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| Duffy v City of New York |
| 2014 NY Slip Op 30942(U) |
| April 10, 2014 |
| Sup Ct, New York County |
| Docket Number: 151632/13 |
| Judge: Kathryn E. Freed |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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ANNIE DUFFY,

Plaintiff,

-against-

DECISION/ORDER
Index No. 151632/13
Seq. No. 002

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
and OLSON’S CREATIVE LANDSCAPING CORP.,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.:

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

| PAPERS | NUMBERED |
|---|------------------|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED..... | 1,2.(Exs. A-H) |
| ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED..... | |
| ANSWERING AFFIDAVITS..... | ..3.(Exs. A-D).. |
| REPLY AFFIRMATION |4..... |
| OTHER...(Memo of Law) | |

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

In this personal injury action, defendant Olson’s Creative Landscaping Corp. (“Olson”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it. Plaintiff Annie Duffy opposes the motion. After oral argument and consideration of the parties’ papers and the relevant statutes and case law, this Court **grants** the motion.

Factual and Procedural Background:

This case arises from a trip and fall on May 31, 2012. In her notice of claim, plaintiff alleged that she fell on a fence that was laid across the sidewalk on Isham Street, between Seaman Avenue and Park Terrace West, in Manhattan. Ex. D, at par. 3.¹ In her notice of claim and complaint, plaintiff alleged that she fell on the sidewalk in front of Isham Park. Ex. A, at pars. 8, 9, 29, 30, 50-51; Ex. D, at par. 3. The notice of claim specifically referenced 10 attached photographs “of the location” of the incident, all of which depicted a park. Ex. D. Plaintiff claimed that Olson and co-defendants the City of New York (“the City”) and the New York City Department of Parks and Recreation (“DPR”) were negligent in, inter alia, maintaining the sidewalk and creating the allegedly dangerous condition. Exs. A, D.

This action was commenced by the filing of a summons and complaint on or about February 6, 2013. Ex. A. Defendants subsequently joined issue by service of their answers. Exs. B, C. In their answer, the City and DPR cross-claimed against Olson for contribution and common-law and contractual indemnification. Ex. C.

In her verified bill of particulars, plaintiff alleged that she fell on Isham Street between Seaman Avenue and Park Terrace West. Ex. E. At her 50-h hearing, plaintiff testified that she was injured when she tripped over a fence at that same location. Ex. F., at 6-7.

Olson now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of its motion, Olson submits an attorney affirmation, the pleadings, plaintiff’s

¹Unless otherwise noted, all references are to the exhibits annexed to Olson’s motion for summary judgment.

verified bill of particulars and 50-h hearing testimony, the affidavit of its president, Donald Olson, and a permit Olson obtained for work in front of 630 Isham Street in 2012.

In his affidavit, Mr. Olson states that, in 2012, Olson performed work for the City which included the creation of tree wells on the sidewalk in front of 630 Isham Street. The work was performed by Olson on March 12 and April 6, 2012. Mr. Olson had “personal knowledge of the work” and it was his responsibility to ensure it was performed. Ex. G. Mr. Olson stated that 630 Isham Street was located across the street from the sidewalk in front of Isham Park, where the plaintiff was allegedly injured. Ex. G.

The permit submitted in support of Olson’s motion allowed it to “open the roadway and/or sidewalk” at 630 Isham Street, between Cooper Street and Seaman Avenue. Ex. H. The work was to include “excavating and planting street trees.” Ex. H. A “stipulation”, submitted by the City’s Department of Transportation (“DOT”) and attached to the permit, provided that Olson “must coord[inate] w/school . . . before starting work.” Ex. H.

In opposition to Olson’s motion, plaintiff submits an attorney affirmation with the following exhibits annexed thereto: a printout from the “Official New York City Website” regarding the number of contracts Olson has had with the City, the location of the work performed under each contract, and how much the company was compensated for each agreement, photographs of 630 Isham Street obtained from Google Maps, a printout from the DOT website reflecting that Olson had permits to work at 620 and 630 Isham Street, and a demand for discovery and inspection, dated September 9, 2013, seeking, inter alia, documents relating to Olson’s work “at Isham Park.”²

²Exhibits A-D to Plaintiff’s Affirmation In Opposition, respectively.

The Parties' Positions:

Olson asserts that it is entitled to summary judgment dismissing the complaint and all cross-claims against it because it neither owned, nor did any work in, the area where plaintiff was injured.

In opposition to the motion, plaintiff asserts that Mr. Olson's affidavit is without probative value since he does not have personal knowledge of the work Olson performed at the premises. Plaintiff further asserts that the accident could not have occurred in front of 630 Isham Street since the photographs of that location (Ex. B to Plaintiff's Aff. In Opp.) do not show any tree or plant life. Further, plaintiff asserts that, although Mr. Olson refers to a permit for work at 630 Isham Street, he failed to mention that Olson had a permit to work at 620 Isham Street as well (Ex. C to Plaintiff's Aff. In Opp.), and that this raises questions regarding his credibility which must be resolved by a jury. Finally, plaintiff argues that Olson's motion must be denied as premature since depositions and document discovery remain outstanding.

