

Tigh v Williams

2014 NY Slip Op 32516(U)

September 29, 2014

Supreme Court, New York County

Docket Number: 160609/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MATTHEW J. TIGH,

Plaintiff,

-against-

Index No. 160609/2013

DECISION/ORDER

ANTHONY G. WILLIAMS, TIME WARNER CABLE
ENTERPRISES LLC as successor in interest to TIME
WARNER ENTERTAINMENT COMPANY, L.P.,
OLGA RAGUSA, M.D., J&C RESTORATION CORP.
and ARSENAL SCAFFOLD, INC.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking to recover damages stemming from a bicycle accident that occurred on October 12, 2013. Defendant Arsenal Scaffold Inc. (“Arsenal”) now moves for an Order pursuant to CPLR § 3212 granting summary judgment dismissing this action as against it. For the reasons set forth below, Arsenal’s motion is granted.

The relevant facts are as follows. On or about October 12, 2013, plaintiff was a bicyclist in the roadway adjacent to the building located at 30 West 12th Street, New York, NY (the “building”) when he was allegedly struck by a motor vehicle operated by defendant Anthony G. Williams (“Williams”) and owned by defendant Time Warner Cable Enterprises, LLC as

successor in interest to Time Warner Entertainment Company, L.P. (“Time Warner”). At the time of plaintiff’s accident, there was a construction barrier in the roadway in front of the building, which plaintiff alleges either caused or contributed to his accident. This construction barrier was allegedly erected in connection with a renovation project that was being undertaken by the building’s owner. Thus, plaintiff commenced the instant action against the building’s owner and two contractors who allegedly performed work at the building asserting that they were negligent in erecting the construction barrier in the roadway.

Arsenal, one of the contractors who performed work at the building, now moves for summary judgment dismissing plaintiff’s action on the ground that it did not erect the construction barrier. Arsenal’s president Philip Susi (“Mr. Susi”) has submitted an affidavit in support of the present motion attesting that Arsenal did not install the construction barrier and that Arsenal’s work at the building was limited to installing a sidewalk bridge in 2011 and scaffolding on the front and rear facade of the building in 2013. Specifically, Mr. Susi attests that “Arsenal did not install any form of structures/barricades/temporary fences in the roadway in front of the [building], nor did it have any responsibility for maintaining such structures/barricades/temporary fences.” Mr. Susi further attests that in the four months prior to plaintiff’s accident no one from Arsenal was even present at the building as Arsenal’s work was completed on June 13, 2013.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim.” See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, the court finds that Arsenal is entitled to summary judgment dismissing all claims and cross-claims asserted against it as it has made a prima facie showing that it did not install the construction barrier, which allegedly caused or contributed to plaintiff’s accident. Plaintiff’s sole basis for liability against Arsenal in this action is his allegation that Arsenal was negligent in erecting the construction barrier in the roadway. However, such allegation is directly refuted by Mr. Susi’s affidavit wherein he explicitly attests that Arsenal did not, in fact, erect the construction barrier and that Arsenal’s work at the building was limited to installing a sidewalk bridge and scaffolding, which did not extend into the roadway and are not implicated in plaintiff’s accident.

In opposition, plaintiff has failed to present any evidence to refute Mr. Susi’s assertions to raise an issue of fact as to Arsenal’s liability. In fact, plaintiff’s only argument in opposition is that summary judgment should be denied as premature as he has not had reasonable time to depose parties with actual knowledge of the facts surrounding the construction barrier. However, such contention is without merit. It is well settled that “[a] determination 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.” *Ruttura & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, plaintiff’s mere speculation that further depositions may lead to relevant evidence refuting or contradicting Mr. Susi’s assertion that Arsenal did not erect the construction barrier is simply insufficient to defeat summary judgment, especially where, as is the case here, no other defendants facing liability has opposed

the present motion.

Accordingly, Arsenal's motion is granted and it is hereby ORDERED that all claims and cross-claims asserted against Arsenal are dismissed. This constitutes the decision and order of the court.

Dated: 9/29/14

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.