Bailey v City of New York
2013 NY Slip Op 32222(U)
September 10, 2013
Supreme Court, New York County
Docket Number: 113253/2007
Judge: Kathryn E. Freed
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[* 1] SCANNED ON 9/20/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 113253/2007
BAILEY, ROXANNE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT CAL: #7

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
SEP 20 2013
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: SEP 10 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5
---X
ROXANNE BAILEY,

Plaintiff,

-against-

DECISION/ORDER
Index No. 113253/2007
Seq. No. 005

THE CITY OF NEW YORK, IMICO 86 DEVELOPER, LLC, BOVIS LAND LEASE LMB, INC., EXTELL DEVELOPMENT COMPANY, CIVETTA-COUSINGS JV, LLC and CIVETTA COUSINS JV, INC.,

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

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

FILED
SEP 20 2013
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2.(exhs. A-P)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3-4
REPLYING AFFIDAVITS	5
EXHIBITS	
OTHER	

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

Defendant Civetta Cousins JV., LLC, i/s/h/a Civetta Cousins JV., LLC, moves for an Order pursuant to CPLR§ 3212,granting summary judgment dismissing the complaint and any cross-claims. Plaintiff opposes. No opposition has been received by any other co-defendant.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on April 17, 2007, as a result of a trip and fall on a broken, depressed, uneven cross-walk/manhole cover in the roadway on or near the intersection of 85th Street and Lexington Avenue in New York County.

Thereafter, she filed a Notice of Claim against the City of New York ("the City"), dated July 9, 2007. She then filed a Summons and Complaint dated September 20, 2007, naming the City, Imico 86 Developer, LLC ("Imico"), Bovis Lend Lease LMB, Inc., ("Bovis"), and Extell Development Company ("Extell").

Subsequently, plaintiff commenced a second action against defendants Civetta-Cousins, JV L.C. and Civetta Cousins JV Inc. (collectively "Civetta"). Civetta served their Answer, along with discovery demands including a Demand for Expert Information. However, to date, plaintiff has failed to exchange any non-medical expert information. Pursuant to a court order dated December 10, 2009, the two actions were consolidated under Index No. 113253/2007.

This case has a long and protracted procedural history. Numerous depositions have been conducted and voluminous amounts of documents have been exchanged. Plaintiff was initially deposed at a GML§ 50-h hearing on August 10, 2007. She was again deposed on October 30, 2008, and again on February 17, 2011. Defendants Imico, Bovis and Extell were collectively deposed twice by witness Robert Marketta of Bovis. Mr. Marketta's deposition occurred on February 26, 2009 and February 24, 2011. Civetta was deposed by Mr. Joseph Kolacia on March 10, 2011. The City was deposed on numerous occasions: October 30, 2008 by Leslie Smalls, a custodian of records; March 4, 2011 by Gregory D. Foster, Jr., an employee with the Highway Inspection Quality Assurance Unit of the DOT; September 9, 2011, by Krzysztof Parczwski, an employee of the Department of Building Inspection; and on April 9, 2012, by Joseph Crupi, an employee of the City's Department of Design and Construction. The transcripts of the aforementioned depositions are annexed as exhibits for the Court's review.

<u>The testimony</u>:

In her GML§ 50-h hearing, plaintiff also testified that when she was walking, the concrete around the manhole appeared to be cracked and a couple of inches before the manhole cover, she felt something like cement pebble under her foot prior to falling. (Motion, Exh. G). In her first deposition, she testified that there were no sidewalks in the area wherein she fell, on Lexington Avenue between 85th and 86th Streets. She testified that an alternative path was designated by orange and white barriers or barricades which were about waist high. (Exh. H, pp. 26-27). She could not determine with any semblance of certainty whether the ground wherein she fell was cement or asphalt, but thought the color to be gray. In her third deposition, plaintiff testified that as she was walking, she felt that the ground was not level or flat. (Exh. I, p. 33). She also described observing a big hole area and a tilted manhole cover. However, she testified that the manhole cover was not responsible for her fall. *Id.* at p. 35. In her October 30, 2008 deposition, she testified that as she was picking herself up from the ground, she observed crumbled, cracked cement where she had fallen.

Robert Marketta, a field supervisor for Bovis, testified on its behalf. He testified that Bovis was the construction management company for the "Project" at the intersection of Lexington Avenue and 85th Street. Said Project involved the demolishing of numerous buildings, the excavation of the property, the building of a foundation and then a superstructure. The demolition occurred in spring 2006, with the excavation commencing in the fall of 2006. (Exh. J, pp. 29-30). The Project also called for the provision of safe passage for pedestrians. (*Id.* at p.13).

