

Royzman v Consolidated Edison Co. of N.Y., Inc.

2012 NY Slip Op 31017(U)

April 16, 2012

Supreme Court, New York County

Docket Number: 103311/2009

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C. Jaffe
Justice

PART 5

Index Number : 103311/2009
ROYZMAN, MOISEY
vs
CONSOLIDATED EDISON
Sequence Number : 005
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment

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

PAPERS NUMBERED
<u>1, 2, 3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/16/12
'APR 16 2012

Barbara Jaffe
BARBARA JAFFE *J.S.C.*

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
MOISEY ROYZMAN,

Plaintiff,
-against-

Index No. 103311/09
Motion Date: 1/10/12
Motion Seq. No.: 005
Motion Cal. No.: 101

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., THE CITY OF NEW YORK, NICO ASPHALT PAVING,
INC., SAFEWAY CONSTRUCTION ENTERPRISES, INC.,
JC DUGGAN, INC., and ZEBRA ENVIRONMENTAL CORP.,

Defendants.

DECISION AND ORDER

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Third-Party Plaintiff,
-against-

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

Third-Party Defendants.

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA JAFFE, J.S.C.:

For Zebra:
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For Duggan:
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By notice of motion dated November 2, 2011 and submitted on default, defendant Zebra Environmental Corp. (Zebra) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it. By notice of cross-motion dated November 23, 2011 and submitted on default, defendant JC Duggan, Inc. (Duggan) moves pursuant to CPLR 3212 for

an order dismissing the complaint and all cross-claims against it.

L. BACKGROUND

On December 31, 2008, plaintiff was walking across West 184th Street just west of its intersection with Broadway in Manhattan when he tripped and fell in a trench in the street, allegedly sustaining physical injuries. (Affirmation of Robert Modica, Esq., dated Nov. 2, 2011 [Modica Aff.], Exhs. A, C).

Court records reflect that on or about March 10, 2009, plaintiff commenced the instant action with the filing of a summons and complaint.

On or about March 29, 2011, plaintiff served defendants with a supplemental summons and amended complaint, adding, *inter alia*, Zebra and Duggan as party defendants and asserting negligence claims against them. (*Id.*).

On April 14 and 25, 2011, Duggan and Zebra joined issue with service of their answers, respectively. (*Id.*, Exh. B; Affirmation of Murad X. Agi, Esq., dated Nov. 23, 2011 [Agi Aff.], Exh. B).

By affidavit dated July 28, 2011, Gerald Cereghino, president of Duggan, states that Duggan “is not in the business of excavating and/or performing roadwork,” that Duggan performed no work or excavation at the accident site, that it obtained a permit to provide a crane for the hoisting up of medical equipment at 4334 Broadway, that this work was complete by the close of business on February 4, 2008, and that Duggan never returned to the accident site. (*Id.*, Exh. D).

By affidavit dated October 4, 2011, Paul Fleischmann, founder and president of Zebra, states that Zebra performs “subsurface sampling, installation, injection and data collection

services to engineering and consulting firms,” that in October of 2008 it performed work at 4320 Broadway, that this work did not involve digging a trench but rather required the drilling of five quarter-sized holes, that these holes were backfilled, that it “has never owned, leased, rented, maintained, occupied, or in any way controlled the roadways and/or crosswalks located at the [subject] intersection,” and that it has never entered into a contract for the maintenance or repair of the accident site. (Modica Aff., Exh. D).

II. CONTENTIONS

Both Zebra and Duggan disclaim liability for plaintiff’s injuries as there is evidence neither that they owned, occupied, controlled or made a special use of the accident site nor that they created the trench on which he tripped, and they assert that all cross-claims against them should be dismissed as a result.. (*Id.*; Agi Aff.).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *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 require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

To state a *prima facie* claim of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). “Liability for

a dangerous condition is generally predicated on [] ownership, control or a special use of the property.” (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]; *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). City has the duty of maintaining public streets and roadways in a reasonably safe condition. (*Kiernan v Thompson*, 73 NY2d 840, 841 [1988]).

“Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff’s injuries.” (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). And, pursuant to CPLR 1401, “two or more persons who are subject to liability for damages for the same personal injury . . . may claim contribution among them.”

Here, plaintiff’s accident occurred on a City street, and there is no evidence that Zebra or Duggan controlled or occupied the accident site or put it to a special use. Moreover, as 4320 and 4334 Broadway are located near the intersection of Broadway and West 185th Street, both Zebra and Duggan offer evidence demonstrating that they did not perform work at the accident site. Absent evidence that their work nearly a block away caused or created the trench, Zebra and Duggan have established *prima facie* entitlement to summary judgment on plaintiff’s claims and have dispositively rebutted any cross-claims for common-law indemnification and contribution. (*See Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [where unrebutted affidavit of project superintendent reflected that defendant did not perform work at accident site, and no evidence showing that its work caused defect offered, defendant entitled to summary judgment]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006][defendant entitled to summary judgment “[a]bsent some evidence connecting [its] work to the situs of plaintiff’s injury”]).

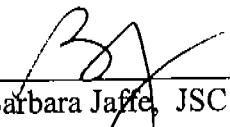
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Zebra Environmental Corp.'s motion for summary judgment on the complaint and all cross-claims against it is granted; and it is further

ORDERED, that defendant JC Duggan, Inc.'s cross-motion for summary judgment on the complaint and all cross-claims against it is granted.

ENTER:



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

DATED: April 16, 2012
New York, New York

APR 16 2012

FILED
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NEW YORK
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