

Pallotta v City of New York

2012 NY Slip Op 31583(U)

June 12, 2012

Supreme Court, Richmond County

Docket Number: 103391/05

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:103391/05
Motion No.:09, 10, 11

CHRISTOPHER W. PALLOTTA,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION,
COFIRE PAVING, CORPORATION,
V.N.A. UTILITY CONTRACTING, INC., and
VERIZON NEW YORK INC.,

Defendants

THE CITY OF NEW YORK,

Third Party-Plaintiff,

against

URBITRAN CORP.,

Third Party-Defendant,

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion(09) and Affidavits Annexed (V.N.A)	1
Affirmation in Opposition (Verizon)	2
Affirmation in Opposition (Plaintiff)	3
Memorandum of Law in Opposition (Plaintiff)	4
Affirmation in Opposition (City of New York)	5
Reply Affirmation (V.N.A.)	6
Notice of Motion(10) and Affidavits Annexed (City of New York)	7
Affirmation in Opposition (Plaintiff)	8
Memorandum of Law in Opposition (Plaintiff)	9

Affirmation in Reply (City of New York)	10
Notice of Motion (11) and Affidavits Annexed (Verizon)	11
Memorandum of Law in Support (Verizon)	12
Affirmation in Opposition (City of New York)	5 (previously designated)
Affirmation in Opposition (Plaintiff)	13
Memorandum of Law in Opposition (Plaintiff)	14
Affirmation in Reply (Verizon)	15
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendant, V.N.A. Utility Contracting, Inc. (“V.N.A.”) moves for an order granting it summary judgment dismissing the plaintiff’s complaint and all cross-claims interposed against it by co-defendants. V.N.A. argues that any work it conducted at the place of plaintiff’s accident was complete on the date of the accident. V.N.A.’s motion for summary judgment is denied.

The defendant, City of New York, (the “City”) moves to dismiss the plaintiff’s complaint arguing that the City had no prior written notice of a defect in the roadway; and that the City was not performing construction work at the accident site on the date in question. The City’s motion is granted.

The defendant, Verizon New York, Inc., (“Verizon”) moves for summary judgment dismissing the plaintiff’s complaint and any and all cross-claims and counterclaims arguing that Verizon was not performing work at the accident site. Verizon’s motion is denied.

Facts

This is an action to recover for personal injuries as a result of a motorcycle accident. During his deposition the plaintiff testified that he was riding his motorcycle on Amboy Road on Staten Island, New York. As he approached the intersection of Amboy Road and Spratt Avenue, the plaintiff testified that he slowed his motorcycle down as he approached a curve. He then testified:

. . . When I hit Spratt Avenue, the road like dropped down and it was all broken up, the way the road was, and the back tire gave out on the bike, and I slid and fell down.¹

The aforementioned testimony is substantially similar to the testimony that the plaintiff gave during his 50-h hearing conducted on April 28, 2005 wherein he testified that:

When I came on Amboy, around the way it is before Spratt, the road is all, like - - had grooves all in the road and then in a certain area the road was all busted up and that's when my bike tires slid out and I lost control of the bike.²

Plaintiff also testified as to his location in the lane at the time of the accident. During his deposition the plaintiff testified as follows:

Q. When you're driving that last block on your motorcycle and you're coming up towards Spratt Avenue, are you riding in the middle of the lane or riding closer to the double-yellow line or closer to the curb?

A. The middle.

Q. In the middle of the lane?

A. Yes.

Q. Did you remain in the middle of that lane right up until the point where you got to Spratt and you felt your bike beginning to shake, or had you moved towards the left?

A. No, it was in the middle.³

The plaintiff testified further at his deposition and 50-h hearing that he lost consciousness

¹ Pallotta EBT Transcript p. 21.

² Pallotta Transcript 50-h hearing, p.21.

³ Pallotta EBT Transcript p. 61.

at the accident scene and did not regain consciousness for several weeks. In addition to a host of broken bones and a sustained brain bleed, the plaintiff was placed in a medically induced coma.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.⁴ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁵ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁶ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁷ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁸

⁴ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

⁵ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁶ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁷ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁸ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

V.N.A.'s motion for Summary Judgment

Deposition testimony revealed that V.N.A. had a contract with Verizon to install PVC conduit under Amboy Road on Staten Island. V.N.A. produced Anthony Coccimiglio, a Vice President for a deposition in this action. According to Coccimiglio's testimony his company dug a trench approximately 2 feet from the curb with a final closed width size of 26 inches. He testified further that the trench was filled and that V.N.A. received no complaints or violations at the work site. V.N.A. argues that it is entitled to summary judgment based on photographic evidence purportedly demonstrates that the roadway was properly filled and note in the middle of the travel lane as described by the plaintiff.

In opposition the plaintiff points to Coccimiglio's deposition testimony where he states that the trench is approximately 30 inches from curb.⁹ Furthermore, the plaintiff directs the court's attention to the fact that the width of the roadway has been estimated as being between 60-63 feet. Additionally, it has been testified to that the roadway did not have a dividing line, so the exact width of the plaintiff's lane at the time of the accident is open to interpretation. Consequently, summary judgment is denied.

City of New York's Motion for Summary Judgment

By order dated April 9, 2008, Justice Aliotta granted the defendant CoFire Paving Corporation's ("Cofire") motion for summary judgment dismissing the plaintiff's complaint and all cross-claims. It had been alleged that the City contracted with Cofire to mill the roadway which was the location of the plaintiff's accident. The City now moves for summary judgment dismissing the plaintiff's complaint arguing 1) that the City had no prior written notice of a defect in the roadway; and 2) it was not performing any construction work at the intersection at the time of the accident.

⁹ Coccimiglio EBT Transcript p. 32.

New York City Administrative Code § 7-201(c)(2) states that a plaintiff must demonstrate that the written notice was given to the commissioner of transportation or a designee. The plaintiff argues that the City received notification of the depression in the roadway by way of the Big Apple Maps filed with the New York City Department of Transportation on February 2, 2004 approximately 8 months before the plaintiff's accident. The Court of Appeals has held that these maps are sufficient in establishing sidewalk and pothole defects.¹⁰ However, as pointed out by the City's attorney the map shows defects in the sidewalk at the accident location and not the roadway. Consequently, the plaintiff has not demonstrated that the City was aware of any defect at the location of the accident and therefore the City is entitled to summary judgment. Furthermore, the law of the case establishes that milling was not being conducted by the City at the time of the accident.

The plaintiff offers no opposition to the City's motion for summary judgment dismissing those claims concerning inadequate lighting. And therefore assuming the City had received notice of the defective condition of the street those claims of inadequate street lighting would be dismissed.

Verizon New York, Inc.'s motion for Summary Judgment

Verizon moves for summary judgment using arguments which are similar to its contractor V.N.A. concerning where the plaintiff was operating his motorcycle. This court has already determined that the location of the plaintiff at the time he lost control of his motorcycle is an issue of fact. Furthermore, the defendant's own witness, James McCue already testified that Verizon had the authority to supervise and control the work of V.N.A. Consequently, the movant failed to meet its burden on a motion for summary judgment.¹¹

¹⁰ *D'Onofrio v. City of New York*, 11 NY3d 581 [2008].

¹¹ *Terrell v. City of New York*, 74 AD3d 787 [2d Dep't., 2010].

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by V.N.A. Utility Contracting, Inc. is denied; and it is further

ORDERED, that the motion for summary judgment made by the City of New York is granted and the complaint is hereby severed as to it; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the motion for summary judgment made by Verizon New York, Inc. is denied; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, July 23, 2012 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: June 12, 2012

Joseph J. Maltese
Justice of the Supreme Court