

Worthman v Trocom Constr. Corp.

2013 NY Slip Op 30838(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 109419/06

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

DIANA WORTHMAN,

Plaintiff,

- v -

INDEX NO. 109419/06

MOTION DATE 12/11/12

MOTION SEQ. NO. 002

TROCOM CONSTRUCTION CORPORATION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, CITY
OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY,
TIME WARNER ENTERTAINMENT COMPANY, L.P., RICHARD
HIRSCH, EMPIRE CITY SUBWAY COMPANY (LIMITED), and
GRACE INDUSTRIES, INC.,

Defendants.

And Third party actions

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Notice of Motion; Affirmation — Exhibits A-H _____ | No(s). 1; 2

Answering Affirmation (submitted with MS 003)— Exhibits _____ | No(s). 3

Replying Affirmation — Exhibits _____ | No(s). _____

(7 papers read on top 03-06)

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED

APR 24 2013

HON. MICHAEL D. STALLMAN

Dated: 4/18/13 NEW YORK COUNTY CLERK'S OFFICE
New York, New York

4/18/13, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if 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: IAS PART 21**

-----X
DIANA WORTHMAN,

Plaintiff,

Index No. 109419/06

-v-

Decision and Order

TROCOM CONSTRUCTION CORPORATION,
CONSOLIDATED EDISON COMPANY OF NEW
YORK, CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, TIME WARNER
ENTERTAINMENT COMPANY, L.P.,
RICHARD HIRSCH, EMPIRE CITY SUBWAY
COMPANY (LIMITED) and GRACE INDUSTRIES, INC.,

Defendants.

FILED

APR 24 2013

-----X
(And Third-Party actions.)

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of an alleged trip and fall in a crosswalk, defendant New York City Transit Authority (NYCTA) moves for summary judgment dismissing plaintiff's complaint as against it, and plaintiff opposes (motion sequence 002). In motion sequence 003, second third party defendant Nico Asphalt Paving, Inc. (Nico) moves for summary judgment dismissing plaintiff's complaint and any and all cross claims as against defendant Empire City Subway Company (Limited) (ECS) and also moves to dismiss ECS' second third party complaint against itself. Plaintiff opposes the motion. In motion sequence 004, defendant Consolidated Edison Company of New York, Inc.

(ConEd) moves for summary judgment dismissing the complaint and all cross claims as against it. Plaintiff opposes ConEd's motion. In motion sequence 005, defendant Empire City Subway Company (Limited) (ECS) moves for summary judgment dismissing plaintiff's complaint as against it and also moves for summary judgment on its second third party claim for indemnification from second third party defendant Nico. Plaintiff and Nico oppose ECS' motion. In motion sequence 006 defendant Trocom Construction Corporation (Trocom) moves for summary judgment dismissing the complaint and cross claims against it and plaintiff opposes. This decision addresses all five motions.

BACKGROUND

On April 19, 2005, plaintiff allegedly tripped and fell in the eastern crosswalk of East 72nd Street at its intersection with Lexington Avenue. She alleges that she had taken about five steps into the crosswalk when she tripped over a defect in the street and fell, sustaining serious injuries. (Coffey Affirmation, Ex. G at 19.) Plaintiff commenced this action against Trocom, ConEd, the City of New York (City), the NYCTA, Time Warner Entertainment Company, L.P. (Time Warner), Richard Hirsch, ECS and Grace Industries, Inc. Time Warner and Richard Hirsch subsequently commenced a third party action against Trinity Communications Corp., and Hylan Datacom & Electrical, Inc.

ECS commenced a second third party action against Nico.

DISCUSSION

Motion Sequence 002

Defendant NYCTA has established its prima facie entitlement to judgment as a matter of law. It has shown that it has no duty to plaintiff and therefore cannot be liable for her injuries. Plaintiff testified at her deposition that she fell in the crosswalk at the intersection of East 72nd Street and Lexington Avenue after taking about five steps. (Coffey Affirmation, Ex. G at 17, 18-19, 84.) The NYCTA does not control public streets and sidewalks in the City of New York, nor is it responsible for maintenance and repair of them. “The responsibility for the maintenance, repair, and creation of the roadway surface lies with the defendant City of New York, not the NYCTA.” (*Tanzer v City of New York*, 41 AD3d 582, 582 [2nd Dept 2007].

Plaintiff argues that the motion is premature because the NYCTA has not appeared for a deposition. Plaintiff further argues that the Lexington Avenue subway line runs underneath the accident location and that there are subway gratings in the vicinity. However, plaintiff does not allege that she tripped on a subway grating or near a subway grating. Furthermore, photographs of the area of the alleged accident do not show any gratings. (Coffey Affirmation, Ex. F.) The

[*5]
motion is not premature because it is a matter of law that the NYCTA is not responsible for public streets and sidewalks in the City of New York.