Mr. Marketta also testified that during the demolition stage, a sidewalk bridge was constructed which enabled pedestrians to walk underneath, while the sidewalk was closed to provide

ingress and egress for trucks at the site. During the excavation stage, sidewalks were not available to pedestrians at all. A permit was obtained from the DOT to close a lane of traffic in the street and to erect barricades to encapsulate the closed lane to be utilized as a pedestrian walkway. Said barricades were concrete and wood. The wooden ones had a 12x12 base; a 2x6 vertical topped by a horizontal beam and were painted orange and white. (Exh. J., p. 16). Within the barricades, was a manhole cover which was present at the inception of the Project. *Id.* at 31.

Mr. Marketta also testified that the records he reviewed confirmed that there was no work being done in the roadway during the course of this particular job. *Id.* at 42-43. However, during the excavation phase, he observed Con Ed, Verizon and Time Warner Cable also working in the roadway. *Id.* p. 43. Multiple Street Opening Permits shown to Marketta during the deposition indicated that various entities not connected with the job site, were issued permits to construct and/or alter manhole castings to both Con Ed and Trocom Construction Corp. *Id.* at 43. Upon being shown photographs of the site, Marketta testified that they depicted work being done near the manhole. He also identified a saw cut or square pattern around the cover. *Id.* at 58.

Mr. Marketta further testified that said barricades were placed by Civetta, who was the excavation and foundation subcontractor, hired by Bovis. Civetta was responsible for supplying, placing and maintaining the barricades. *Id.* at 63. These barricades were placed according to a logistics plan prepared by Bovis and approved by both the DOT and DOB, who would then issue permits. (Exh. K p. 26). After the issuance of a permit, the BEST Squad of the DOB, which inspects new construction, would then inspect the job on a regular basis.

Mr. Marketta also testified that Bovis would inspect Civetta's work on a daily basis. Exh. J, p. 83), in that Civetta was responsible for housekeeping on the side walk and within the barricades.

Civetta would also be required to clean any debris in and around the manhole cover. *Id.* at 84. He also identified his daily, hand written construction reports, marked as Exhibit 3. Said reports indicated that the Best Squad was present at the site on April 3, 2007, inspecting the area. *Id.* at 31.

Mr. Marketta also testified that Civetta had to follow Bovis's logistics plan. While they could request that Bovis make changes, such changes would have to be approved before being implemented. On this particular job, Mr. Marketta testified that the only request Civetta made was to change a ramp for the trucking entrance which did not affect the pedestrian walkway. *Id.* at 40-41. Civetta was also required to clean up any debris in the walkway and maintain the barriers in their rightful place.

Joseph Kolacia was deposed on March 10, 2011, on behalf of Civetta. He testified that Civetta was doing work for Bovis at the subject site, pursuant to a contract prepared by Bovis and subsequently identified by Kolacia. (Exh. L, pp. 11-13). Mr. Alan Rothenberg signed the contract on Bovis's behalf. Mr. Kolacia testified that Civetta created a pedestrian walkway in the closed lane by installing the barricades. However, they did so without benefit of written guidelines. Additionally, there was no work done in the roadway prior to the placement of barriers, no milling to the area around the manhole covers and no backfilling the area. No work was done around the manhole cover prior to the installation of the barricades. *Id.* pp. 25-28.

Mr. Kolacia also testified that Bovis had a site superintendent/safety person who walked around the perimeter of the job site doing inspections. Laborers would be assigned on a daily basis to clean the walkway where plaintiff fell. They would definitely clean up in the morning and afternoon, and periodically during the day if required. Cleaning of the temporary walkway was also done on a needed basis. *Id.* pp. 40-41.

The deposition of the City was done by Mr. Gregory D. Foster, an employee of the DOT HIQA Unit, whose duties include the enforcement of DOT regulations, including pedestrian and traffic safety. He testified that a function of the DOT is to inspect sidewalks or streets where it issued permits and to insure work is performed within the parameters of these permits. (Exh. N, p. 9). During his testimony, Mr. Foster was shown a packet of records which contained 4 Notices of Violations. Two were issued prior to November 17, 2007. One had been issued to Bovis on October 16, 2006, for the storage of construction materials and equipment on the street without a permit. *Id.* at 37. No notices of violations were found relating to the permits for road closings or the temporary pedestrian walkway.

Mr. Joseph Crupi also testified for the City. (Motion, Exh. P, p.8). As the City Engineer in Charge, he was the designated manager of the Project. Mr. Crupi testified that the City retained Trocom Construction Corp. to participate in the Project and that the Project was established to replace or repair misaligned or damaged manhole covers. *Id.* at 12. A list was provided by either DEP or DOT, identifying which specific manhole covers required adjustment, resetting or replacement pursuant to the contract *Id.* at 13-15. The list would then be provided to Trocom who would execute the repair. *Id.* at 16-17. The City had also hired an engineering firm as a consultant, to also conduct inspections. *Id.* pp. 12-13. Mr. Crupi also testified that during the pendency of the work, the DDC or its consultant would make visual inspections. *Id.* at 17-18. If the repair was deemed insufficient, the DDC would notify Trocom who would then correct the problem. Mr. Crupi explained that in order to realign or reset a manhole cover, Trocom would use a drill bit to core out around the manhole casting, pull the casting out and either reset or replace it, depending on what was necessary. Recasting or coring would involve cutting asphalt. *Id.* at 23.

