Stewart v City of New York
2017 NY Slip Op 32402(U)
November 21, 2017
Supreme Court, New York County
Docket Number: 152315/2014
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

ALYSIA STEWART and JOE WILLIAMS
Plaintiffs

- v -

THE CITY OF NEW YORK and BURTIS CONSTRUCTION
Defendants

INDEX NO. 152315/2014

MOT. DATE September 26, 2017

MOT. SEQ. NO. 003

The following papers were read on this motion for Summary Judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through M	ECFS DOC No(s). 1-21
Affirmation in Opposition Exhibits A through D	ECFS DOC No(s). 1-23
Replying Affidavits	ECFS DOC No(s). 1-11

In Motion Sequence No. 003 Defendant, (hereinafter "City") seeks an order pursuant to CPLR §3211 (a)(7) and §3212, dismissing the complaint and granting summary judgment in favor of the City. Plaintiffs oppose the motion claiming that the City has not met its burden to entitlement to summary judgment and that there are issues of fact as to the ownership of the sign that allegedly fell and crashed into plaintiff's vehicle.

FACTUAL BACKGROUND and CONTENTIONS

In this personal injury action, plaintiffs allege that on June 19, 2013, they were involved in an accident while driving northbound on the Henry Hudson Parkway, when a street sign fell off its support beam and shattered their vehicle's front window causing injuries. (Davidoff Aff., Ex. A). Plaintiff alleges that the City has not met its burden to establish its entitlement to summary judgment as there is strong evidence that the sign that crashed into plaintiffs' vehicle belonged to the City. Additionally, plaintiffs contend that should the court find that the City has met its burden, that the motion should be denied as discovery is incomplete and the City should be required to produce an additional witness for deposition.[1]

According to plaintiff's testimony, the accident happened on June 19, 2013 when she was the driver of a vehicle in which plaintiff Williams and their two children were passengers. (Davidoff Aff. Exs. F and G). Plaintiff was driving northbound on the Henry Hudson Parkway when a construction sign fell on top of her car and broke through her windshield. (Davidoff Aff. Ex. F, pp. 10, 14-16). At her deposition, plaintiff testified that the construction sign was attached to a divider in the highway and was affixed to a metal pole. (Davidoff Aff. Ex. G, pp. 21-22). Plaintiff described the sign as orange in color with black writing and indicated that the construction sign was a diamond shape. (Davidoff Aff. Ex. G, pp. 21-22).

According to the testimony of Tonya Palner, produced for deposition on behalf of the City, when the City performs highway repair work, it places collapsible and transportable signs to ensure people know that work is being performed. (Davidoff Aff. Ex. H, p. 16). The collapsible signs are made of soft plastic material and are affixed to a metal stand with four legs; the signs are triangular. (Davidoff Aff. Ex. G, pp. 17, 18, 24).

[1] Defendant Burtis Construction was granted summary judgment on December 2, 2016 as the court found that Burtis did not perform any work in the vicinity of the accident. (See, Davidoff Aff., Ex. E). Additionally, plaintiffs filed the Note of Issue and Certificate of Readiness on January 26, 2017, certifying that all discovery was complete. (See, NYSCEF document, number 51).

Defendant Burtis Construction produced a witness for deposition prior to being dismissed from the matter and according to the deposition testimony of Percy Mowdawalla, Burtis was contracted by the State of New York and the State of New York governed the subject highway; moreover, Burtis did not do any repair work in the vicinity of plaintiffs' accident and testified that a State of New York contractor was replacing a sign structure on the Henry Hudson Parkway around the time of plaintiffs' accident. (Davidoff Aff. Ex. I, pp. 10-11, 16-17).

Based on the pleadings and deposition testimony, the City directed the DOT to conduct a search for all arterial maintenance records and complaints maintained by DOT for the subject accident location, for a period of two years prior to and including the date of plaintiff's accident. These documents were produced during discovery pursuant to the Case Scheduling Order ("CSO"). (Davidoff Aff. Ex. J).

The City also conducted a search for records within DOT's Arterial Highways Unit for the roadway located at the Henry Hudson Parkway, northbound and southbound lanes, for approximately one quarter mile around the vicinity of plaintiff's accident. The documents and the affidavit of the paralegal who conducted the search for said records were submitted in support of the City's motion for summary judgment. (Davidoff Aff. Ex. K and L). Ms. Dubina's affidavit indicates that her search for records revealed that one OCMC permit was issued to New York State and its contractor, Burtis Construction on June 7, 2011 and the permit was extended through May 27, 2014. (Davidoff Aff. Ex. K, paragraph 3).

In support of this motion, the City argues that it is entitled to summary judgment because it owed no duty of care to plaintiffs as the City did not own, oversee or exercise any control over the construction project at the location where plaintiffs' accident occurred. Likewise, the City argues that the applicable search of DOT records revealed no records constituting prior written notice and a review of the record evidence makes clear that plaintiffs have not pled or proven that the City had the requisite prior written notice necessary to hold it liable in damages for Plaintiff s injuries.