Motion Sequence 003

Third party defendant Nico moves for summary judgment dismissing plaintiff's complaint against ECS. A "third party defendant [is] permitted to raise any defense that defendant might have against plaintiff's main claim." (*Jeanson v Middlegrove Estates*, 222 AD2d 782, 783 [3rd Dept 1995].) In this case, third party defendant Nico performed paving work for third party plaintiff ECS. (Canavan Affirmation, Ex. I at 38.) Nico has shown that ECS did not perform any work in the eastern crosswalk of the intersection of East 72nd Street Lexington Avenue. A witness produced by ECS for deposition stated that work was performed on the west side of East 72nd Street and Lexington Avenue and would not have extended into the eastern crosswalk. (*Id.* at 8-9, 37, 49.) An affidavit from Nico states that paving work was performed on the west side of East 72nd Street and Lexington Avenue and that this work did not extended into the eastern crosswalk. (*Id.*, Ex. K at ¶¶ 7, 9.) Plaintiff clearly states that she fell in the east crosswalk at the intersection and marked a photo showing where she fell. (*Id.*, Ex. A, Ex. H at 17.) "Absent some evidence connecting defendants' work to the situs of plaintiff's injury, these defendants are entitled to summary judgment."

[*6]
(*Robinson v City of New York*, 18 AD3d 255, 256 [1st Dept 2005].) Furthermore, “[w]ithout some evidence of their proximate cause of plaintiff’s injury, these defendants are entitled to summary judgment.” (*Cibener v City of New York*, 268 AD2d 334, 334-335 [1st Dept 2000].)

Plaintiff has not raised a triable issue of fact. Defendants have submitted evidence in admissible form to show that neither ECS nor Nico performed work in the area of plaintiff’s alleged accident.

Nico has also established its prima facie entitlement to judgment as a matter of law dismissing ECS’s third party action against Nico. ECS did not oppose Nico’s motion for summary judgment.

Motion Sequence 004

Defendant ConEd has established its prima facie entitlement to judgment as a matter of law. ConEd has submitted evidence to show that it did not perform any work in the area of plaintiff’s alleged accident at East 72nd Street and Lexington Avenue. The work done by ConEd was done on East 72nd Street between Lexington Avenue and Park Avenue, and there was no work performed in the intersection of East 72nd Street and Lexington Avenue. (Marlowe Affirmation, Ex. M at ¶ 20, Ex. N at 11.) A ConEd witness testified at her deposition that no work was done in the intersection of East 72nd Street and Lexington Avenue. (*Id.*,

Ex. N at 11.) There was one permit found for the location of East 72nd Street between Third Avenue and Lexington Avenue, but there was no work done under that permit. (*Id.* at 12-13.) Plaintiff testified that she was crossing East 72nd Street on the east side of Lexington Avenue. (*Id.*, Ex. J at 17.) Therefore, the work done by ConEd was not in the area of plaintiff's alleged accident. It is well settled that "[o]ne who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site." (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006].)

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's counsel argues that ConEd has failed to meet its burden because its witness stated that ConEd does have hardware in the area of plaintiff's alleged accident and that ConEd did perform work in the area. However, plaintiff's counsel does not have personal knowledge of any work ConEd allegedly performed in the area of plaintiff's alleged accident. Plaintiff's argument is unavailing as the witness testified and produced documents showing that ConEd did not perform work in the intersection where plaintiff allegedly fell.

Motion Sequence 005

Defendant ECS has met its prima facie burden for establishing judgment as a matter of law as to plaintiff's claim. ECS has shown that it did not perform any

work in the intersection where plaintiff's alleged accident occurred. (Bogle Affirmation, Ex. H ¶5.) An ECS employee searched its records and discovered that no work had been done on the east side of the intersection of East 72nd Street and Lexington Avenue. (*Id.*, Ex. G at 8-9, 37, 49.) A paving order showed that work had been done on the west side of the subject intersection, but that work did not extend into the eastern crosswalk or any part of the crosswalk area. (*Id.* at 37, 46, 49.) Therefore, defendant ECS has produced evidence that shows that ECS did not do any work in the area of the plaintiff's alleged accident and therefore cannot be held liable for her injuries. "One who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site." (*Kenney*, 30 AD3d at 262.)

