

Chiaperotti v City of New York

2012 NY Slip Op 31139(U)

April 23, 2012

Sup Ct, NY County

Docket Number: 101243/07

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 5

Index Number : 101243/2007
CHIAPEROTTI, DANIELA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

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

CA # 27

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>2, 3</u>
Replying Affidavits _____	No(s). <u>4, 5</u>

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

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

FILED

APR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/12

_____, 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

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
DANIELA CHIAPEROTTI,

Plaintiff,

-against-

Index No. 101243/07

Motion Date: 12/6/11
Motion Seq. Nos.: 005, 006

DECISION AND ORDER

CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., CONSOLIDATED
EDISON INC., HALCYON CONSTRUCTION CORP.,
EMPIRE CITY SUBWAY COMPANY, LTD., and
VERIZON COMMUNICATIONS, INC.,

Defendants.

-----X
EMPIRE CITY SUBWAY COMPANY, LTD., and
VERIZON COMMUNICATIONS, INC.

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590986/09

FILED

APR 27 2012

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA JAFFE, JSC:

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By notice of motion dated August 23, 2011, third-party defendant Nico Asphalt Paving Inc. (Nico) moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint against it. Plaintiff opposes the motion.

By notice of motion dated August 26, 2011, defendants/third-party plaintiffs Empire City Subway Company, Ltd. (ECS) and Verizon Communications, Inc. (Verizon) move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Nico supports the motion, while plaintiff and City oppose.

The motions are consolidated for decision.

I. BACKGROUND

On December 23, 2005, plaintiff was allegedly injured when she fell in the crosswalk on the east side of Fifth Avenue crossing 52nd Street from south to north in Manhattan, approximately 13 feet from the southeast corner within the crosswalk. (Affirmation of Aoife Reid, Esq., dated Aug. 23, 2011 [Reid Aff.], Exh. A).

By contract entered into in 1998, and still in effect at the time of plaintiff's accident, ECS/Verizon's predecessor retained Nico to perform paving work for its construction projects. In amendment No. 1, Nico agreed to indemnify Verizon for any injuries resulting from Nico's acts or omissions while performing work for Verizon, and to name Verizon and ECS as additional insureds on Nico's general liability insurance policy. (*Id.*, Exh. Q). The amendment also provides that:

- A. When a trench is restored the normal length of time for any defect to present itself as a hazard is within the first six months following the restoration.
- B. If the trench is restored with base and then topcoat asphalt which is properly tamped, rolled and sealed there should be no failure.
- C. If the trench is restored with a normal 2 to 4 inches of base and topcoat and the

- base coat is NOT properly tamped and rolled a failure of up to 1 inch is possible.
- D. If full depth asphalt is utilized (over 4 inches) and is not properly tamped and rolled a failure of up to 2 inches is possible.
 - E. Any failure over 2 inches is the result of improper compaction and should NOT be held to be the result of a failure on the part of Nico's restoration activity. Such failures should be held to be the result of [ECS]' failure to properly compact the trench.

By insurance policy effective between February 4, 2005 and February 4, 2006, Nico obtained insurance naming ECS/Verizon as an additional insured. (*Id.*, Exh. T).

At a 50-h hearing held on May 1, 2006, plaintiff testified that she fell when her foot landed in a hole in the crosswalk. (*Id.*, Exh. I).

At an examination before trial (EBT) held on June 10, 2008, plaintiff testified that she was walking in the crosswalk when one of her feet landed in a big and deep hole, causing her to fall, and that the street surface was rough, rather than flat as it normally should be. (*Id.*, Exh. H).

On or about October 23, 2009, ECS/Verizon commenced the third-party action against Nico, alleging causes of action for contribution, apportionment and/or common law indemnification, contractual indemnification, and breach of contract related to Nico's alleged failure to procure insurance naming them as additional insureds. (*Id.*, Exh. D).

At an EBT held on April 5, 2010, Marc Soto, an area operations manager employed by ECS, testified that between November 3, 2005 and November 23, 2005, ECS constructed conduits on the northeastern side of 52nd Street from Fifth Avenue to Madison Avenue, which included opening the street on 52nd Street, beginning 10 feet from the curb line on the north side of the street. ECS contracted exclusively with Nico to pave its projects, and it was ECS's custom and practice to inspect Nico's repaving work within a day or two of its completion. For the opening made in November 2005, Nico repaved the area on November 16, 2005. (*Id.*, Exh. K).

