

O'Grady v City of New York

2014 NY Slip Op 32058(U)

August 4, 2014

Supreme Court, New York County

Docket Number: 116883/2008

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 116883/2008
O'GRADY, LISELOTTE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 02

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**

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


RECEIVED
AUG 05 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

AUG 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/4/14
AUG - 4 2014


HON. KATHRYN FREED, J.S.C.
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

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

-----X
LISELOTTE O'GRADY,

Plaintiff,

-against-

THE CITY OF NEW YORK and
THE HALCYON CONSTRUCTION CORP.,

Defendants.

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

DECISION/ORDER
Index No. 116883/2008
Seq. No. 002

FILED

AUG 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2(Exs. A-K)
CROSS-MOTION AND AFFIDAVITS ANNEXED.....	3,4(Exs. A-O)
ANSWERING AFFIDAVITS.....5,6.....
REPLYING AFFIDAVITS.....7,8.....
OTHER.....

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

In this personal injury action commenced by plaintiff Liselotte O'Grady, defendant The Halcyon Construction Corp. ("Halcyon") moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiff opposes the motion. After oral argument and a review of the papers presented, all relevant statutes and case law, this Court **denies** Halcyon's motion.¹

¹The City cross-moved for the same relief and its cross motion was granted at oral argument of the applications on April 22, 2014.

Factual and Procedural Background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on June 27, 2008, when she fell after stepping into a pothole while exiting a bus on Second Avenue between 53rd and 54th Streets in Manhattan. Plaintiff commenced the captioned action against the City on December 18, 2008. Ex. A.² On or about February 14, 2011, plaintiff amended the complaint to name Halcyon as a defendant. Ex. A. In the amended complaint, plaintiff alleged, inter alia, that the defendants were negligent in creating a defect in the roadway between 1009 and 1015 Second Avenue. Ex. A. Halcyon joined issue by service of its verified answer on or about June 9, 2011. Ex. A.

In her bill of particulars dated August 2, 2011, plaintiff alleged, inter alia, that she was injured when she fell in a pothole on Second Avenue between 53rd and 54th Streets in Manhattan and that the hole was located in front of the premises located at 1009 and 1015 Second Avenue. Ex. B.

Plaintiff testified at a 50-h hearing on December 10, 2008. Ex. D. She claimed that she was injured when she fell while stepping off of a City bus and into a pothole between 53rd and 54th Streets. Ex. D, at 9, 10. The door of the bus was approximately 3 meters from the curb when she exited. Ex. D, at 49. Plaintiff did not see any construction underway in the area where she fell. Ex. D, at 21.

Plaintiff appeared for a deposition on March 27, 2012. Ex. E. She testified that she was injured on June 27, 2008 when she exited a bus at 53rd Street and Second Avenue and stepped in a pothole before she reached the curb. Ex. E, at 15, 65-66, 76. Her testimony regarding whether she saw the pothole before she fell was contradictory. Ex. E, at 84-85. She did not know the depth of the

²Unless otherwise noted, all references are to the exhibits annexed to Halcyon's motion for summary judgment.

pothole, how it was created, or how long it had existed prior to her fall. Ex. E, at 88-89.

She could not recall whether the bus stop was located between 52nd and 53rd Streets or 53rd and 54th Streets. Ex. E, at 65-66. Second Avenue was a one-way roadway which led downtown and the bus stop was on the right side of the street as one headed downtown. Ex. E, at 67-68.³ Plaintiff did not see any construction in the area. Ex. E, at 90, 100.

On September 16, 2010, Greg Foster appeared for deposition on behalf of the City. Ex. F. As of June, 2008, he was an employee of the City's Department of Transportation ("DOT") and was a member of its Highway Insurance Quality Assurance Department ("HIQA") for Manhattan. Ex. F, at 5-7. HIQA inspected sidewalks and roadways to ensure that they were in compliance with DOT regulations. Ex. F, at 6. His specific job was to inspect highways and sewers. Ex. F, at 7. Part of his responsibility was to ensure that contractors who made street openings closed those openings in accordance with the City's requirements. Ex. F, at 18.

Foster testified that Halcyon worked on Second Avenue between 53rd and 54th Streets from March 11 until June 4, 2007 and passed several inspections. Ex. F, at 35-36. However, he could not tell whether Halcyon's work was performed on a roadway or a sidewalk. Ex. F, at 36. Halcyon also did emergency work on the roadway of Second Avenue between 53rd and 54th Streets on June 4 and 5, 2007 but Foster could not tell precisely where that work was performed. Ex. F, at 37-42.

On September 16, 2010, Fulu Bhowmick, a record searcher for the City, testified that his office had conducted a "roadway block search" for Second Avenue between 53rd and 54th Streets and found six permits and five corrective action requests ("CAR"). Ex. G, at 1, 5-7. No notices of

³Neither plaintiff nor any other witness testified that the west was to one's right side as one headed downtown on Second Avenue. Thus, this Court takes judicial notice of this fact.

violation were found. Ex. G, at 7.

James Pellizzi, a field supervisor for Halcyon, appeared for deposition on behalf of that entity on June 14, 2012. Ex. H, at 1, 7. He testified that Halcyon was a general contractor which worked on water mains, roads, and bridges, and that his duties included checking work sites to ensure that they had necessary personnel and equipment and drawing sketches needed to expedite work. Ex. H, at 1, 7-8.

In 2007 and 2008, Halcyon had a contract with the City’s Department of Environmental Protection (“DEP”) to perform “emergency water job[s].” Ex. H, at 10-11.⁴ Pursuant to the contract, Halcyon was to repair water main breaks, fix fire hydrants, restore roadways, and do whatever else the DEP requested. Ex. H, at 11. When Halcyon performed work on a roadway, it was supervised by a DEP inspector. Ex. H, at 15. A time and material report would be completed by the DEP inspector and signed off on by the DEP inspector and Pellizzi. Ex. H, at 15-16. The time and material reports reflected the personnel, equipment and materials used, as well as the location of the work. Ex. H, at 16. Pellizzi kept work logs which contained a more general description of the location of the work. Ex. H, at 17-18.

Prior to testifying at his deposition, Pellizzi reviewed time and material reports reflecting that Halcyon had performed work on Second Avenue between 53rd and 54th Streets beginning on April 28, 2007. Ex. H, at 21-23. The job involved the replacement of a defective water main valve at Second Avenue and 53rd Street. Ex. H, at 23-26, 54. In order to perform the work, Halcyon “chopped out

⁴Although counsel for Halcyon represents that he has annexed contract #GE344 between the City and Halcyon as Exhibit J to Halcyon’s motion, that exhibit merely contains a time and material inspection report dated May 5, 2007. Counsel further represents that he has attached time and material sheets as Exhibit K. However, that exhibit merely contains several street opening permits which are, for the most part, illegible.

the pavement” in order to expose the valve which needed replacement. Ex. H, at 24. The excavation needed to make the repair was performed on the west side of Second Avenue between 53rd and 54th Streets. Ex. H, at 27. He believed the repair involved a fire hydrant. Ex. H, at 27. Before starting work, Halcyon had to submit a sketch to, and obtain a permit from, the DEP. Ex. H, at 28.

Pellizzi believed that Halcyon performed a prior excavation in the roadway on the same block to repair a fire hydrant about two weeks before. Ex. H, at 31-32, 55. The prior excavation would have been done in the parking lane on the west side of Second Avenue. Ex. H, at 32. Halcyon’s work in the area, which, he maintained, did not interfere with any bus stop, was completed on June 9, 2007, on which date it excavated in order to replace a broken casting. Ex. H, at 33, 38-40. After the valve was replaced, Halcyon restored the road on the northeast side of the intersection of Second Avenue and 53rd Street. Ex. H, at 42. Pellizzi was unable to state for certain precisely where Halcyon had excavated, although he admitted that two of the excavations were in the parking lane on the west side of Second Avenue. Ex. H, at 43-48.

Although Pellizzi admitted that “[t]here ha[ve] to be” records relating to the work done to repair the water main, he did not have them at his deposition. Ex. H, at 57.

Pellizzi was also shown two permits allowing Halcyon to open Second Avenue between 53rd and 54th Streets, one from February until March of 2007 and the other from March through May of 2007, but neither indicated the exact address where the street was to be opened. Ex. H, at 60-63. The permits were issued under contract number GE344. Ex. H, at 63. Yet another permit was issued to Halcyon to open the same block from May through July of 2007 to repair a water main. Ex. H, at 63-64. That permit was issued pursuant to contract number GE345. Ex. H, at 65.

According to Pellizzi, if Halcyon improperly restored a roadway, it would be told by the DEP

immediately. Ex. H, at 69. One of the DEP's inspectors at the site was Jeff Kwami. Ex. H, at 52.

On February 20, 2013, Godwin Kwami, an assistant civil engineer for the DEP, appeared for a deposition on behalf of the City. Ex. I, at 1, 9.⁵ His duties included supervision and inspection of sewer and water main construction. Ex. I, at 10. Prior to his deposition, his attorney showed him his time and material reports, sketch, and photos. Ex. I, at 11-13. Kwami confirmed that Halcyon had a contract with the City to perform sewer and water main repairs. Ex. I, at 24.

Initially, Kwami said that his review of the records did not indicate that any work had been performed on Second Avenue between 53rd and 54th Streets. Ex. I, at 16. However, he then referred to a June 16, 2007 sketch he made indicating that Halcyon restored asphalt at the intersection of Second Avenue and 53rd Street. Ex. I, at 17-21. The sketch did not indicate the distance between the work performed by Halcyon and the curbs on Second Avenue. Ex. I, at 69. Three different locations where asphalt had been restored were represented in the sketch. Ex. I, at 22. One was a 16' x 12' section of asphalt on the east side of the street where a water main had been repaired. Ex. I, at 22-23. He was not sure where the 10' x 7' restoration was performed or whether it was related to the water main repair. Ex. I, at 27-28. Nor did he know whether the restoration of a 13' x 9' area was related to the water main. Ex. I, at 27.

A time and material report dated June 16, 2007, signed by Pellizzi, reflected that Halcyon removed asphalt and replaced it with "new asphalt compacted and sealed." Ex. I, at 60-61. Kwami was not aware of any fire hydrant repair or replacement during the two years preceding the alleged

⁵Counsel for Halcyon represents that "Godwin Jeff Kwami" appeared for deposition in this matter. See Plaintiff's Aff. In Support, at par. 16. However, counsel does not state whether Jeff Kwami is the same individual as Godwin Kwami. Nor was Kwami asked at his deposition whether he went by the name of Jeff.

incident. Ex. I, at 63. June 16, 2007 was the only time Kwami inspected work performed by Halcyon. Ex. I, at 64-65. The inspection occurred at Second Avenue and 53rd Street. Ex. I, at 91. The DEP signed off on all work performed by Halcyon at that location. Ex. I, at 76-77.

Kwami's sketch included the address 1008 Second Avenue, which was on the east side of the street. Ex. I, at 83, 88. He did not see the premises at 1009 or 1015 Second Avenue when he was at the site and did not know which blocks they were between. Ex. I, at 70, 89. Nor could he tell from his own sketch whether 1009 and 1015 Second Avenue were located between 53rd and 54th Streets. Ex. I, at 93-94. He admitted that he did not know whether Halcyon performed any restoration work in front of 1009 or 1015 Second Avenue. Ex. I, at 92-93.

Although Kwami stated that he did not know whether he would have noted in his drawing any work performed in front of 1009 Second Avenue (Ex. I, at 95), he also stated that, had Halcyon performed restoration work in front of 1009 or 1015 Second Avenue, he would have noted this in his drawing. Ex. I, at 95-96.

Positions of the Parties:

Halcyon argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it⁶ since it has no liability in this matter. Specifically, it asserts that it "provided daily logs with respect to work performed in the street which pre-dates the accident for more than a year before the accident which reveal that it did not perform and was not responsible for any construction at the specific accident location as identified by the plaintiff." Halcyon's Aff. In Support, at par. 25.

⁶This Court notes that the City's cross claims against Halcyon have already been extinguished by the dismissal of the complaint against the City.

It further asserts that it cannot be liable since the City approved its work.

In opposition to the motion, plaintiff argues that Halcyon failed to establish its prima facie entitlement to summary judgment as a matter of law. Specifically, she asserts that Halcyon failed to submit any evidence demonstrating that it did not create the pothole which caused her accident and that it did not perform excavation and restoration work in the area where she fell. Plaintiff further asserts that she raised a material issue of fact regarding whether Halcyon performed work which created the pothole.

In a reply affirmation in further support of its motion, Halcyon argues that it is entitled to summary judgment since Kwami's drawing of June 16, 2007 shows that restoration work was performed on the east side of Second Avenue. Further, it asserts that Kwami's drawing reflects that the restoration was performed in front of 1008 Second Avenue, which is across the street from where the alleged accident occurred, and that, had the work been done in front of 1009 or 1015 Second Avenue, this would have been reflected in his drawing.

Conclusions of Law:

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case." *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Where, as here, a contractor seeks to establish that it did not create the defect which injured

a pedestrian, it must “establish prima facie that it did not cause or create the [defect] that allegedly caused plaintiff’s fall (*citations omitted*).” *Corprew v City of New York*, 106 AD3d 524 (1st Dept 2013). Halcyon has failed to sustain this burden.

Plaintiff testified that she was injured when she alighted from a bus on Second Avenue between 53rd and 54th Streets and stepped into a pothole. Ex. D, at 9, 10; Ex. E, at 65-66, 76. The exit of the bus was approximately 3 meters from the curb when she exited. Ex. D, at 49.

Foster testified that Halcyon performed emergency work on the roadway of Second Avenue between 53rd and 54th Streets on June 4 and 5, 2007 but did not know exactly where that work was performed. Ex. F, at 37-42.

Pellizzi testified that the DEP’s time and material inspection reports reflected, inter alia, the location where work was performed. Ex. H, at 16. He admitted that Halcyon worked on Second Avenue between 53rd and 54th Streets beginning in April of 2007. Ex. H, at 21-23. This work involved, inter alia, chopping up pavement. Ex. H, at 24, 27. In order to obtain a permit for the work, a sketch had to be submitted to the DEP. Ex. H, at 28. Approximately two weeks prior, Halcyon performed a fire hydrant repair involving excavation of the parking lane on the west side of Second Avenue. Ex. H, at 31-32, 55. In June of 2007, yet another excavation was performed by Halcyon. Although he was not certain where that excavation occurred, Pellizzi stated that at least two of Halcyon’s excavations in 2007 were in the parking lane on the west side of Second Avenue. Ex. H, at 33, 38-40, 43-48.

Halcyon admits that based on Pellizzi’s testimony, “it was necessary to conduct a further

deposition of [the City]”, which led to Kwami’s deposition.⁷

Kwami testified that, according to a sketch he drew, Halcyon restored asphalt in three different locations in the area of Second Avenue and 53rd Street. Ex. I, at 17-22. Kwami was not certain where the restorations were made. Ex. I, at 27-28. Nor did his drawing reflect the distances between the restored areas and the curbs. Ex. I, at 69.

Kwami’s sketch specifically referenced the address 1008 Second Avenue, which was on the east side of the street, because it was “in close proximity” to one of the areas restored by Halcyon. Ex. I, at 83-84. He did not know whether Halcyon performed restoration work in front of 1009 or 1015 Second Avenue. Ex. I, at 92-93. Although Kwami stated that he did not know whether he would have noted in his drawing any work performed in front of 1009 Second Avenue, he also stated that, had Halcyon performed restoration work in front of 1009 or 1015 Second Avenue, he would have noted this in his drawing. Ex. I, at 95-96.

Halcyon has failed to establish its entitlement to summary judgment dismissing the complaint as a matter of law “by offering admissible evidentiary proof sufficient to demonstrate the absence of material issues of fact from the case.” *Harris v New York City Health & Hosps. Corp.*, 24 AD3d 164 (1st Dept 2005). The testimony submitted by Halcyon is insufficient to fulfill this burden. Although Halcyon claims that it cannot be held liable for plaintiff’s injuries since it did not perform work in the area where she fell, it failed to submit evidence establishing as a matter of law that it did not create the condition which caused the alleged accident. *See Harris v Niko Devel. Corp.*, 10 AD3d 410 (2d Dept 2004); *Bral v City of New York*, 221 AD2d 283 (1st Dept 1995). Neither Foster, Pellizzi nor

⁷This Court interprets this statement as tantamount to an admission by Halcyon that Pellizzi’s testimony, in and of itself, was insufficient to establish the location and scope of Halcyon’s work.

Kwami could state precisely where Halcyon's work was performed. Although Kwami identified one of the three locations where such work was done (1008 Second Avenue) (Ex. I, at 83-84), he could not state with any certainty where Halcyon's other work was performed. Pellizzi admitted that Halcyon performed at least two excavations in the parking lane on the west side of Second Avenue between 53rd and 54th Streets (Ex. H, at 48), which would have been at or near the area where plaintiff fell.

Summary judgment must also be denied to Halcyon since it fails to include in its papers Kwami's sketch depicting where Halcyon's work was performed.⁸ Pellizzi stated that, before starting work, Halcyon had to submit a sketch to, and obtain a permit from, the DEP. Ex. H, at 28. Kwami testified that, on June 16, 2007, he drew a sketch indicating that Halcyon restored asphalt at the intersection of Second Avenue and 53rd Street. Ex. I, at 17-21. Three different locations where asphalt had been restored were represented in his sketch. Ex. I, at 22. One was a 16' x 12' section of asphalt on the east side of the street where a water main had been repaired. Ex. I, at 22-23. He was not sure where the 10' x 7' restoration was performed or whether it was related to the water main repair. Ex. I, at 27-28. Additionally, Kwami did not know whether the restoration of a 13' x 9' area was related to the water main. Ex. I, at 27.

Although Kwami's sketch was marked as an exhibit at his deposition (Ex. I, at 17), it is not annexed as an exhibit to Halcyon's motion. Thus, it is evident that Halcyon has not "'assembled and revealed' all pertinent evidence available to [it] (*citations omitted*)."⁹ *Hendries, Inc. v American Express Co.*, 35 AD2d 412, 415 (1st Dept 1970); *see generally Farmer v City of New York*, 25 AD3d

⁸As noted previously, despite representing that it had annexed to its motion its contract with the City, as well as numerous time and material reports (Halcyon's Aff. In Supp., at par. 16), it merely annexed one time and material sheet, dated May 5, 2007, and illegible permits.

649 (2d Dept 2006) (although defendant's medical experts indicated in their affidavits in support of motion for summary judgment that they relied on plaintiff's medical records in reaching their opinions, such records were not annexed to defendant's motion). Even assuming that the sketch had been annexed to the motion, it is unclear whether this would have conclusively established Halcyon's entitlement to summary judgment given Kwami's concession that it did not set forth the distance between the work performed by Halcyon and the curb nearby. Ex. I, at 69.

To the extent that Kwami's deposition testimony was contradictory, such also warrants the denial of Halcyon's motion. *See Lacagnino v Gonzalez*, 306 AD2d 250 (2d Dept 2003). As noted previously, Kwami stated that he did not know whether he would have noted in his sketch any work performed in front of 1009 Second Avenue. Ex. I, at 95. However, he also stated that, had Halcyon performed work in front of 1009 or 1015 Second Avenue, he would have noted this in his drawing. Ex. I, at 95-96.

Finally, even if Halcyon passed inspections by the DEP (Ex. F, at 35-36), it is not immunized from liability if it is found to have created the defect. *See Coprew, supra* at 524.

Halcyon's motion for summary judgment must thus be denied. Given its failure to establish its entitlement to judgment as a matter of law, this Court need not address the sufficiency of plaintiff's affirmation in opposition. *See Winegrad, supra* at 853.

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

ORDERED that defendant The Halcyon Construction Corp.'s motion for summary judgment is denied; and it is further,

ORDERED that the case against The Halcyon Construction Corp. shall continue; and it is further,

ORDERED that, given the prior dismissal of the complaint and all cross claims against defendant The City of New York by order date April 22, 2014, the caption of this action be amended to reflect the dismissal of The City of New York, and that all future papers in this action bear the amended caption; and it is further,

ORDERED that counsel for The City of New York shall serve a copy of this order on all other parties, the County Clerk, and the Trial Support Office at 60 Centre Street, Room 158. The County Clerk and the Trial Support Office are hereby directed to mark the court's records to reflect the change in the caption and the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Any compliance conferences currently scheduled are hereby cancelled; and it is further,

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

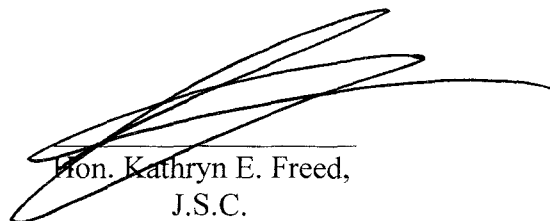
FILED

AUG 06 2014

Dated: August 4, 2014

ENTER:

COUNTY CLERK'S OFFICE
NEW YORK



HON. KATHRYN FREED
JUSTICE OF SUPREME COURT