

Edwards v City of New York

2012 NY Slip Op 30117(U)

January 11, 2012

Sup Ct, NY County

Docket Number: 109738/09

Judge: Debra A. James

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SCANNED ON 1/18/2012

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

EDYTHE EDWARDS,
Plaintiff,
- v -

Index No.: 109738/09

Motion Date: 09/27/11

THE CITY OF NEW YORK, ESPLANADE GARDENS,
INC., WELSBACH ELECTRIC CORP., CONSOLIDATED
EDISON, INC. and CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., and FUTURA
BUILDERS GROUP INC.,
Defendants.

Motion Seq. No.: 02

Motion Cal. No.: _____

FUTURA BUILDERS GROUP INC.,
Third-Party Plaintiff,
- v -

PERKAN CONCRETE CORP.,
Third-Party Defendant.

The following papers, numbered 1 to 6 were read on this motion and cross motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

1

Notice of Cross-Motion/Answering Affidavits - Exhibits _____

2, 3, 4

Replying Affidavits - Exhibits _____

5, 6

FILED

Cross-Motion: **Yes** **No**

JAN 18 2012

Upon the foregoing papers,

NEW YORK

Welsbach Electric Corp. (Welsbach) moves for summary judgment dismissing the complaint against it. The City of New York (the City) cross-moves for summary judgment dismissing the

COUNTY CLERK'S OFFICE

judgment dismissing the complaint against it. The City of New York (the City) cross-moves for summary judgment dismissing the

Check One: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

complaint against it.

On August 14, 2008, plaintiff was walking in the street in front of 2569 Adam Clayton Powell Boulevard, New York County (the Accident Site) in the pedestrian area created by concrete barriers, when she allegedly tripped and fell in a hole. Welsbach had contracted with L & M Builders (L & M) to perform some electrical work in the area of 148th Street and Adam Clayton Boulevard. Plaintiff asserts that the City authorized construction work at the Accident Site. Esplanade Gardens, Inc. (Esplanade) and Futura Builders Group (Futura) are alleged to have ownership interest or control of the Accident Site. Plaintiff alleges that her fall was caused by the hole's condition, the improper placement of concrete barriers and inadequate lighting at the Accident Site.

Welsbach alleges that it contracted with L & M to install a sidewalk box and related conduit at 201 West 148th Street, that on June 11, 2008, it performed this work and that, on June 17, 2008, it returned to install a frame and cover. It contends that it performed its work in the intersection near, but not at the Accident Site, that it did not place any concrete barriers and that it did not create the hole into which plaintiff fell.

On these motions, neither plaintiff, the City, Esplanade nor Futura has submitted in support of their arguments an affidavit

by a party with personal knowledge of the facts or any testimony at a hearing under oath.

The City argues, through its counsel's affidavit, that there was no prior written notice of the purportedly defective condition. However, as argued by Esplanade and Futura through their counsel, attached to the City's moving papers are copies of permits for work near the Accident Site, as well as a complaint about a hole at the Accident Site made within two years of the accident, which documents were produced by the City in response to discovery demands. In addition, plaintiff's counsel asserts that the City's cross motion is premature because the City's discovery responses do not cover, inter alia, demands for records and depositions pertaining to plaintiff's allegation that she fell because of inadequate or non-existent lighting at the Accident Site.

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (id.). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). In

deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (Dauman Displays v. Masturzo, 168 AD2d 204, 205 [1st Dept 1990], lv dismissed 77 NY2d 939 [1991]).

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (Peralta v Henriquez, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]).

Welsbach has presented evidence that it did not do any work at the Accident Site, but rather at the nearby intersection and was, therefore, not responsible for plaintiff's fall. No party has submitted any evidentiary proof opposing this prima facie showing, but rather, at most, has proffered statements of counsel without any personal knowledge of the underlying facts (Zuckerman, 49 NY2d at 562; Garcia v City of New York, 53 AD3d

644 [2d Dept 2008]; Amarosa v City of New York, 51 AD3d 596 [1st Dept 2008]). As these lack any probative value, Welsbach's motion for summary judgment dismissing the complaint against it is granted.

In contrast to Welsbach, the City has failed to proffer an affidavit by a person with knowledge of its purported lack of notice or creation of the allegedly hazardous condition (Pangerl v Town of N. Hempstead, 76 AD3d 1001 [2d Dept 2010]; Rivera-Irby v City of New York, 71 AD3d 482, 483 [1st Dept 2010]). Consequently, it has not met its "burden as [cross-movant] to establish prima facie entitlement to judgment as a matter of law" (DiPierro v City of New York, 25 AD3d 306, 308 [1st Dept 2006]). The City's cross motion for summary judgment dismissing the complaint against shall therefore be denied.

It is, therefore,

ORDERED that the motion of WELSBACH ELECTRIC CORP. to dismiss the complaint against it is GRANTED and the complaint is DISMISSED in its entirety against such defendant, together with any cross-claims, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant Welsbach Electric Corp. and that all future papers filed with court bear the amended caption; and it is further

ORDERED that counsel for Welsbach Electric Corp. shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the cross motion of the City of New York to dismiss the complaint against it is DENIED; and it is further

ORDERED that the remaining parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a status conference on January 31, 2012 at 2:30 P.M.

This is the decision and order of the court.

FILED

Dated: January 11, 2012

ENTER:

JAN 18 2012

~~NEW YORK COUNTY CLERK'S OFFICE~~
DEBRA A. JAMES J.S.C.