrew Lucas, ACC, dated March 31, 2011 [Lucas Aff.]). On January 29, 2009, plaintiff served defendants with a notice of claim. (*Id.*, Exh. A).

On May 7, 2009, plaintiff testified at a 50-h hearing, as pertinent here, that on the day of

her accident, there was ice on the sidewalk in front of the premises which caused her to fall and that she also fell in a tree well in front of the premises. (*Id.*, Exh. B).

On or about June 16, 2009, plaintiff commenced the instant action. (*Id.*, Exh. C). The same day, she commenced a separate action against 36 Rivington Street, Inc., Hui's Realty, Inc., Rich Mansion Condominium, and Indochina Sino American Senior Citizen Center under index number 108714/09. (*Id.*, Exh. D). On or about May 4, 2010, plaintiff commenced a third action against Olson's Creative Landscaping (Olson), Olson's Creative Landscaping, Inc., and Doe Corporation Inc. d/b/a Olson's Creative Landscaping under index number 106206/10. (*Id.*, Exh. E). All three actions arise out of plaintiff's accident on January 11, 2009.

On or about September 2, 2009, plaintiff served a bill of particulars in which she alleged that she fell in front of the premises "in the tree well and around the tree well on the sidewalk." (*Id.*, Exh. F).

Sometime before plaintiff's accident, City contracted with Olson for it to plant new and replacement trees in existing tree wells in Manhattan. (*Id.*, Exh. G). The contract requires Olson to indemnify, defend, and hold City harmless from any claims arising from Olson's operations in performing the contract. (*Id.*).

By decision and order dated December 27, 2010, another justice of this court consolidated for all purposes the other two actions under index number 108714/09.

II. CITY'S MOTION TO DISMISS

A. Contentions

City denies liability for the icy condition on the sidewalk, asserting that the owner of the premises is liable for any sidewalk defect, and submits evidence showing that it did not own the

premises on the date of plaintiff's accident. It also maintains that to the extent that a defect associated with the tree well may have caused plaintiff's accident, it is entitled to indemnification from Olson. (Lucas Aff.).

Plaintiff contends that as City is liable for any defects related to tree wells, it may be held liable here, and that whether Olson must indemnify City does not affect her claim against City. (Affirmation of Frank V. Kelly, Esq., dated Apr. 26, 2011).

In reply, City concedes that it may be held liable for a defective tree well, but argues that it is entitled to a defense and indemnification by Olson. (Reply Affirmation, dated May 9, 2011).

B. Analysis

As plaintiff testified that she fell in or on the tree well in front of the premises, City may be held liable. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). Moreover, as it has not yet been determined whether plaintiff's accident arose out of Olson's performance of the contract between it and City, City's motion to dismiss based on Olson's duty to defend and indemnify it is premature. (See *Martinez v City of New York*, 73 AD3d 993 [2d Dept 2010] [as it had not been determined whether contractor was negligent, summary judgment on City's claim for indemnification against contractor denied as premature]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied; it is further

ORDERED, that defendants' motion to consolidate is granted without opposition and the above-captioned action is consolidated for joint trial with *Eusebia Colon vs. 36 Rivington Street, Inc., Hui's Realty, Inc., Rich Mansion Condominium, Indochina Sino American Senior Citizen*

Center, Olson's Creative Landscaping, Olson's Creative Landscaping, Inc., and Doe Corporation Inc. d/b/a Olson's Creative Landscaping, Index number 108714/09, pending in this court; it is further

ORDERED, that within 30 days from entry of this order, plaintiff shall file and pay the fee for a Request for Judicial Intervention, to which shall be attached a copy of this order, and the Clerk shall assign the action entitled Eusebia Colon vs. 36 Rivington Street, Inc., Hui's Realty, Inc., Rich Mansion Condominium, Indochina-Sino American Senior Citizen Center, Olson's Creative Landscaping, Olson's Creative Landscaping, Inc., and Doe Corporation Inc. d/b/a Olson's Creative Landscaping to the undersigned Justice; it is further

ORDERED, that within 30 days from entry of this order, counsel for plaintiff shall serve a copy of the order with notice of entry upon the Clerk of the Trial Support Office (Room 158); it is further

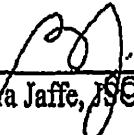
ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED, that at said joint trial plaintiff in the Colon vs. The City of New York, et al. action shall have the right to open and close before the jury.

FILED

ENTER:

SEP 16 2011


Barbara Jaffe, J.S.C. COUNTY CLERK'S OFFICE

BARBARA JAFFE
J.S.C.

DATED: September 13, 2011
New York, New York

SEP 13 2011