The City maintains that the documentary evidence establishes that it is entitled to summary judgment as it did not own or control the roadway and construction project where plaintiffs' accident occurred; the City also contends that it did not have prior written notice of the alleged defective condition pursuant to New York City Administrative Code §7-201(c)(2), and it did not cause or create the alleged defective condition.

In opposition to defendant's motion for summary judgment, plaintiff contends that summary judgment is a drastic remedy and that there are issues of fact as to whether the City owned and/or maintained the sign that fell onto plaintiffs' vehicle. In addition, plaintiffs argue that they have presented issues of fact concerning whether the City had prior written notice of the alleged defective condition. Finally, plaintiffs argue that discovery is incomplete and that the City should be required to produce an additional fact witness to appear for deposition testimony.

STANDARD OF REVIEW/ANALYSIS

When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Winegrad v. New York Univ. Med. Ctr.*. 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). The Court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC,* 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.*, 32 N.Y.2d 285, 290 (1973); *Tobron Office Furniture Corp. v King World Productions*, 161 A.D.2d 355,356 (lst Dept. 1990) (the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient); *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman* v. *City of New York*, 49 NY2d 557, 562 (1980).

In opposing the City's motion, plaintiff argues, that the City has not met its burden to establish entitlement to the drastic relief of summary judgment. Given the uncontradicted testimony of Mr. Mowdawalla which establishes that it was New York State that owned the roadway where the accident occurred, and that it was New York State that oversaw and controlled the construction project in the vicinity of the accident, it is clear that the City did not own or exercise any control over the construction being performed at the accident location. Additionally, the deposition testimony of Mr. Mowdawalla makes clear that the in the summer of 2013, Burtis Construction was contracted by New York State to perform construction work on the northbound side of the Henry Hudson Parkway and that New York State governed the subject highway. (Davidoff Aff. Ex. I, pp. 10-11, 16-17).

Plaintiffs have failed to establish that the City exercised any control over the construction being performed on the highway where plaintiffs' accident occurred. As such, plaintiffs have simply failed to meet their burden to defeat summary judgment; "a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment". *Polanco v. City of New*, 244 AD2d 322 (2d Dept. 1997).

Plaintiffs' complaint alleges that the City retained Burtis Construction to perform work on the highway and the allegations against the City arise solely from the actions of Burtis Construction. Plaintiffs do not offer any deposition testimony or expert affidavit to contradict these facts or Mr. Mowdawalla's testimony that in June, 2013, the State of New York via a contractor, was performing work north of where Burtis Construction's work ended. (Davidoff Aff. Ex. I, p.17). As such, plaintiffs' allegations are insufficient to defeat summary judgment. *Zuckerman* v. *City of New York*, 49 NY2d 557, 562 (1980).

Plaintiffs have not alleged that the City was independently performing any work at the subject location and the evidence before the court establishes that any construction work performed at the location would have been performed pursuant to a State of New York contract or project. (Davidoff Aff. Ex. I, pp. 16-17). Moreover, the City has produced records and the affidavit of Ms. Dubina which indicates that an OCMC permit was issued to New York State and its contractor and that permit encompassed the date of plaintiffs' accident. Id.

Plaintiff's attempts to create an issue of fact by claiming that the shape of the sign that fell onto plaintiffs' vehicle may have been triangular and not a diamond shape as plaintiff testified at her deposition, ignores the deposition testimony of Mr. Mowdawalla and the documentary evidence produced by the City which demonstrates that the City did not own or exercise any control over the construction project or the signage at the accident location. As such, the arguments concerning the shape of the sign, have no relevance to the fact that the City has demonstrated that it did not own or exercise control over the highway where the accident occurred. As such, plaintiffs' attempts to create an issue of fact relative

to the shape of the sign, when plaintiffs have failed to demonstrate that the City owed them a duty of care, are simply insufficient to defeat the City's motion for summary judgment

In order to hold the City liable, plaintiffs must demonstrate that the City owed them a duty of care by demonstrating that the City owned or exercised control over the construction project or that the City owned or maintained the sign that is alleged to have fallen onto plaintiffs' vehicle. *Ernest v Red Creek Cent. Sch. Dist.*, 93 NY 2d 664 (1999) (holding that a municipality owes no duty of care where it does not own or control a roadway); See also, *Horst v State,* 6 Misc.3d 1025 (A) (Ct. Cl. 2205). As the record makes clear, the State of New York owned the highway where plaintiffs' accident occurred and as such, the State, not the City, had full responsibility for the roadway. (Davidoff Aff. Ex. I, pp. 16-17, Ex. M, *Macleod v City of New York,* Index No. 117427/2001 (Sup. Ct. New York County, 2017)).

Plaintiffs have not sustained their burden to come forward with proof which would permit a reasonable fact-finder to reach the conclusion that the City owned or controlled the construction project in the area of the Henry Hudson Parkway at the time plaintiffs' accident occurred. Absent such a showing the court must grant the City's motion for summary judgment. The City has met its burden and has established its entitlement to judgment as a matter of law.

CONCLUSION

ORDERED, that Defendant the City of New York's motion for summary judgment, Sequence No. 003, seeking dismissal of all claims is granted in its entirety and the complaint is dismissed without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: November 21, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

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**