In its reply affirmation in further support of its motion, Olson argues that plaintiff has failed to submit any evidence establishing that it worked in the area where she fell. On the contrary, argues Olson, the evidence submitted by plaintiff establishes that she was injured across the street from where it worked. It further asserts that 620 and 630 Isham Street are on the same side of the street and consist of a convent and school. Finally, Olson asserts that its motion is not premature since there is no discovery outstanding which will establish that plaintiff was injured in front of 620 or 630 Isham Street.

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 fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1989).

Olson established its prima facie entitlement to judgment as a matter of law on the issue of liability. A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition on a public street or sidewalk. See *Cino v City of New York*, 49 AD3d 796 (2d Dept 2008). Here, however, Olson offered admissible evidence demonstrating that it performed no work on the sidewalk where plaintiff was allegedly injured, therefore establishing that it did not create the defect which caused the alleged injury. See *Amarosa v City of New York*, 51 AD3d 596 (1st Dept 2008); *Flores v City of New York*, 29 AD3d 356 (1st Dept 2006); *Robinson v City of New York*, 18 AD3d 255 (1st Dept 2005). In response, plaintiff failed to raise a triable issue of fact regarding whether Olson caused or contributed to the alleged incident. See *Blech v West Park Presbyterian Church*, 97 AD3d 443 (1st Dept 2012); *Amarosa, supra*.

In opposing Olson’s motion, plaintiff incorrectly states that Mr. Olson’s affidavit “is the only evidence produced in support of [Olson’s] motion and lacks any probative value.” Plaintiff’s Aff. In Opp., at par. 9. First, Mr. Olson’s affidavit does not lack probative value (*cf. Mazzocchi Wrecking Inc. v East 115th St. Realty Corp.*, 70 AD3d 519 [1st Dept 2010]) since he states therein that he has personal knowledge of the work performed by Olson in front of 630 Isham Street and that the said work was performed across the street from Isham Park, where plaintiff claims she was injured. Ex. G, at pars. 2, 4, 6 and 7.

Nor was Mr. Olson's affidavit the only proof submitted by Olson in support of its motion. Even assuming, arguendo, that Mr. Olson's affidavit were not considered by this Court, Olson nevertheless established its entitlement to summary judgment by submitting the notice of claim and photographs annexed thereto, the complaint, its answer, and its permit. The notice of claim and complaint both allege that plaintiff was injured on the sidewalk in front of Isham Park. Ex. A, at pars. 8, 9, 29, 30, 50-51; Ex. D, at par. 3. In its answer, Olson denied all substantive allegations of wrongdoing, as well as its ownership of the sidewalk in front of Isham Park. Ex. B. The photographs annexed to the notice of claim, which plaintiff claims show the area where she fell (Ex. D), depict a sidewalk in front of a park and not one in front of a building with a street address, such as 620 or 630 Isham Street, where Olson had permits to perform work. Ex. H; Ex. C to Plaintiff's Aff. In Opp.³ Indeed, plaintiff concedes that 630 Isham Street "is on the opposite side of the street from where [plaintiff's fall] occurred." Plaintiff's Aff. In Opp., at par. 13. Moreover, Olson's permit reflects that its work was to be done next to a school and does not mention a park. Ex. H.

Finally, plaintiff's claim that Olson's motion should be denied due to outstanding discovery is unavailing. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Lee v Ana Devel. Corp.*, 83 AD3d 545, 546 (1st Dept 2011), quoting *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 (1st Dept 2000); see also CPLR 3212(f). The mere hope that additional discovery will lead to evidence which will enable a party to defeat a motion for summary judgment

³Plaintiff's contention that an issue of fact is raised by the permit reflecting that Olson worked at 620 Isham Street is without merit. Whether Olson worked at 620 or 630 Isham Street is not a material issue of fact since it is evident that neither address was in front of Isham Park, the alleged location of the accident. Ex. A, at par. 51; Ex. D, at par. 3.

is insufficient. See *Washington v New York City Bd. of Educ.*, 95 AD3d 739, 740 (1st Dept 2012). Plaintiff provides no explanation as to how additional discovery could, or would, establish that she was injured on the side of the street where Olson worked. Therefore, Olson's motion is not premature as plaintiff asserts.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant Olson's Creative Landscaping Corp. seeking summary judgment dismissing the complaint and all cross-claims against it is granted, 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 shall continue against the remaining defendants; and it is further,

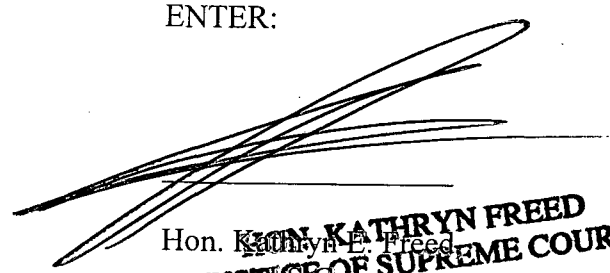
ORDERED that counsel for Olson's Creative Landscaping Corp. shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the entry of judgment in its favor; and it is further,

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

DATED: April 10, 2014

APR 10 2014

ENTER:


Hon. ~~Kathryn E. Freed~~ **KATHRYN FREED**
JUSTICE OF SUPREME COURT