Plaintiff has not raised a triable issue of fact. Plaintiff argues that the evidence submitted by ECS is inadmissible because the deposition witness did not personally conduct the search and had no personal knowledge of the records. However, ECS's witness testified that he personally did a second search of the records before signing his affidavit. (*Id.* at 8-9, 42.) The original search was conducted by an employee who had retired before the deposition. (*Id.* at 9.) ECS' deposition witness did have personal knowledge of the search he conducted and produced the records at the deposition. The records and deposition testimony

clearly show that ECS did not perform any work in the area where plaintiff's alleged accident occurred.

Second third party plaintiff ECS moves for summary judgment against second third party defendant Nico for indemnification. Notwithstanding that ECS asserts that Nico did work under the contract in 2005, albeit not at the accident location, ECS has not met its prima facie burden for establishing judgment as a matter of law. The contract submitted with the motion expired in 2002 and there is no evidence that it was ever extended. A witness averred that the contract was in effect at the time of plaintiff's alleged accident; however, Nico argues that the contract was not in effect on the date of plaintiff's accident and that the contract had actually expired in 2002, three years before plaintiff's alleged accident. (Bogle Affirmation, Ex. I.) Indeed, the contract itself shows that it expired in September 2002. (*Id.*) The Court notes that, in motion sequence 003, above, second third party defendant Nico moved for summary judgment dismissing ECS's complaint against it. ECS did not oppose that motion.

Motion Sequence 006

Defendant Trocom has met its prima facie burden for establishing judgment as a matter of law. Trocom has produced admissible evidence showing that it did not perform any work in the area of plaintiff's alleged accident. The Vice

President of Trocom averred that his duties and responsibilities require him to oversee the construction projects undertaken by Trocom. (Torino Affirmation, Ex. O at ¶ 1.) He further avers that he has personal knowledge of contract number SEHDWR04N between Trocom and the New York City Department of Parks and Recreation. (*Id.* at ¶ 2.) Under that contract Trocom performed work at East 74th Street and Lexington Avenue in January -February 2005, but performed no work south of East 74th Street. (*Id.* at ¶ 3.) He further averred that he reviewed a photograph of the area of the alleged accident that was provided by plaintiff's counsel and did not recognize the intersection and that Trocom did not perform any work in the area. (*Id.* at ¶ 5.) Furthermore, according to the photographs there are no manhole covers in the subject intersection; the only manhole covers depicted in the photograph that plaintiff marked are located outside the crosswalk where plaintiff allegedly fell. (*Id.*) "Absent some evidence connecting defendants' work to the situs of plaintiff's injury, these defendants are entitled to summary judgment." (*Robinson*, 18 AD3d at 256.) Defendant Trocom cannot be held liable for plaintiff's alleged accident as it did not own or have control of the area, nor did it perform any work in the area of plaintiff's alleged accident.

Plaintiff has not raised a triable issue of fact. The contract between Trocom and the New York City Department of Parks and Recreation is unnecessary to

decide the motion. However, Trocom did submit the contract with its reply. (Torino, Reply Affirmation, Ex. A.) Trocom has produced an affidavit of someone with personal knowledge of the contract and of Trocom's construction projects and he averred that Trocom did not perform any work in the area of plaintiff's alleged accident. The affidavit does not rely on the contract, but merely refers to it as the witness has personal knowledge of the construction project. Therefore, Trocom has met its burden of proof. Furthermore, the motion is not premature, as no further evidence is necessary to determine that Trocom did not perform any work in the subject intersection, and therefore cannot be held liable for plaintiff's injuries.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant New York City Transit Authority for summary judgment is granted and the complaint and any cross claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of second third party defendant Nico Asphalt Paving, Inc. for summary judgment dismissing plaintiff's complaint as against

defendant Empire City Subway Company (Limited) is granted and plaintiff's complaint and any cross claims are dismissed as against said defendant, with costs and disbursements to said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of second third party defendant Nico Asphalt Paving, Inc. for summary judgment dismissing second third party plaintiff Empire City Subway Company (Limited)'s complaint as against it is granted without opposition and the complaint and any cross claims are dismissed as against said second third party defendant, with costs and disbursements to said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendant Consolidated Edison Company of New York for summary judgment is granted and the complaint and any cross claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendant Empire City Subway Company (Limited) for summary judgment is granted and plaintiff's complaint and all cross

claims are dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of second third party plaintiff Empire City Subway Company (Limited) for summary judgment as against second third party defendant Nico Asphalt Paving, Inc. is denied; and it is further

ORDERED that the motion of defendant Trocom Construction Corporation for summary judgment is granted and the complaint and any cross claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this action is respectfully referred to the Trial Support Office for reassignment to a City Part.

HON. MICHAEL D. STALLMAN

Dated: April 16, 2013
New York, NY

ENTER: 

J.S.C.

FILED

APR 24 2013