

Lugo v City of New York
2013 NY Slip Op 30267(U)
January 29, 2013
Supreme Court, New York County
Docket Number: 105267/2010
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 105267/2010
LUGO, ROMAN
vs
CITY OF NEW YORK
Sequence Number : 001
SUMMARY JUDGMENT

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

col: # 69

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

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

FILED

FEB 05 2013

**COUNTY CLERKS OFFICE
NEW YORK**

Dated: 1-29-13



J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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

JAN 29 2013

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
ROMAN LUGO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
HOUSING AUTHORITY and CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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

-against-

HALLEN CONSTRUCTION CO., INC., and
NICO ASPHALT,

Third-Party Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 3-4.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

DECISION/ORDER

Index No.: 105267/2010

Seq. No. : 001

PRESENT:

Hon. Kathryn E. Freed
J.S.C.

FILED

FEB 05 2013

**COUNTY CLERKS OFFICE
NEW YORK**

Defendant/Third-Party Defendant Nico Asphalt, Inc., (hereinafter, "Nico"), moves for an Order pursuant to CPLR 3212, granting summary judgment in its favor, dismissing all claims and cross-claims, together with interest, cost and disbursements. Consolidated Edison Company of New York, Inc. and plaintiff Roman Lugo oppose.

After a review of the papers presented, all relevant statutes and caselaw, the Court denies the motion.

Factual and procedural background:

Plaintiff seeks recovery for personal injuries he allegedly sustained as a result of a trip and fall occurring on December 12, 2009, on the sidewalk adjacent to the premises known as 2931 8th Avenue, specifically on the west side of 8th Avenue north of the intersection with West 155th Street.

Plaintiff commenced the instant suit via the filing of a summons and complaint on April 22, 2010. A third-party summons and complaint was filed against Nico on August 3, 2011. Nico filed its Answer to the third-party complaint on November 28, 2011. Plaintiff then filed a supplemental summons and amended complaint naming Nico as a direct defendant on October 14, 2011. Issue was subsequently joined by service of Nico's Answer on January 12, 2012.

Plaintiff alleges that his accident occurred on the "common sidewalk adjacent to premises known as 2931 8th Avenue...next to and near a yellow gas cover...." Thus, he alleges that Nico was negligent in the ownership, operation, management, control and maintenance of said sidewalk area and in allowing the sidewalk area to be in a defective and hazardous condition.

Positions of the parties:

Nico asserts that during his deposition, plaintiff testified that he tripped and fell on the sidewalk and not on the street. Additionally, as its Exhibit "E," Nico appends the affidavit of John Denegall, its Superintendent, for the past eleven years.

In his affidavit, Mr. Denegall avers that Nico is and has always been in the business of restoring asphalt roadways in Manhattan pursuant to a contract it has with Con Edison. He also avers that while plaintiff alleges that he slipped and fell on the sidewalk, Mr. Denegall avers that Nico has never performed any work on any sidewalks, solely on roadways. He further avers that pursuant to a search that he personally performed, he did not locate any records indicating that Nico performed any work at the accident location. Therefore, he alleges that Nico is not a proper party to the instant suit.

Nico also argues that plaintiff's testimony that his foot came into contact with a square, yellow cap also absolves it from any liability, in that the Rules of the City of New York Department of Transportation (34 RCNY) 2-07(b), provide that owners of covers or gratings on the street are responsible for monitoring their conditions and the area extending 12 inches outward from the hardware. Since it clearly did not own the gas cap, Nico argues that it was not responsible and cannot be held responsible for its maintenance. Therefore, summary judgment is warranted.

Con Ed opposes the instant motion, asserting that contrary to Nico's contentions, there are questions of fact regarding its liability which preclude the granting of summary judgment in its behalf so early on in the action. Con Ed argues that the instant motion is premature because "significant discovery" remains outstanding, in that third-party defendants' Hallen and Nico have yet to be deposed. Additionally, it argues that while Nico relies on Mr. Denegall's affidavit, said affidavit fails to state what records were searched and what the parameters of said search were. Additionally, Con Ed argues that said affidavit "fails to mention that Nico picked up the relevant opening tickets to perform restoration work three months before the date of the alleged accident" (Aff. In Opp. ¶ 5). Con Ed further asserts that it is currently searching for paving orders and other related documents that would specifically indicate if Hallen and/or Nico performed the final

restoration work on the subject sidewalk.

Plaintiff agrees with Con Ed that granting the instant motion for summary judgment would be premature at this time. Plaintiff informs the Court that a witness associated with the movant was not deposed on the scheduled date of May 17, 2012 in accordance with the compliance conference ordered dated January 10, 2012. Said deposition was delayed due to the instant motion made on May 10, 2012.

Plaintiff also indicates its concern with Mr. Donegalls' affidavit and states that "it is noteworthy that Mr. Donegall's affidavit was executed two weeks prior to the scheduled deposition date, thereby intending to prevent plaintiff, the third-party plaintiff and the other co-defendants to *[sic]* properly depose this witness at an examination before trial" (Nico's Aff. In Opp. § 5). Moreover, plaintiff finds the contents of said affidavit to be conclusory in that Mr. Donegall conveniently fails to indicate the dates of his alleged record search and the identify of said records. Plaintiff further asserts that it is noteworthy that Nico fails to append a copy of the contract it has with Con Edison, to its moving papers.

Conclusions of law:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law"(Dallas-Stephenson v. Waisman, 39 A.D.3d 303,306 [1st Dept. 2007] citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a *prima facie* showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (*see* Zuckerman v. City of NY, 49 N.Y.2d 557 [1989]; People ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise,

conjecture or speculation” (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, the Court agrees that the instant motion for summary judgment is premature. It is well settled that a motion for summary judgment may be “denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a co-defendant” (Metichecchia v. Palmeri, 23 A.D.3d 894, 895 [3d Dept. 2005]; *see also* Raimondo v. Plunkitt, 2013 WL 238919 (N.Y.A.D.2 Dept.); Alarcon v. UCAN White Plains Housing Development Fund Corp., 100 A.D.3d 431 [1st Dept. 2012]).

Nico clearly relies exclusively on Mr. Denegall’s affidavit as support for its position that it lacks any liability for the instant incident. However, it fails to proffer any physical evidence of the records and contract that he refers to in his affidavit. Indeed, these are not only discoverable, they are necessary to obtain summary judgment.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 29, 2013

JAN 29 2013

FILED

FEB 05 2013

COUNTY CLERK'S OFFICE
NEW YORK

~~_____~~
Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT