Locastro v City of New York
2013 NY Slip Op 32090(U)
August 27, 2013
Sup Ct, New York County
Docket Number: 100601/10
Judge: Manuel Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

FRANK LOCASTRO,

Plaintiff,

-against-

CITY OF NEW YORK, N.E.C.F., INC., d/b/a MR. DENNEHY'S,

Defendants.

INDEX NO. 100601/10
MOTION DATE 08-14-2013
MOTION SEQ. NO. 003
MOTION CAL. NO.

CITY OF NEW YORK,

Third-Party Plaintiff,

-against -

MCC CONSTRUCTION AND DEVELOPMENT CORP.,

Third-Party Defendant.

The following papers, numbered 1 to 10 were read on this motion and cross-motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____cross motion _____	5 - 9 , 10
Replying Affidavits _____	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that N.E.C.F. INC. d/b/a MR. DENNEHY's (herein after referred to as "N.E.C.F. Inc."), motion for summary judgment dismissing the complaint and all cross-claims against it, is denied. Plaintiff's cross-motion pursuant to CPLR 3212[e], for partial summary judgment on the issue of liability against N.E.C.F. Inc. and seeking an assessment of damages, is denied. MCC CONSTRUCTION AND DEVELOPMENT CORP.'s (hereinafter referred to as "MCC"), motion for summary judgment filed under Motion Sequence 004, seeking dismissal of N.E.C.F. Inc.'s purported cross-claims against it, is granted.

The City of New York's motion for summary judgment filed under Motion Sequence 002, was granted unopposed, severing and dismissing that portion of the complaint and any and all cross-claims and counterclaims against it.

N.E.C.F. Inc. seeks an Order granting it summary judgment dismissing the complaint and all cross-claims asserted against it.

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

Plaintiff opposes N.E.C.F. Inc.'s motion and cross-moves pursuant to CPLR §3212[e], for partial summary judgment on the issue of liability against N.E.C.F. Inc..

MCC seeks summary judgment under Motion Sequence 004, dismissing all claims and N.E.C.F. Inc.'s purported cross-claims against it.

On October 21, 2008, at approximately 8:15 am, Frank Locastro claims he sustained serious injuries, including a fractured wrist, after slipping and falling on a greasy substance on the street adjacent to 63 Carmine Street, Manhattan, New York (Mot. Exhs. J & K). Mr. Locastro testified at his deposition that he was on his way to his office located at 375 Hudson Street, New York, when he found that the sidewalk was blocked due to its repair and neighboring construction. He observed that an alternate route was in the process of being constructed. To avoid being late, he entered the street to go around the construction and proceed to work (Mot. Exhs L, pgs. 13-15, 18). Mr. Locastro fell after walking behind a parked car and entering the street for approximately two feet from the curb. Plaintiff claims he fell on a thick, light brown or beige type substance that was oil-like, greasy waste and had a bad odor, he did not fall into the area where traffic passed (Mot. Exh. L, pgs. 49-50). The substance was in the form of a puddle approximately three feet long and two feet wide. He did not notice the puddle until after he slipped and fell (Mot. Exh. L, pg. 19-21). Plaintiff testified at his deposition that the greasy waste appeared to be similar to that which is found in a grease trap (Mot. Exh. L, pgs. 45 & 50).

David Reilly is president of MCC, he testified at his deposition that the garbage in the street was there before he and his men arrived for work at seven in the morning on October 21, 2008 (Mot. Exh. N, p. 39). He states that there was no debris from the concrete because it was picked up with a broom sweep and tools were cleaned with water in a bucket that was from the concrete truck, and taken away by the truck (Mot. Exh. N, pgs. 40-41). Mr. Reilly stated that at 10:00am, on the date of the accident, he observed another man wearing a fur coat with earphones in his ears, fall in grease on the sidewalk and curb in the same approximate location as the plaintiff. Mr. Reilly almost fell himself going to take a look at the debris and found that the grease had food in it (Mot. Exh. N, pgs. 24-26). He told the man to follow the trail of grease that led back into the N.E.C.F. Inc.'s building, which was being used as a restaurant. The trail of grease ran from the steps leading to the cellar door of N.E.C.F. Inc.'s building, unto the sidewalk and to the curb (Mot., Exh. N, pgs. 25, 48-49). Mr. Reilly testified that the owner of the restaurant sent busboys out with buckets of water and washed the whole thing down (Mot. Exh. N, pgs. 26-28).

Donal Dennehy, owner of the restaurant known as Mr. Dennehy's located at 63 Carmine Street, New York, New York, provided testimony on behalf of N.E.C.F. Inc.. He testified that the restaurant used private contractors to take the garbage away. Regular garbage was picked up every night except Saturdays. The restaurant had large plastic containers with no wheels, to take the garbage out to the curb for pick-up (Mot. Exh. M, pgs. 21-22). Garbage was placed in plastic bags which were put in the plastic containers and taken to the street by porters at close to mid-night for pick-up. He did not observe garbage taken to the curb, including the night before the accident. Donal Dennehy would

not have approved of garbage taken out in the plastic bags without containers because it would result in fines from the Department of Environmental Protection (DEP) (Mot. Exh. M, pgs. 39-40) Although, he did not personally observe the procedure, he was advised that grease was vacuumed up using a hose, directly from the kitchen. The hose was run down the steps into the basement (Mot. Exh. M, pgs. 40-42). A separate private contractor was responsible for the grease pick-up and came approximately once a week (Mot. Exh. M, pgs. 23-26, 40).

Donal Dennehy could not recall whether he was at the restaurant on the date of the accident (Mot. Exh. M. , pg. 14). His wife, Helena, managed the restaurant when he wasn't there. He testified that the greasy substance depicted in pictures looked like sheetrock compound which could have come from defendants and their work inside the building next door (Mot. Exh. M, pgs. 14-16). Donal Dennehy testified that he complained about the dirt and debris from the neighboring construction because it was getting out of hand (Mot. Exh. M, pgs. 17, 33-34). He did not observe the substance identified by plaintiff on the street outside of his restaurant in mid-October and was unaware of the substance in the street until being shown pictures of it at his deposition (Mot. Exh. M, pgs. 17-19).

N.E.C.F. Inc. seeks summary judgment, relying on deposition testimony which it contends proves that the plaintiff cannot establish the restaurant or its employees caused or had notice of, the dangerous or defective condition. The deposition testimony of the plaintiff and Mr. Reilly on behalf of MCC, as to the cause of the greasy substance in the street, is pure speculation. Mr. Reilly's self-serving testimony also ignores the fact that plaintiff was forced to walk into the street between parked cars after MCC's work made the sidewalk impassable. The condition to the extent it existed would have been obscured by the parked cars and would not have been easily visible and apparent to be remedied. Deposition testimony of Donal Dennehy established that construction debris was also routinely left out on the street and the greasy substance could have just as easily been left by MCC as part of the work going on inside the building.

Plaintiff opposes N.E.C.F. Inc.'s motion and seeks partial summary judgment on the issue of liability against N.E.C.F. Inc.. Plaintiff contends that the deposition testimony establishes N.E.C.F. Inc.'s liability. Donal Dennehy testified that the garbage was taken out the night before the accident. The garbage would have been visible to employees leaving the restaurant at night and in the morning when they returned to work. Employees returning in the morning would be able to observe the blocked sidewalk and debris in the street. Donal Dennehy offered no definitive proof and only a general denial of knowledge related to the accident. His concession that grease and garbage was taken from the basement, when taken into account with the testimony of Mr. Reilly on behallf of MCC concerning the grease trail from the stairs, demonstrates causation. Mr. Reilly's description of the conduct of cleaning the street after the second incident in which a pedestrian fell on the grease, demonstrates an admission of N.E.C.F. Inc.'s liability.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City

of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966]. Summary Judgment is "issue finding" not "issue determination"(Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 240 [2012] citing to, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y. 2d 395, 144 N.E. 2d 387, 165 N.Y.S. 2d 498 [1957]). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[N.Y.A.D. 1st Dept. 2004]).

Pursuant to CPLR §3212[e], a party can obtain partial summary judgment on multiple causes of action to remove from the case claims for which there are no issues of fact (Joswick by Joswick v. Lennox Hill Hosp., 161 A.D. 2d 352, 555 N.Y.S. 2d 104 [N.Y.A.D. 1st Dept., 1990] and Levey v. Saphier, 74 A.D. 2d 918, 426 N.Y.S. 2d 79 [N.Y.A.D. 2nd Dept., 1980]).

The defendant seeking summary judgment in a slip and fall case has the burden of proving the condition was not visible and apparent for a sufficient length of time prior to the accident to permit its employees to discover and remedy it, and that it did not create the condition (Healy v. ARP Cable, Inc., 299 A.D. 2d 152, 753 N.Y.S. 2d 38 [N.Y.A.D. 1st Dept., 2002] and Gordon v. American Museum of Natural History, 67 N.Y. 2d 836, 501 N.Y.S. 2d 646, 492 N.E. 2d 774 [1986]). Whether the defendant created or was aware of the condition is a material issue of fact (Barbitsch v. City of New York, 241 A.D. 2d 527, 661 N.Y.S. 2d 527 [N.Y.A.D. 1st Dept., 1997] and Andino v. NSPD Associates, LLC, 89 A.D. 3d 414, 931 N.Y.S. 2d 856 [N.Y.A.D. 1st Dept., 2011]). Testimony concerning observation of a dangerous or wet condition on prior occasions raises a triable issue of fact concerning whether there was constructive notice of the condition (Talavera v. New York City Transit Authority, 41 A.D. 3d 135, 836 N.Y.S. 2d 610 [N.Y.A.D. 1st Dept., 2007]). A defendant can establish that there is a lack of constructive notice by, "producing evidence of its maintenance activities on the day of the accident and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (Ross v. Betty G. Reader Revocable Trust, 86 A.D. 3d 419, 927 N.Y.S. 2d 49 [N.Y.A.D. 1st Dept., 2011]). Presentation of circumstantial evidence which tends to show that a party was responsible for creating the dangerous condition, is sufficient to raise an issue of fact and deny summary judgment (Henderson v. Hickory Pit Restaurant, 221 A.D. 2d 161, 633 N.Y.S. 2d 31 [N.Y.A.D. 1st Dept., 1995], Cruz v. Apex Investigation and Security Company, Inc., 285 A.D. 2d 427, 728 N.Y.S. 2d 154 [N.Y.A.D. 1st Dept., 2001] and Brown v. Parrocks Associates,88 A.D. 3d 624, 931 N.Y.S.2d 599 [N.Y.A.D.1st Dept., 2011]).

This Court finds that N.E.C.F. Inc. has not met its burden of proof for purposes of obtaining summary judgment. Donal Dennehy did not recall events that took place on the date of the accident or even whether he was at the restaurant on the date of the accident. He made generalizations and provided self-serving statements as to the source of the greasy debris in the street. Plaintiff through the circumstantial evidence has raised an issue of fact concerning N.E.C.F. Inc.'s liability for the accident.

Plaintiff is relying on circumstantial evidence, he has not made out a prima facie case for purposes of obtaining summary judgment on liability against N.E.C.F. Inc.. There remain issues of fact concerning whether N.E.C.F. Inc., was responsible for creating the dangerous condition in the street outside the restaurant and the extent to which it was visible and apparent to the restaurant employees.

MCC seeks summary judgment under motion sequence 004 contending that N.E.C.F., Inc. never commenced a third-party action or included a summons with its counterclaims served on MCC. N.E.C.F. Inc., is not authorized to assert crossclaims against a third-party defendant. Now that the City is no longer a party to this action any cross-claims against MCC should be dismissed. MCC seeks to have the counterclaims asserted by N.E.C.F. Inc. for indemnification and contribution dismissed because pursuant to CPLR §3019[b], they are procedurally defective and there is no basis to find liability. MCC did not cause the dangerous condition and there is no contractual indemnification or contribution with the City of New York. There is no basis to maintain the third-party action since the City of New York has been granted summary judgment.

N.E.C.F. Inc. opposes the motion contending that the service of the counterclaim was procedurally proper pursuant to CPLR §3019[b], since MCC is already a party to the action and is potentially liable to the plaintiff. There was no need to commence a third party action or serve a summons with the counterclaim on MCC. There remain issues of fact concerning MCC's liability to plaintiff for its negligence in creating a dangerous condition.

CPLR §3019[b] permits a cross claim, "..in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable..."

Pursuant to CPLR §3019[d], a cross claim may be asserted against a person that is not a party to the action, "...Where a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant..." Such defendant, "...shall serve a reply or answer as if he or she were originally a party."

The proper procedure for defendants to bring cross-claims against a third-party defendant is to serve a summons and answer with cross-claims permitting the third-party defendant an opportunity to reply (Lake v. John W. Cowper Co., Inc., 249 A.D. 2d 934, 671 N.Y.S. 2d 375 [N.Y.A.D. 4th Dept., 1998]). An individual or entity has to be a defendant already in the action before a cross-claim will lie (Fleck v. Goehrig, 167 Misc. 2d 208, 638 N.Y.S. 2d 864 [Sup. Ct., Erie County, 1995]).

N.E.C.F. Inc. did not serve a summons with its counterclaim or commence a third-party action against MCC. MCC is not a party to the plaintiff's action. N.E.C.F. Inc. only served MCC with a counterclaim for contribution and indemnification. There is no basis to maintain the third-party action since the City of New York has been granted summary judgment.

Accordingly, it is ORDERED that defendant N.E.C.F. INC. d/b/a MR. DENNEHY's, motion for summary judgment dismissing the complaint and all cross-claims against it is denied, and it is further,

ORDERED that plaintiff's cross-motion pursuant to CPLR 3212[e], for partial summary judgment on the issue of liability against N.E.C.F. Inc. and seeking an assessment of damages, is denied, and it is further,

ORDERED that, MCC CONSTRUCTION AND DEVELOPMENT CORP.'s motion for summary judgment filed under Motion Sequence 004, seeking dismissal of N.E.C.F. Inc.'s purported cross-claims against it is granted, and it is further,

ORDERED that all cross-claims and counterclaims asserted by defendant N.E.C.F. Inc. against MCC CONSTRUCTION AND DEVELOPMENT CORP., are severed and dismissed, and it is further,

ORDERED that the third-party action is severed and dismissed, and it is further,

ORDERED, that the Clerk of the Court shall enter Judgment accordingly, and it is further,

ORDERED, that within thirty (30) days from the date of entry of this Order, plaintiff shall serve a copy of this Order with Notice of Entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the Court records to amend the caption to read as follows:

Frank Locastro, Index No. 100601/10

Plaintiff,

-against-

N.E.C.F. INC., d/b/a MR. DENNEHY'S,

Defendant. and it is further,

ORDERED that the action shall continue to mediation and/or trial with the remaining defendant.

ENTER:

MANUEL J. MENDEZ,

Dated: August 27, 2013 *J.S.C.*

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE