Blum v City of New York
2014 NY Slip Op 32046(U)
August 1, 2014
Sup Ct, New York County
Docket Number: 113887/2009
Judge: Michael D. Stallman
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SCANNED ON 8/5/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 113887/2009
BLUM, ILENE EPSTEIN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 113887/2009

MOTION DATE 2/25/14

MOTION SEQ. NO. 006

The following papers, numbered 1 to 9, were read on this motion for summary judgment

Notice of Motion —Affidavit of Service; Affirmation — Exhibits A-K	No(s). 1-2; 3
Affirmation in Opposition — Exhibits A-B—Affidavit of Service; Affirmation in Opposition —Affidavit of Service	No(s). 4-5; 6-7
Reply Affirmation —Affidavit of Service	No(s). 8-9

Upon the foregoing papers, this motion for summary judgment by defendants Felix Associates, Inc. and Felix Associates, LLC is decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN
J.S.C.

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

Dated: 8/1/14
New York, New York

[signature], J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

FILED
AUG 05 2014
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

--X

ILENE EPSTEIN BLUM,

Plaintiff,

- against -

Index No. 113887/2009

CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK, JUDLAU CONTRACTING, INC., JUDLAU ENTERPRISES, LLC, DRAGADOS, S.A., DRAGADOS USA, INC., PULLINI CONTRACTORS, INC., PULLINI SUBSURFACE CONTRACTORS, INC., VERIZON NEW YORK INC., CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TULLY CONSTRUCTION CO. INC., and EMPIRE CITY SUBWAY (LIMITED), NICO ASPHALT PAVING INC., FELIX ASSOCIATES, INC., and FELIX ASSOCIATES, LLC,

Decision and Order

Defendants.

--X

FILED

AUG 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this trip and fall action, defendants Felix Associates, Inc. and Felix Associates, LLC move for summary judgment dismissing the action and all cross claims as against them. Plaintiff and co-defendant Nico Asphalt Paving Inc. (Nico) oppose the motion.

BACKGROUND

Plaintiff commenced this action on October 2, 2009. On November 9, 2010, plaintiff filed a supplemental summons and amended verified complaint adding defendants Felix Associates, Inc. and Felix Associates, LLC.

By decision and order dated March 27, 2012, this Court dismissed the complaint and all cross claims as against defendant Tully Construction Co., Inc. By decision and order dated November 20, 2013, this Court dismissed the complaint and all cross claims as against defendants Empire City Subway Company and Verizon New York Inc. By decision and order dated January 2, 2014, this Court dismissed the complaint and all cross claims as against Pullini Contractors, Inc. and Pullini Subsurface Contractors, Inc. Plaintiff filed the note of issue on June 19, 2014.

Plaintiff alleges that, on December 15, 2008, at around 9:45 p.m., she tripped and fell in a "trench like hole, depression and/or gulley" while crossing East 37th Street along Park Avenue, from the southwest corner to the northwest corner of the intersection. (*See* Boulhosa Affirm., Ex A [Notice of Claim].) At her deposition, plaintiff testified:

> "Okay. I was walking, and all of a sudden, the ground fell out from underneath me from out of nowhere. And being strong, I tried to get - - [colloquy omitted] . . . I tried to keep myself up. Not to fall. And in doing so, I took my other foot to balance myself, and my

> toe, my foot, caught on something, and I fell forward. So I tripped first, lost my balance, and then I fell forward."

(Boulhosa Affirm., Ex D [Blum EBT], at 51-52.) Plaintiff testified that she returned to the area the next day in the morning and took photographs, which she identified at her deposition as the group of photographs marked as Defendants' exhibits A through P. (Boulhosa Affirm., Ex D [Blum EBT], at 41-42.) Plaintiff testified as follows:

> "Q. What caused you to fall in this case?
> A. The trench. (Indicating). That I stepped into.
> Q. And, 'the trench,' that you are describing now, is that accurately . . . depicted in Defendants' Exhibit C?
> A. It seems a lot deeper, it looks like it was filled in. But not that night."

(*Id.* at 46.)

Jennifer Taisley, an employee of defendant Consolidated Edison Company of New York, Inc. (Con Ed) testified about the search of Con Ed's records for opening tickets, paving orders, permits, and emergency control tickets for the intersection of East 37th Street and Park Avenue in Manhattan for the period of three years prior to plaintiff's alleged slip and fall. (Bouholsa Affirm., Ex G [Taisely EBT], at 10.) According to Taisley, the search revealed three opening tickets, three paving orders, two permits, and ten emergency control tickets. (Id. at 11.)

Taisely was then shown documents marked as Plaintiff's Exhibit 1. Taisely identified the first page of the records as a "street opening ticket" prepared by "RH for Vito Quato." (*Id.* at 12.) Taisley stated that the street opening ticket reflected that the street was opened by "Felix," "an outside contractor that Con Edison uses for construction services." (*Id.* at 17.)

According to Taisley, the street opening ticket indicated that two cuts were made in the parking lane at the northwest corner of Park Avenue and East 37th Street: "the first cut starts 45 feet going west and three feet going south away from the curb. The second cut starts just one foot from that curb and three feet going south." (*Id.* at 22-23.) When asked about the size of those openings, Taisley testified, "Cut number one was eleven feet by four feet and that looks to be five inches. And twelve inches in depth and then the second cut was 45 feet by three and twelve inches in depth." (*Id.* at 21-22.)

Taisley stated that the street opening ticket indicated that paving was required after the work was done, and that the second page of the records was a paving order that was issued out to another outside contractor, Nico Asphalt Paving. (*Id.* at 25.)

Donald Venturino testified on behalf of Felix Associates, LLC. (Boulhosa Affirm., Ex E [Venturino EBT].) Venturino was shown the

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document marked as Plaintiff's Exhibit 1, and he testified that, based on the document, Felix performed "opening and excavation at this location" on October 20, 2008. (*Id.* at 19.)

Defendants Felix Associates, Inc. and Felix Associates, LLC (collectively, Felix) now move for summary judgment dismissing the action and all cross claims as against them.

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

Felix argues that there is no evidence that Felix created the trench, and that, assuming that it created the trench, no duty was owed to plaintiff because it was contractually required to leave the pavement approximately 16 inches below the roadway, so that Nico could perform final road

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restoration and pave the area. In support of the motion, Felix submits only deposition transcripts and the photographs that plaintiff took the day after the alleged incident.

To the extent that Felix appears to assert that Felix did not make cuts into the parking lane at the northwest corner of East 37th Street and Park Avenue, Taisely's and Venturino's deposition testimonies about the street opening ticket (i.e., the document marked as Plaintiff's Exhibit 1) suggests otherwise. To the extent that Felix appears to assert that there is no evidence that a trench on the northwest corner of East 37th Street and Park Avenue was not a trench that Felix excavated, Felix "cannot obtain summary judgment by pointing to gaps in plaintiff's proof." (*Coastal Sheet Metal Corp. v Martin Assocs.; Inc.*, 63 AD3d 617, 618 [1st Dept 2009], citing *Torres v Indus. Container*, 305 AD2d 136 [1st Dept 2003].)

Felix's reliance upon *Gee v City of New York* (304 AD2d 615 [2d Dept 2003]) and *Levbarg v City of New York* (282 AD2d 239 [1st Dep 2001]) is misplaced. In those cases, courts held that the City's issuance of a work permit does not constitute prior written notice to the City. Here, the "street opening ticket" was not a City-issued work permit, which is apparent from the copy of the "street opening ticket" that Nico submitted in opposition to Felix's motion. (Adler Opp. Affirm., Ex A.)

As Felix indicates, in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]), the Court of Appeals held that a party who enters into a contract to render services may be potentially liable in tort to third persons in only three situations:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

(*Espinal*, 98 NY2d at 140.) Felix relies upon three cases where courts ruled that a contractor owed no duty of care to plaintiff, citing *Espinal*. (*Miller v. City of New York*, 100 AD3d 561 [1st Dept 2012]; *Peluso v ERM,* 63 AD3d 1025 [2d Dept 2009]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492 [1 Dept 2010].)

In *Miller*, the plaintiff allegedly was injured when the front wheel of her scooter fell into a trench in the roadway. Several days before the incident, Con Ed had hired a contractor to perform excavation, conduit installation, and backfilling at an intersection. In accordance with the contract, the contractor left the trench 1½ inches below grade. The Appellate Division affirmed summary judgment dismissing the action as against the contractor, stating, "[the contractor] did precisely what it was obligated to do under the

contract, Con Ed failed to raise an issue of fact whether [the contractor] performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff, for whose injuries it could be held liable." (*Id.*)

In *Peluso*, the plaintiff's employer had retained the defendants to perform work on its property, which included excavating portions of the parking lot. Under their contract with the plaintiff's employer, the defendants were required to backfill the excavated areas with recycled concrete aggregate and tamp it down, but were not responsible for repaving the parking lot after their work was completed. The plaintiff was allegedly injured when she tripped and fell on rocks that had accumulated on her employer's asphalt parking lot, which had become loose as vehicles drove over the backfilled areas. The Appellate Division granted defendants summary judgment dismissing the complaint, reasoning, "There is no evidence that the defendants breached their contractual obligation to backfill the excavated areas, or that they assumed a continuing duty to return to the premises after completing their work and remedy any defects that eventually developed there." (*Peluso*, 63 AD3d at 1026.)

In *Agosto*, the plaintiff was allegedly injured when she tripped and fell on an unfinished section of the lobby floor in the building where she worked.

Six weeks before the accident, the building owner had retained a contractor to remove the tiles from the lobby floor, but the contractor was not responsible for refinishing the floor. The Appellate Division granted the contractor summary judgment dismissing it from the action, reasoning,

> "While it appears that defendant, six weeks earlier, had exposed the concrete section of floor on which plaintiff fell, the creation of that allegedly dangerous condition was precisely what was called for in defendant's contract. Under the circumstances, defendant cannot be said to have created an unreasonable risk of harm to plaintiff."

(*Agosto*, 73 AD3d at 493.)

Felix relies upon Venturino's deposition to establish that Felix did not negligently perform its contractual obligations. When asked about how Felix performs excavation, Venturino answered,

> "Well, in most cases they would have a road saw come out and cut the excavation, cutting the asphalt, as well as if there is concrete underneath, the road saw would cut the outline of the excavation that was going to be dug, and then we would have a backhoe and an excavation crew, would have pavement breakers, and they would remove the asphalt as well as the concrete, and then remove the dirt underneath."

(Venturino EBT, at 30-31.) According to Venturino, following excavation, pipes or ducts would be placed inside the excavation, and then it would be Felix's job to backfill the excavation using "sand to cover the utility, and then clean fill to bring it up to grade." (*Id.* at 31-32.) Venturino testified that Felix would leave the backfilled area 16 inches down from the surrounding

roadway, and would leave road plates. (*Id.* at 34.) Venturino stated that, when Nico when it came to do restoration on the trench, Felix would meet Nico with a boom truck to come and pick up the plates, which ended Felix's involvement. (*Id.* at 34.)

However, as Nico indicates, Venturino stated at his deposition testimony that the installation crews that he managed did not do any excavating work. (Venturino EBT, at 10.) Venturino also testified that he had no recollection of going to the job site on East 37th Street between Park and Madison Avenues back in 2008. (*Id.* at 36.) Therefore, Venturino has no personal knowledge as to whether Felix actually performed the excavation and backfilling at the location either in accordance with the Felix's contract, or in the manner in which Venturino had testified. Plaintiff's testimony that she stepped into what apparently was an uncovered trench that Felix allegedly excavated and backfilled raises triable issues of fact as to whether Felix negligently performed the work.

To the extent that Venturino relies upon the street opening ticket and paving order, they appear to indicate that Felix backfilled the trench and that Nico paved over the trench on the same day, i.e., November 22, 2008. However, Nico points out that the testimony of other witness about the street opening ticket and paving order raise questions as to when Felix's work was

completed and when the excavated area was repaved. Taisley stated that, on the paving order, was a stamp, which had the word "REST SAT", which Taisley stated meant "restoration satisfactory." (Taisley EBT, at 46; *see also* Adler Opp. Affirm., Ex A.) Next to "REST STAT" is the date "11/22/08" and the initials, "R.H.", which also appear on the street opening ticket. Taisley identified the initials "R.H." as Russell Harris, another Con Ed employee.

At Russell Harris's deposition, Harris was shown the street opening ticket and paving order. (Boulhosa Affirm., Ex H, at 37.) Harris stated that he recognized his handwriting at the bottom of the paving order. When asked what "REST SAT" stood for, Harris testified as follows:

> "A. I have no idea.
> Q. Is that your handwriting to the right of that?
> A. Yes.
> Q. What's the date that it reflects that you wrote there?
> A. 11/22/08.
>
> * * *
>
> Q. You are writing 11/22/08 next to RESTSAT, do you know what you are signifying by putting the date there?
> A. No.
> Q. Have you ever heard the term restoration satisfactory with Con Ed?
> A. No.
> Q. So you wrote a date, but you don't know what you wrote it for?
> A. I don't know why my name is on this document. I am not affiliated with this type of document.
> Q. You have never seen this document?
> A. I have seen this document. I don't work with the group that deals with this particular document."

(*Id.* at 38-39.)

Plaintiff testified that she had taken photographs on the day after the alleged incident, which were marked at her deposition as marked as Defendants' exhibits A through P. (Blum EBT, at 41-42.) At his deposition, Joseph Denegall, a Nico superintendent, was shown the photographs marked as Defendants exhibits E, F, and H. (Boulhosa Affirm., Ex I, at 30.) Denegall stated that, based on Exhibit F, a worker appears to be doing work that would be related to final restoration, based on the tool the worker is using in the photograph. (*Id.*) However, Denegall was unable to tell from the photographs whether any of the workers were Nico employees. (*Id.* at 29.)

Viewing the evidence in the light most favorable to plaintiff, the non-movant, the photographs purportedly taken on December 16, 2008 raise triable issues as to whether the paving of the trench that Felix purportedly excavated and backfilled was completed on November 22, 2008 as indicated in paving order. Given that Venturino testified that Felix would remove any road plates covering a trench when Nico when it came to do restoration, the presence of workers performing final restoration work depicted in photographs (who might be Nico workers) raise the possibility that Felix's work was not completed by November 22, 2008.

CONCLUSION

Accordingly, it is hereby

ORDERED that that this motion for summary judgment by defendants Felix Associates, Inc. and Felix Associates, LLC is denied.

Dated: August 1 , 2014
New York, New York

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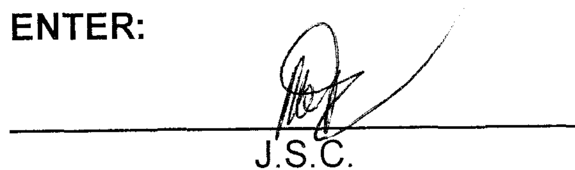

J.S.C.

MICHAEL D. STALLMAN J.S.C.

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