

Groppi v City of New York

2013 NY Slip Op 31849(U)

August 8, 2013

Sup Ct, New York County

Docket Number: 104664/2009

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 104664/2009
GROPPI, JEFFREY
vs. CALL # 31
CITY OF NEW YORK
SEQUENCE NUMBER : 0005 005
SUMMARY JUDGMENT

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

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

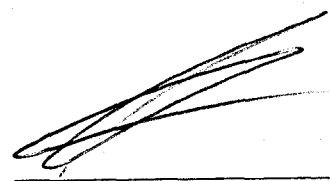
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

AUG 12 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-8-13
AUG 08 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

JEFFREY GROPP, I,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY and JOAN PRICE RAHAV,

Defendants.

-----X

JOAN PRICE RAHEV,

Third-Party Plaintiff,

-against-

HALCYON CONSTRUCTION CORP. and FELIX
ASSOCIATES, LLP,

Third-Party Defendants.

-----X

FELIX ASSOCIATES LLC,

Second Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Second Third-Party Defendant.

-----X

HON. KATHRYN E. FREED:

DECISION/ORDER

Index No. 104664/2009

Seq. No. 005

FILED

AUG 12 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

Under Sequence No. 005, third-party defendant/ second third-party defendant Felix Associates LLC, (“Felix”), moves for an Order pursuant to CPLR§ 3212 dismissing all claims and cross-claims against it, in that it has no liability in this matter. Defendant/third-party defendant, Joan Price Rahav, (“Rahav”), opposes. It is important to note that Nico, in also moving for summary judgment, adopts and incorporates the factual evidence and legal argument proffered by co-defendant Felix. It is also important to note that plaintiff has discontinued his suit against defendants the City of New York and the New York City Transit Authority.

Under Seq. No. 006, Nico Asphalt Paving, Inc. (“Nico”), also moves for summary judgment. Rahav opposes. Under Seq. No. 007, Halcyon Construction Corp. (“Halcyon”) also moves for summary judgment. Rahav opposes.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries allegedly sustained when he tripped and fell on the sidewalk adjacent to the premises located at 78 7th Avenue, in New York County, on January 10, 2008. Thereafter, plaintiff commenced the instant action on or about August 3, 2009, via service of a Summons and Complaint. Defendant Rahav joined issued on or about September 3, 2009.. Defendant Rahav then commenced a third-party action against Halcyon and Felix on or about August 6, 2010. Third-party defendant Halcyon served its Answer to the Third-party complaint on or about October 17, 2010, in addition to asserting a counterclaim as to the third party plaintiff also on October 17, 2010. Felix answered the third-party complaint on or about October 8, 2010. Third-party defendant Felix then commenced a Second third-party action against Nico on or about April 29, 2011. Nico answered on or about August 4, 2011.

Plaintiff served a Bill of Particulars in response to the demands of the third party defendant Felix. In said Bill of Particulars, plaintiff alleges that his accident occurred “when [he] was crossing 7th Avenue at the intersection of 15th Street and as he stepped on the sidewalk, he was caused to trip, fall and be precipitated to the ground thereat as a result of a hole in the sidewalk.” Plaintiff’s deposition took place on September 19, 2012. He testified that on January 10, 2008, at approximately 6:00 pm, he crossed 7th Avenue and 15th Street, east to west and “as soon as [he] stepped on the sidewalk, [he] went right into the hole” (See Exhibit “E,” p. 67).

He also testified that the hole was entirely on the sidewalk (*id.* at 92), and it was the sole cause of his accident (*id.* p. 93). When shown a photograph depicting the area, plaintiff circled the area of the hole that caused his accident, and said hole appeared to be entirely on the sidewalk. (*Id.* at p.100). Plaintiff also testified that three weeks following his accident, he returned to the scene to take photographs of the subject hole. At that time, he asserts that an individual associated with the deli on the northwest corner of 7th Avenue and West 15th Street, informed him that the subject hole had existed for “a couple of years.” (*Id.* at pp. 79-80).

Intended as support for its argument of entitlement to summary judgment, Felix annexes an affidavit from Mr. Donald Venturino, its supervisor for natural gas installations from 2005 to 2008. (Felix closed in 2008). In pertinent part, Mr. Venturino states that in July 2008, Felix was hired by non-party Consolidated Edison (“Con Ed”), to perform a street opening in the street adjacent to the building. Felix then retained its subcontractor Nico, to perform the final paving for the project.

Felix argues that its work was not performed on the sidewalk wherein plaintiff fell, but was limited to the parking lane of 7th Avenue. Additionally, it argues that since no documentation has been produced that could possibly link it to the accident location, it cannot legally be held liable for

plaintiff's injuries.

Nico also argues that no evidence has been produced that proves that it performed any work where plaintiff's accident occurred. It asserts that Con Ed had performed work underneath the street in question, approximately two years prior to the subject accident. That work consisted of nine openings in the street, performing work on the underground electrical conduit system beneath the roadway and then backfilling the openings. Nico also asserts that the cutting and backfilling of the roadway was performed by MEC Construction Corp., ("MEC"), while Nico paved over the areas where the roadway had been disturbed. Nico refers to and relies on the deposition testimony of two witnesses produced by Con Ed who "were directly involved with the project and familiar with the work performed by Nico." (See Nico's Motion, p. 6. ¶ 5).

Nico asserts that the first witness, a construction inspector, testified that MEC had opened up a trench which extended across the roadway and ended near the maintenance hole cover where plaintiff fell. This witness also testified that the cover was located in the middle of the hole and that the trench did not extend past the outer wall of the hole. Additionally, Nico asserts that Con Ed's second witness testified that he inspected the paving performed by Nico on the project, and while he could not recall if Nico paved right up to the cover in question, he did recall that if the trench had stopped at the outer wall of the hole and had not extended to the cover, Nico would not have been responsible for paving around the cover.

Nico asserts that it had previously moved for summary judgment dismissing the complaint, the third-party complaint and all cross-claims and counter-claims against it, based on the aforesaid testimony of Con Ed's two witnesses. In opposition to that motion, plaintiff argued that Nico had not effectively established that it did not pave around the maintenance hole, since none of the

witnesses possessed first hand knowledge of whether it did or did not. After denial by the trial court, the Appellate Division determined that Nico's reliance on the testimony of said Con Ed employees who supervised the project established a prima facie entitlement to judgment as a matter of law.

Nico argues that based on its same arguments promulgated in that motion, it should now be entitled to summary judgment in the instant case, as its evidence, in the form of Mr. Venturino's affidavit, also establishes a prima facie entitlement to judgment as a matter of law for Nico as well as Felix.

Halcyon additionally moves for summary judgment. It annexes as its Exhibit "F," an affidavit of Mr. Sal Leopoldo, its Executive Vice President, who is also in charge of preparing bids and acting in the capacity as project manager. In his affidavit, Mr. Leopoldo states in pertinent part, that work was performed on West 15th Street and 7th Avenue, to repair a broken water main pursuant to "Contract GE 344." Thus, on December 25, 2006, January 6, 2007 through January 14, 2007, January 27, 2007 and February 21, 2007, Halcyon repaired the water main. However, it only performed work in the street. Mr. Leopoldo also states that on May 19, 2007, restoration work of the trenches was performed and final restoration with asphalt was performed on June 2, 2007.

Halcyon vehemently maintains that at no time did it perform any sidewalk work, in the form of paving or restoration. Thus, since plaintiff's accident occurred on the sidewalk, it cannot be held liable for plaintiff's injuries.

Rahav argues that to date only plaintiff's deposition has been conducted. She also argues that despite the fact that both Felix and Nico argue that they are not liable for the accident, they have not produced any witnesses with actual, personal knowledge of the work performed by their respective companies at the subject location. Rahav further argues that in December 2006, Halcyon was hired

by the City to perform work in the street adjacent to the building in connection with a broken water main. She argues that to date, only her deposition has been conducted. She also argues that neither Felix, Nico or Halcyon , have produced witnesses with knowledge of the specific work these entities are responsible for at the accident site. Therefore, their respective motions for summary judgment are premature at this juncture.

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]).

In the case at bar, the Court agrees that the instant motions for summary judgment are premature at this juncture, in that necessary discovery, in the form of depositions, has not been completed. The Court agrees that the defendants need to produce witnesses with personal knowledge of the subject condition which caused plaintiff’s accident, and what their participation was in relation

to the work that was performed in relation to it (see *Cruz v. City of New York*, 81 A.D.3d 505 [1st Dept. 2011]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the summary judgment motion of third-party defendant/second third-party plaintiff Felix Associates LLC is denied; and it is further

ORDERED that the summary judgment motion of second third-party defendant Nico Asphalt Paving, Inc. is also denied; and it is further

ORDERED that the summary judgment motion of third-party defendant Halcyon Construction Corp. is also denied; and it is further

ORDERED that a compliance conference is scheduled for September 24, 2013 at 2:00 pm in Room 103 at 80 Centre Street; and it is further

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

DATED: August 8, 2013

AUG 08 2013

ENTER:



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

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

AUG 12 2013

**COUNTY CLERK'S OFFICE
NEW YORK**