During his deposition, Mr. Crupi identified a street opening permit which had been issued to Trocom to open a roadway or sidewalk on Lexington Avenue from East 85th to East 86th Streets, for the purpose of constructing or altering a manhole and/or casting replacement of defective hardware. The work was done by Trocom Plumbing.

The City was also deposed by Krzysztof Parczewski, an Associate Inspector for the DOB. In his capacity as a construction inspector, he responds to complaints. (Exh. O, pp. 9-10). He received his assignments from his supervisor in addition to receiving a printout of complaints and violations for the job. In reference to the construction site on Lexington Avenue between 5th and 96th Streets, he testified that the complaints he received were limited to water not being pumped from the excavation site, and also for vibrations. *Id.* at 25-26.

Positions of the parties:

Civetta argues that its duties were limited to setting up the barricades and the removal of dirt and debris. Thus, since it was under no duty to maintain or repair concrete or asphalt in the temporary walkway, it did not breach any duty to plaintiff, and is entitled to summary judgment. Plaintiff argues that triable issues of material fact exist as to whether Civetta's construction of the pedestrian walkway was reasonable.

Defendants Imico, Bovis and Extell argue that there exists an issue of fact as to whether Civetta acted negligently in the operation, maintenance and repair of the site wherein plaintiff's accident occurred. They emphasize that it was Civetta's responsibility to supply, place and maintain the barricades on the roadway which created the temporary pedestrian walkway where the manhole was situated. Additionally, and more importantly, they argue that it was Civetta who was solely responsible for removing any debris from the walkway, pursuant to the contract between Bovis and

Civetta.

Plaintiff argues that issues of fact exist as to whether Civetta's construction of the pedestrian walkway was reasonable. She argues that "it is undisputed that ....Civetta was responsible for the implementation of the pedestrian walkway wherein [her] incident arose. Notwithstanding adequate clearance to barrier the walkway away from a hazard, ...Civetta affirmatively chose to incorporate that hazard into its pedestrian walkway.." (Plaintiff's Aff. in Opp., ¶ 15). Therefore, Civetta's failure to inspect the roadway prior to the building of the pedestrian walkway, raises a triable issue of fact as to whether this behavior was reasonable. Plaintiff also argues that Civetta's failure to set forth any written guidelines or instructions to their employees when implementing said pedestrian walkway also raises a triable issue of fact as to whether such failure is reasonable in light of foreseeable risks of danger to pedestrians.

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.3d 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 [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]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition complained of, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Petersel v. Good Samaritan Hosp. of Suffern*, N.Y., 99 A.D. 3d 880, 881 [2d Dept. 2012]; see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; *Willis v. Galileo Cortlandt, LLC,* 106 A.D.3d 730 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas*, Inc., 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (see *Perez v. Rodriguez*, 25 A.D.3d 506 [1st Dept. 2006]).

In the case at bar, after perusing the extensive testimony wherein all the parties involved seem to be pointing the accusing finger at each other, the Court finds that a question of fact exists as to whether Civetta breached its responsibility to insure that the pedestrian walkway was free of debris and/or was not constructed in a way that would pose any danger to pedestrians. This is particularly difficult to determine with any semblance of certainty at this juncture. Therefore, it becomes a question of fact that is more appropriately reserved for a jury.

The Court now addresses the sufficiency of the indemnity clause contained in the contract between Civetta and Bovis. It should be noted that despite moving for the "dismissal of all cross-claims from co-defendants," Civetta fails to address this issue except to state in its Reply Affirmation, that "the cross claims of BOVIS must also be dismissed with prejudice as plaintiff's fall as described by plaintiff did not arise out of the performance of CIVETTA's work." (*Id.* ¶ 20).

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Nevertheless, after a review of said indemnification provision, the Court finds that this clause specifically contemplates indemnification as a defense even if the claims are proven baseless (see *Di Perna v. American Broadcasting Services, Inc.*, 200 A.D.2d 267 [1st Dept. 1994]).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants Civetta Cousins, JV, LLC and Civetta Cousins JV Inc., ("Civetta"), motion for summary judgement dismissing plaintiff's complaint and cross claims is denied; and it is further

ORDERED that Civetta's motion for summary judgment dismissing the cross-claims of co-defendant Bovis Lend Lease LMB ("Bovis"),is also denied; and it is further

ORDERED that a compliance conference/mediation is scheduled for October 29, 2013; and it is further

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

DATED: September 10, 2013

SEP 10 2013

FILED

SEP 20 2013

NEW YORK
COUNTY CLERKS OFFICE

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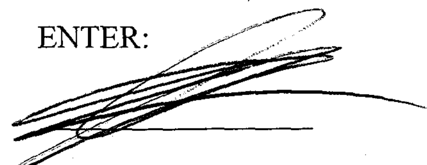

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT