

Arenas v City of New York

2012 NY Slip Op 30578(U)

March 6, 2012

Supreme Court, New York County

Docket Number: 109388/09

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 5

Index Number : 109388/2009
ARENAS, CARLOS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL. HS

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>23</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, It is ordered that this motion is

FILED
MAR 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 3/6/12
MAR 06 2012

[Signature], J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
CARLOS ARENAS,

Plaintiff,

-against-

Index No. 109388/09

Motion Subm.: 11/29/11
Motion Seq. No.: 003

DECISION & ORDER

THE CITY OF NEW YORK, *et al.*,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No.
590728/10

FILED

MAR 08 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

SAFEWAY CONSTRUCTION ENTERPRISES, INC., and
NICO ASPHALT PAVING INC.,

Third-Party Defendants.

-----X

BARBARA JAFFE, JSC:

For Tishman:
Danielle Salese Tauber, Esq.
Wilson, Elser *et al.*
3 Gannett Dr.
White Plains, NY 10604-3407
914-323-7000

For Con Ed:
Brian C. Parris, Esq.
Richard W. Babinecz
4 Irving Pl., Rm. 1800
New York, NY 10003-3598
212-460-3355

For Safeway:
Ying Hua Huang, Esq.
Law Offices of Todd M. McCauley
274 Madison Ave., Ste. 1002
New York, NY 10016
212-679-3124

By notice of motion dated September 8, 2011, defendants Tishman Construction Corporation of Manhattan, Tishman Construction Corporation of New York, and Tishman Construction Corporation (Tishman, collectively) move pursuant to CPLR 3212 for an order dismissing all cross claims against them. Defendants Consolidated Edison Company of New

York, Inc. (Con Ed) and Safeway Construction Enterprises, Inc. (Safeway) oppose the motion.

I. BACKGROUND

On December 10, 2008, plaintiff was injured when he allegedly tripped and fell on a trench or ditch that had been excavated and thereafter improperly repaired and backfilled in the crosswalk on the west side of Eighth Avenue at its intersection with West 44th Street in Manhattan. (Affirmation of Danielle Salese Tauber, Esq., dated Sept. 8, 2011 [Tauber Aff.], Exh. B).

By permit issued on July 9, 2008, Con Ed was given permission to open the roadway at 305 West 44th Street between Eighth and Ninth Avenues in order to replace obstructed ducts. (*Id.*, Exh. G). A Con Ed Report, dated August 9, 2008, reflects that Safeway opened the street at West 44th Street between Eighth and Ninth Avenues and the intersection at West 44th Street and Eighth Avenue by making several cuts in the roadway and closed and backfilled the cuts the same day. (*Id.*, Exh. H).

On August 11, 2008, the New York City Environmental Control Board issued two notices of violation to Con Ed, one for the location of Eighth Avenue and West 44th Street for having a temporary restoration with a depth of two and a half inches in the roadway, the other in front of 305 West 44th Street for having a temporary restoration with a depth of two and a half inches in the roadway/crosswalk. (*Id.*, Exh. L).

On August 14, 2008, Con Ed issued Nico Asphalt Paving, Inc. (Nico) a paving order to repave the roadway, on August 19, 21, and 25, 2008, a Nico employee observed a motor vehicle located on the roadway cuts, and on September 3, 2008, the paving order was cancelled. There is no indication that Nico ever repaved the roadway. (*Id.*, Exh. K).

On or about June 25, 2009, plaintiff served defendants with his summons and complaint, and on or about August 26, 2009, Tishman served its answer. (*Id.*, Exhs. B, C).

In its answer dated November 8, 2010, Safeway asserted cross claims against Tishman for common law and/or contractual indemnification and contribution. (*Id.*, Exh. D). In its answer, Con Ed asserted cross claims against Tishman for contribution and/or indemnification. (*Id.*).