At an EBT held on October 15, 2010, John Denegall, a superintendent employed by Nico, testified that on November 16 and 21, 2005, ECS sent Nico paving orders to restore the roadway at 52nd Street between Fifth and Madison Avenues, that Nico repaved the roadway the day of the orders, and that ECS then inspected Nico's work. Denegall fruitlessly searched Nico's records for any corrective action reports that may have been issued by City for the two paving orders. Denegall opined that the pothole in which plaintiff fell was not in the area where Nico paved the roadway, and that the crosswalk lines, as depicted in photographs taken by plaintiff, were painted by City, not Nico. (*Id.*, Exh. P).

On November 2, 2010, Micah Martino, an ECS employee, testified at an EBT that Nico repaved the roadway at 52nd Street on November 16 and 21, 2005, and that he inspected and approved Nico's work after it was completed. (*Id.*, Exh. N).

At an EBT held on May 3, 2011, George Crimarco, a construction laborer employed by City's Department of Environmental Protection (DEP), testified that there is one water main running east to west beneath 52nd Street between Fifth and Madison Avenues and four mains running north to south along Fifth Avenue. On February 18, 2005, DEP received a complaint of a sinkhole located 20 feet east of Fifth Avenue and 15 feet south of the north curb line, and on March 10, 2005, it repaired the hole by applying a hot patch. On March 9, 2005, a caller reported a cave-in in the street, and the next day DEP investigated the location but did not find the cave-in. On November 15, 2005, DEP received a complaint about a water main break 10 feet away from the curb at 52nd Street and Fifth Avenue, and the same day it investigated and determined that there was construction in the area and that a contractor's machine had broken the water main. DEP's work order for the complaint reflects that an ECS work crew fixed the broken

water main line and that City would charge ECS for any costs related to it. City's records for the location do not reflect that City performed any excavation work in the crosswalk or that the sinkhole was located in the crosswalk. Several other complaints were received about defective fire hydrants in the area. (*Id.*, Exh. S).

In an affidavit dated August 23, 2011, Joseph C. Cannizzo, a professional engineer, states that he reviewed the documents produced in discovery and conducted a site inspection on April 11, 2011, and opines that neither ECS nor Verizon performed any work at the accident location, nor is the sinkhole located within the area of Nico's paving work for ECS. He also opines that the hole in which plaintiff fell was caused by underground water leakage. (Affirmation of Kenneth B. Wiesen, Esq., dated Sept. 30, 2011 [Wiesen Sept. Aff.], Exh.1).

By further affidavit dated November 7, 2011, Cannizzo states that even though the hole in which plaintiff fell has since been paved over, he was able to identify its location through her testimony and photographs and conclude that it was outside the boundaries of ECS's work at the location. He opines that the hole was caused by City's failure to repair various water leaks at the location, and observes that City received complaints beginning in February 2005 about defects at the location related to water leakage. (Reply Affirmation, dated Nov. 8, 2011 [Reply Aff.], Exh. V).

II. NICO'S MOTION

A. Contentions

Nico denies having caused or created the defect at issue, or having had notice of it, and argues that absent proof of any acts or omissions by it that may have caused or contributed to causing the defect, it has no common law or contractual duty to indemnify ECS/Verizon. It also

denies having failed to obtain insurance naming ECS/Verizon as additional insureds. (Aoife Aff.).

Plaintiff argues that there are triable issues as to whether Nico paved in the area of her accident. (Wiesen Sept. Aff.).

In reply, Nico observes that plaintiff submitted no evidence showing that it performed work at the accident location, and that Cannizzo stated that Nico's paving work was outside the area where the hole was located. (Reply Affirmation, dated Oct. 12, 2011).

In sur-reply, plaintiff maintains that Cannizzo's affidavit has no evidentiary value, and denies that Nico has established that it performed no work in the accident location. (Reply Affirmation, dated Oct. 24, 2011).

In reply to plaintiff's sur-reply, Nico argues that plaintiff's sur-reply should not be considered, observes that plaintiff has not asserted a direct claim against it, and otherwise reiterates its arguments. (Affirmation, dated Oct. 26, 2011).

B. 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]). Here, Nico offers admissible evidence demonstrating that it performed no work at the location of plaintiff's accident, thus establishing, *prima facie*, that it did not create the defect which caused plaintiff's accident. (See *Sand v City of New York*, 83 AD3d 923 [2d Dept 2011] [contractor entitled to dismissal of third-party complaint based on evidence that it performed no work on portion of roadway where accident occurred]; *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]).

In opposition, plaintiff submits no proof showing that a triable issue of fact exists as to whether Nico performed work at the location of plaintiff's accident. (*See Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011] [rejecting plaintiff's argument that proximity of ECS conduit to alleged defect raised triable issue as to whether ECS's work caused defect]; *Minier v City of New York*, 85 AD3d 1134 [2d Dept 2011] [plaintiff's only evidence was permit issued to contractor which did not encompass area where plaintiff fell]; *Elkman v Consol. Edison of New York*, 71 AD3d 817 [2d Dept 2010] [plaintiff failed to raise triable issue as to whether defendants performed work in area of sidewalk where accident occurred]; *Flores*, 29 AD3d at 356 ["(a)t best, plaintiff demonstrated that ECS was present at the site some eight months before plaintiff's fall, which is insufficient to raise a triable issue of fact as to whether ECS worked in the crosswalk where plaintiff fell"]).

III. ECS/VERIZON'S MOTION

A. Contentions

ECS/Verizon (ECS, collectively) rely on Cannizzo's affidavit to argue that they performed no work in the location of plaintiff's accident, and thus neither caused nor created the

hole in which she fell, and that the hole was caused by City's failure to repair water leaks beneath the street. (Affirmation of James P. Tenney, Esq., dated Aug. 26, 2011).

Plaintiff contends that Cannizzo's affidavit is conclusory and insufficient to establish that ECS performed no work in the crosswalk he inspected the site five years after the accident and gave no indication that the condition he examined was the same as it was on the date of the accident. (Wiesen Sept. Aff.).

City maintains that triable issues remain as to the location of plaintiff's accident, whether the water main break caused by ECS created the hole, and whether City had a duty to correct any water leaks and/or negligently failed to do so. (Affirmation of Yael Barbibay, ACC, dated Oct. 21, 2011).

In reply, ECS relies upon Cannizzo's two affidavits to argue that it performed no work at the location of plaintiff's accident and that the hole was caused by City's failure to repair water leaking beneath the street. (Reply Aff.).

B. Analysis

Here, ECS has established, *prima facie*, through plaintiff's and other witnesses' testimony, photographs, documents, and Cannizzo's first affidavit, which was based on the aforementioned evidence along with his inspection of the location, that ECS performed no work in the crosswalk where plaintiff fell. (*See Ottenstein v City of New York*, 83 AD3d 1024 [2d Dept 2011] [contractor established through affidavit of president, street opening reports, paving orders, and photographs that although it applied two asphalt patches at location, it did not apply patch which caused plaintiff to fall]; *Vidakovic v City of New York*, 84 AD3d 1357 [2d Dept 2011] [contractor established entitlement to dismissal based on photograph of area and expert affidavit

showing that area where plaintiff fell was not contractor's responsibility to maintain]; *Loughlin v City of New York*, 74 AD3d 757 [2d Dept 2010] [through deposition testimony, work permits, and photograph, contractor established that it performed no work on portion of sidewalk where plaintiff fell]).

However, ECS does not address the evidence that it may have caused a water main line to break while it performed work at the location, and as Cannizzo opines that the hole was caused by water leakage beneath the street, ECS has failed to demonstrate, *prima facie*, that it did not cause or contribute to causing the hole.

IV. CONCLUSION

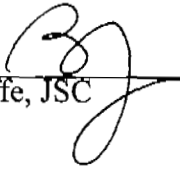
Accordingly, it is hereby

ORDERED, that third-party defendant Nico Asphalt Paving, Inc.'s motion for summary judgment, and the third-party complaint is dismissed and severed with costs and disbursements to said defendant 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; it is further

ORDERED, that defendants Empire City Subway Company, Ltd. and Verizon Communications, Inc.'s motion for summary judgment is denied; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:


Barbara Jaffe, JSC

DATED: April 23, 2012
New York, New York

FILED

APR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE