

Gelbard v City of New York

2013 NY Slip Op 33676(U)

March 1, 2013

Sup Ct, New York County

Docket Number: 105251/07

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 105251/2007
GELBARD, ROSE
vs
CITY OF NEW YORK
Sequence Number : 008
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) 1

Answering Affidavits — Exhibits _____ | No(s) 2, 3

Replying Affidavits _____ | No(s) 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
APPELLATE DECISION / ORDER
FILED

MAR 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/1/13


_____, J.S.C.
HON. EILEEN A. RAKOWER

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

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

-----X
ROSE GELBARD,

Plaintiff,

Index No.
105251/07

Mot. Seq. 008

- against -

Decision and
Order

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.; EMPIRE
CITY SUBWAY COMPANY (LIMITED), ROADWAY
CONTRACTING, INC., SLATTERY/GOTTLIEB JOINT
VENTURE, SKANSKA USA CIVIL NORTHEAST INC.,
SKANSKA USA CIVIL INC., SLATTERY ASSOCIATES,
INC., JERSEY BORING & DRILLING CO., INC., CITNALTA
CONSTRUCTION CORP., TECTONIC ENGINEERING
AND SURVEYING CONSULTANTS P.C. and
M. PALADINO, INC.

Defendants.

FILED

-----MAR 08 2013-----X

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on Dey Street, between Church Street and Broadway in the County and State of New York on January 19, 2006. The Summons and Complaint were served on defendant Con Edison on or about April 27, 2007. Con Edison joined issue on or about May 14, 2007. The following defendants are no longer in the action: Empire City Subway, Tectonic Engineering and Surveying Consultants P.C., Citnalta Construction Corp., Roadway Contracting, Inc., and Jersey Boring & Drilling Co., Inc.

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Defendant The City of New York ("the City"), Slattery/Gotlieb Joint Venture, Skanska USA Civil Northeast Inc., Skanska, Inc, Skanska USA Civil Inc., Gottlieb Skanska, Inc. n/k/a Skanska Mechanical and Structural, Inc., Slattery Skanska Inc. n/k/a Skanska USA Civil Northeast Inc., and Slattery Associates, Inc. n/k/a Skanska USA Civil Northeast Inc. (collectively referred to herein as "Skanska" or "Skanska Defendants") now move for summary judgment pursuant to CPLR 3212, dismissing the within action and all cross claims.

Movants submit the following: pleadings; Verified Bill of Particulars; Second Verified Supplemental Bill of Particulars; deposition transcript of Plaintiff; the affidavit of Norman Hirsch, senior project manager at Skanska USA Civil Northeast; the deposition transcript of Stacey Williams; the affidavit of Frank Bocchichio, a Director with the Roadway Repair and Maintenance Unit, Citywide Speed Bump and Ponding, at the Department of Transportation of the City of New York; the affidavit of Dmitriy Surkov, a member of the Office of Litigation Service of the City of New York Department of Transportation, and the exhibits marked at Plaintiff's deposition.

Movants allege that Skanska did not create the defect and lacked the requisite notice or duty to make any repairs as the only road work, including drilling or excavation, that Skanska performed on Dey Street prior to January 19, 2006 was limited to the northwest corner of Dey Street, and that did not perform work on the south side of the street, the area in which Plaintiff cites the alleged defect, until some time in March 2006. Furthermore, it contends that to the extent that it was aware of the condition, it had no duty to remedy the condition. Movants also contend that the City was not given actual written notice of a specific defect sufficient to support Plaintiff's cause of action.

Plaintiff opposes and submits, among other documents, Hirsch's deposition transcript. Plaintiff states that Hirsch's deposition testimony demonstrates that Skanska was responsible for the maintenance of, and controlled, the subject roadway on the date of the accident. Plaintiff states that there is additional evidence that Skanska "may have caused damaged on the street with their construction vehicles." Plaintiff also states that the City had written notice of pothole defects in the subject roadway prior to the accident.

As for the City's motion, Plaintiff state that the City's own documents show than ten months prior to the accident the City was made aware of potholes on Dey

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Street between Church Street and Broadway. Plaintiff also contends that to the extent that the Skanska defendants were acting pursuant to a contract with the City, and acting as its agents, the City can be held liable under a theory of respondent superior.

Plaintiff further contends that the City and Skanska's motions should be denied on the basis that they failed to provide outstanding discovery pursuant to Court Order. Plaintiff states that the City was to produce hard copies of permits and applications for permits for Day Street from January 19, 2003 to January 19, 2006. The Skanska Defendants were to produce the following documents regarding the Dey Street Concourse Project: (1) all documents including safety logs, quality control reports and progress reports; (2) all photographs of Dey Street including pre-construction, pre-excavation, and progress photographs through January 19, 2006; (3) correspondence to or from the Skanska entities regarding the asphalt condition on Dey Street prior to January 19, 2006; and (4) all inspection reports regarding Dey Street up to January 19, 2006. Plaintiff provides a copy of its October 5, 2012, specifically detailing what discovery remained outstanding.

Con Edison also opposes.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact are presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues. (*Wagner v. Zeh*, 45 Misc.2d 93, aff'd 26 A.D. 729).

Plaintiff asserts that this motion is premature. Where facts essential to justify

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opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. (See CPLR §3212[f]). Here, Plaintiff states that the City and the Skanska defendants have failed to respond to outstanding discovery. In their reply, Movants do not deny the same.

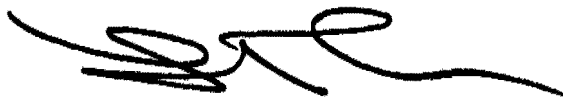
Wherefore it is hereby

ORDERED that defendants' motion is denied as premature.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

3/1/13



EILEEN A. RAKOWER, J.S.C.

FILED

MAR 08 2013

NEW YORK
COUNTY CLERK'S OFFICE