By affidavit dated July 28, 2010, Peter Hardecker, a Tishman employee and superintendent of the construction project at the InterContinental New York Times Square Hotel located on Eighth Avenue and 44th Street (the project), states that based on his personal knowledge and review of Tishman's records, Tishman did not create or maintain the trench that caused plaintiff's fall and the trench was not part of Tishman's work on the project. (*Id.*, Exh. F).

By stipulation dated July 29, 2010, plaintiff discontinued his claims against Tishman. (*Id.*, Exh. A).

At an examination before trial (EBT) held on May 4, 2011, Martin Cuevas, a Con Ed inspector who supervises Con Ed contractors, testified that for the street opening at the location of plaintiff's accident, Con Ed hired Safeway to excavate the roadway and install the conduits and it made two cuts in the roadway. Con Ed then assigned the repaving of the roadway to Nico, and hired no other contractors besides Safeway and Nico to work on the street opening. Cuevas did not know whether the roadway was ever repaved. (*Id.*, Exh. I).

On May 13, 2011, Guido DiRe, Safeway's secretary-treasurer and Operations Manager, testified at an EBT that on August 9, 2008, Safeway left the roadway cuts at the accident location backfilled up to an inch below street level, and performed no further work there after that date. (*Id.*, Exh. J).

II. CONTENTIONS

Tishman denies any liability for plaintiff's accident as it performed no work at the accident location and did not create the dangerous condition on which plaintiff tripped. (Tauber Aff.).

Con Ed argues that there are triable issues as to whether Tishman's work on the Hotel project, which was adjacent to the accident location, contributed to causing the accident as Tishman may have left building materials or the motor vehicle on the cuts which prevented Nico from repaving the roadway, and observes that Tishman and Nico have not yet been deposed and that Tishman has not produced its construction records for the project. (Affirmation of Brian C. Parris, Esq., dated Oct. 14, 2011).

Safeway argues that Tishman's motion is premature as Tishman has not provided any discovery responses or appeared for a deposition. (Affirmation of Ying Hua Huang, Esq., dated Oct. 18, 2011).

In reply, Tishman observes that no party ever requested its deposition, that Nico's deposition was held, and that it has provided all requested discovery to date. It thus contends that Con Ed and Safeway have failed to establish that any discovery remains outstanding which may raise triable issues. (Reply Affirmation, dated Oct. 20, 2011).

III. ANALYSIS

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. (*Cino v City of New York*, 49 AD3d 796 [2d Dept 2008]). Having established that it did not create the dangerous condition on which plaintiff tripped and that it performed no work at the accident location, Tishman has

demonstrated, *prima facie*, that it may not be held liable to plaintiff, thereby negating any possible cross claims for contribution and/or indemnification against it. (*See Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location, and even if other contractor performed work at location, no evidence that its work was proximate cause of pothole 400 feet away from its work]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006] [ECS demonstrated it did not perform work where plaintiff allegedly fell as its records showed it performed work on different corner of crosswalk than where plaintiff fell]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005] [although contractors performed work on street, no evidence that work was performed at location of plaintiff's fall]).

As there is no evidence that any party ever requested Tishman's deposition or that any discovery responses remain outstanding, Con Ed and Safeway have failed to establish that further discovery from Tishman may lead to relevant evidence. (CPLR 3212[f]; *see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]; *Rubina v City of New York*, 51 AD3d 761 [2d Dept 2008] [no evidentiary basis showing that further discovery may lead to relevant evidence concerning whether contractor created defect]; *Arrucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [plaintiffs failed to establish what additional facts might be disclosed which would demonstrate that issue of fact existed as to whether contractor did work on roadway]).

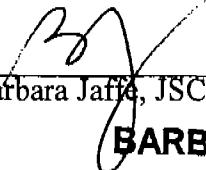
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Tishman Construction Corporation of Manhattan, Tishman Construction Corporation of New York, and Tishman Construction Corporation's motion for summary judgment is granted, and all cross claims are dismissed against said defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:


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

DATED: March 6, 2012
New York, New York

MAR 06 2012

FILED

MAR 08 2012

NEW YORK
COUNTY CLERK'S OFFICE