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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice

PART 5

Index Number : 100635/2010
CAMPOS, JESUS
vs.
STOROZUM, JUDITH
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT CAL # 16

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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
APR 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4-2-13
APR 02 2013

_____, 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

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

----------X

JESUS CAMPOS,

Plaintiff,

-against-

JUDITH STOROZUM, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC., THE CITY OF NEW YORK, YG HOLDINGS CORP., CYPRESS CONSTRUCTION CORP., FELIX ASSOCIATES and NICO ASPHALT, INC.,

Defendants.

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DECISION/ORDER
Index No.: 100635/2010
Seq. No.: 009

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

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	3
REPLYING AFFIDAVITS	4
EXHIBITS	
STIPULATIONS	
OTHER	

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

Defendant YG Holdings Corp. moves for an Order pursuant to CPLR§3212 granting summary judgment dismissing plaintiff's claims and all cross-claims, in their entirety. Plaintiff opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the

motion.

Factual and procedural background:

In the instant case, plaintiff sues for injuries he allegedly sustained on November 2, 2008, when he tripped and fell over a metal plate that was situated in the middle of the roadway on East 117th Street, New York, New York. Said metal plate was described as being square in shape, approximately 7 to 8 feet long, which covered a hole in the ground. Plaintiff alleges that the area where he fell was approximately 5 feet away from his girlfriend's vehicle which was parked on the opposite side of East 117th Street.

Consequently, plaintiff commenced the instant action via service of a Summons and Complaint dated January 15, 2010. On March 23, 2010, he filed a Supplemental Summons and Verified Complaint adding defendants YG Holding Corp. (hereinafter, "YG"), and Cypress Construction, (hereinafter, "Cypress"). At the time of the accident, YG was the owner of 205 East 117th Street, the property adjacent to where the plate was situated. Cypress was the general contractor hired by YG to renovate an area in the subject premises. On September 29, 2010, Consolidated Edison Company of New York, Inc., (hereinafter, "Con Ed"), filed a third party Summons and Complaint alleging that third party defendants, Felix Associates, LLC and Nico Asphalt, Inc., were hired to perform work for it, in the roadway at the location of the subject accident. On April 6, 2011, plaintiff filed a Second Supplemental Summons and Complaint adding Felix Associates, LLC and Nico Asphalt, Inc., as defendants. Thereafter, YG served a Verified Answer to the Second Amended Complaint. Following joinder of issue, the discovery process commenced.

Positions of the parties:

YG argues that its motion for summary judgment should be granted because it did not owe plaintiff any duty of care for the work done by Con Ed and its subcontractors. It argues that pursuant to Section § 7-210 of the New York City Administrative Code, a real property owner only has a duty to maintain an abutting sidewalk in reasonably safe condition. YG asserts that during his deposition, plaintiff testified that the area where he fell was approximately five feet away from his girlfriend's car which was parked on the opposite side of East 117th Street.

Additionally, YG annexes an affidavit of Sergio Garretti, its managing agent. In his affidavit, Mr. Garretti avers in pertinent part that YG had hired Cypress to perform some renovation/installation work limited to a commercial kitchen and cellar in the subject premises. Mr. Garretti also avers that he was unaware of Cypress doing any work in the street abutting the aforementioned premises. Moreover, he avers that neither he nor YG were aware of any potential defects existing in the street abutting the aforementioned premises, and that YG was not responsible for creating any defects.

YG also annexes numerous documents it received from various sources during the discovery process. It first directs the Court's attention to its Exhibit"G" appended to its motion. Exhibit G is comprised of documentation exchanged by Con Ed during discovery. Said documentation indicates that Con Ed was issued a street opening permit for East 117th Street from Second Avenue to Third Avenue for the installation of gas mains. Said permit was valid from August 13, 2008 to September 12, 2008. A specific document entitled "Emergency Control System Remarks," indicates that Con Ed was to install a new three inch LPPE gas service at 205 East 117th Street.

YG also directs the Court to its Exhibit "H." Exhibit H is comprised of documentation it received from Felix Associates, LLC, (hereinafter, "Felix"). Pursuant to a purchase order between Con Ed and Felix, which was in effect in 2008, Felix was to "furnish supervision, labor, materials, tools and equipment to install various sized gas facilities throughout the borough of Manhattan..." Additionally, these records reflect that on August 19, 2008, Felix began excavating the street in front of the subject premises, to install gas service. The street was subsequently backfilled and re-paved. Felix also installed a valve box in the sidewalk in front of the subject premises, which was then backfilled, and new concrete slabs were put down. Another document is an invoice from Nico Asphalt Paving, Inc., (hereinafter, "Nico"). It is dated October 20, 2008, and notes that Nico had completed the repaving of the street in front of the subject premises.

Plaintiff asserts that YG failed to meet its burden of establishing a prima facie case entitling it to judgment as a matter of law. He argues that YG's purported proof is deficient, in that it failed to establish that it did not cause and/or create the condition which caused his accident or that the work performed by Cypress did not create said condition. Plaintiff also argues that Mr. Garretti's affidavit consists merely of conclusory denials. He also argues that said affidavit is conveniently silent on the issue of whether YG performed any work on the roadway in connection with the renovation of its building that was ongoing at the time of his accident.

Plaintiff further argues that the instant motion for summary judgment is premature in that he has not been afforded the opportunity to depose YG and any of the answering defendants. He argues that it is well settled law that a motion for summary judgment necessitates denial if the facts upon which the motion is predicated are clearly not within the knowledge of the moving party.

Conclusions of law:

"The proponent of a summary judgment motion 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 New York, 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]).

Section § 7-210(a) of the New York City Administrative Code provides in pertinent part that "[i]t shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.....Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewallk.....:

As a general rule, a property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property, unless the work is inherently dangerous,

or the owner interferes with and assumes control over the work (*see* Kleeman v. Rheingold, 81 N.Y.2d 270, 273 [1993]; Rosenberg v. Equitable Life Assur. Socy. of U.S., 79 N.Y.2d 663, 668 [1992]; Laecca v. New York Univ., 7 A.D.3d 415; Fernandez v. 707, Inc., 85 A.D.3d 539 [1st Dept. 2011]; Paez v. 1610 Nicholas Avenue, L.P., 103 A.D.3d 553 [1st Dept. 2013]).

In the case at bar, the area wherein the accident occurred was not within the areas contemplated by Section §7-210 of the New York City Administrative Code, as being the responsibility of a land owner. Moreover, YG hired Cypress to specifically install/renovate a commercial kitchen and cellar inside its premises, not on the street. Additionally, there is no evidence to indicate that YG somehow exercised control over the work it hired Cypress to perform or that said work was inherently hazardous. Furthermore, and more importantly, the Court has reviewed various documents annexed as exhibits to YG's motion. These clearly indicate that any excavation and repaving that occurred in the area wherein plaintiff tripped and fell was performed by or involved Con Ed, Felix and Nico.

Therefore, the Court finds that YG has established a prima facie entitlement to judgment as a matter of law, which plaintiff has failed to rebut. Indeed, plaintiff has failed to proffer any evidence in admissible form which raises an issue of material fact that is more appropriate for a jury to consider. It should also be noted that the Court also agrees with YG's contention that plaintiff's application to hold the instant motion in abeyance following a deposition of YG, would merely be an exercise in futility as well as a waste of time and money. Furthermore, the Court notes that any work that was done, would have been done by Cypress and Cypress remains as a defendant in this case.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant YG Holdings Corp.'s motion for summary judgment is granted; and the complaint and any cross-claims against it are hereby severed and dismissed against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendant movant shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further

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

ENTER:

DATED: April 2, 2012

APR 02 2013

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

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

APR 10 2013

NEW YORK
COUNTY CLERK'S OFFICE