

Hernandez v L&L Painting Co. Inc.
2020 NY Slip Op 33870(U)
November 19, 2020
Supreme Court, Kings County
Docket Number: 519248/17
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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RAFAELA HERNANDEZ,

Plaintiff,

-against-

L&L PAINTING CO. INC.,

Defendant.

-----X

DECISION/ORDER

Index No.: 519248/17

Motion Seq. No.: 3

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of defendant's motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed	<u>55-76</u>
Answering Affirmation and Exhibits Annexed	<u>78-81</u>
Reply Affirmation	<u>82</u>

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

Defendant moves for summary judgment dismissing the complaint. This action arises from a one car motor vehicle accident which took place on June 15, 2015 on Van Sinderen Avenue between Blake and Dumont Avenues in Brooklyn, NY. Plaintiff claims that as she was driving along this one-way street, her car hit a pothole, which caused her car to lose control and hit a fence. She claims the accident caused her to sustain serious injuries. The City of New York won dismissal of the related case she filed [13993/2015] in 2018 on the grounds that they did not have prior written notice. This court denied a pre-answer motion to dismiss brought by defendant as premature. Now, defendant moves for summary judgment.

Defendant supports its motion with an affirmation of counsel, the pleadings, defendant's contract for the work it had done for the Transit Authority on the subway line which runs alongside the roadway at issue, photos, an affidavit of the defendant's project manager, EBTs of plaintiff and defendant, EBTs of two non-party witnesses employed by the NYC Transit Authority, and the pleadings and some documents from the related case against the City of New York, including an affidavit of an employee of the NYC Department of Transportation.

Defendant's counsel argues that he establishes in the motion papers that the defendant did not cause or create the subject pothole in the course of their work on the subway, entitling defendant to summary judgment. He states

“work for the subject project involved minor steel repairs and repainting of the exterior structure of the Canarsie Subway line. The work did not involve any maintenance or repairs to the roadway of Van Sinderen Avenue. While L&L PAINTING did utilize equipment on the roadway of Van Sinderen Avenue to access the subway trestle, there is absolutely no evidence of any kind to indicate that L&L PAINTING's work caused or created the subject pothole. The testimony of multiple witnesses from the New York City Transit Authority ("NYCTA") confirms that NYCTA representatives inspected L&L PAINTING's work on a daily basis and did not observe any potholes on any roadway that were created by L&L PAINTING in the course of its work. Therefore, the plaintiff's claims against L&L PAINTING are based entirely upon speculation and the plaintiff's Complaint must be dismissed as a matter of law.”

Plaintiff was deposed, but her testimony could not provide any probative information on the issue of the creation of the pothole.

The affidavit of Scott Earl, a Project Manager employed by L&L Painting, E-File Doc. 66. authenticates the Contract (C-33840 Terms and Conditions), Drawings and

Addenda. He was deposed on May 7, 2019 and his transcript is E-File Doc. 70. He testified that the company does painting work, with union painters, and if the contract requires some steel repairs, such as the one for the L line which is involved in this matter, they subcontract the steel repair work [Page 10]. This job was expected to take two years to complete. He testified that this job did not require defendant to do any work in the roadway, "or [to] subcontract for any repaving, or repair, or any kind of roadway work near this project or alongside that subway line" [Page 45]. He testified that his company did not do roadway work or repair potholes, and shown a photo of the pothole at issue, he said he was not familiar with it. If he or the other employees had seen it, they would not have reported it. He said the City is full of potholes. He said that to paint the elevated subway, they used either a boom lift or a scissor lift, which they were given a permit to place on the street, even if it blocked the roadway while they were working. They were small and could be driven. They did not have any "outriggers" and rested solely on their tires [Page 71].

E-File Doc. 75 is an affidavit from Danny Garcia, who works for the NYC Department of Transportation. He was asked to perform a search for the location of the pothole for two years before and two years after the date of the plaintiff's accident. He reports that for the block in question, 25 permits had been issued, and there was no record of a complaint of a pothole or of an accident involving a pothole. Annexed to his affidavit are numerous permits issued to defendant to close the street at issue, for scraping and painting, so debris would not fall onto the cars, and for permission to place their equipment in the roadway during specified hours. The other permits issued for this location are not provided and are not discussed in his affidavit.

On May 21, 2019, Chris Velanovsky, an employee of the NYC Transit Authority, was deposed. He testified that he has been employed by the Transit Authority for 25 years and is currently a construction manager. He was one of the construction managers on the L line repainting project which defendant was engaged to perform. He testified that L&L Painting was hired to “perform specified steel repairs and mainly to clean the structure, remove any loose paint, and apply a new three-coat paint system” along the Canarsie (L) line of the subway [Pages 13-14]. He was asked, “was it ever discussed with you in any way whatsoever that a pothole was created by any type of equipment utilized in this contract?” He answered: “Definitely not.”

Robert Romain, a field engineer for the NYC Transit Authority, was also deposed. His deposition [E-File Doc. 56] was held on October 31, 2018. He authenticated the daily reports which he said he prepared for this project, and testified that if he saw a pothole that was created in the course of the ongoing work, he would note it in his daily report [Pages 66-68]. There were no daily reports which referenced a pothole prior to the date of the plaintiff’s accident. Mr. Romain testified that L&L Painting did not perform any roadway excavations or repairs on Van Sinderen Avenue between Blake Avenue and Dumont Avenue in the course of the subject project [Pages 20-21]. To his knowledge, neither L&L Painting nor any other contractor at this project created any potholes in the roadway on Van Sinderen Avenue between Blake Avenue and Dumont Avenue in the course of this project [Page 36]. He prepared the daily reports and does not note any damage to the street (Van Sinderen Avenue) caused by the work being done. He said there were several potholes that he noticed on the block, but they were not related to the painting work being done on the subway line [Pages 32-

33]. Defendant was working on the block where plaintiff had her accident in May and June of 2015, according to his daily reports.

Discussion

It is well settled that “the 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 demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez v Prospect Hospital*, 68 NY2d at 324; see also *Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Tort 2002]).

Here, after extensive discovery, defendant has established that their work did not involve opening or closing the street, repairing or resurfacing the street, or in any way performing work which could cause a pothole to form. The court disagrees with counsel's argument that defendant had no duty of care to the plaintiff because they

were a contractor and not the property owner. Defendant did owe a duty to keep the area safe for cars and pedestrians during the hours they did not have the street closed. Clearly they could not create a giant hole in the street and avoid any liability if a person or a car fell into it. This is what would be known as an *Espinal* exception, here, failing to exercise reasonable care and “launching an instrument of harm,” a hole (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). The court does agree, however, that now that discovery is complete, defendant has made a prima facie case for dismissal, as plaintiff’s claim that defendant caused and created the pothole can now be said to be “mere speculation.”

Plaintiff opposes the motion. Plaintiff provides an affirmation of counsel, more photos of the pothole at issue, and an affidavit from an engineer, Robert Fuchs, P.E., dated August 17, 2020. Mr. Fuchs states, in sum, that the roadway was in a deteriorated condition in 2011, according to the photo on Google Maps, that it was improperly and/or incompletely repaired in 2012, and that the defendant’s equipment caused it to deteriorate in 2015. By the time he inspected the area, the pothole had been “patched.” He states his opinion that the defendant was obligated to repair the pothole and misunderstood its responsibility in this regard. He says: “The resulting dangerous and unsafe condition of the roadway resulting from the presence of the pothole should have been recognized and corrected by the Defendant, as required by the contract for the work that was performed. The failure to recognize and correct such an unsafe condition during the work was an omission that can be cited as a proximate cause for the accident.”

Mr. Fuchs continues: "The failure to remove the existing layers of deteriorated pavement and to provide an adequate subgrade and/or sub-base [in 2012] is a defect that made the asphalt overlay inherently weak and prone to failure. Such weakness contributed to the development of a hole (opening) on the roadway at the accident location, as shown on street view imagery from August and October 2014, approximately 8 months prior to the accident."

Mr. Fuchs concludes "I have determined within a reasonable degree of engineering certainty that the pothole that existed at the time of the accident was caused by an accelerated and localized failure of the asphalt roadway pavement from exposure to construction equipment and trucks used during the work on the nearby elevated train tracks. The resulting dangerous and unsafe condition of the roadway resulting from the presence of the pothole should have been recognized and corrected by the Defendant, as required by the contract for the work that was performed."

Mr. Fuchs is not correct. Defendant, a painting company hired to paint the subway line, was not responsible for repairs to the roadway. The clause in the contract to which Mr. Fuchs refers does not mean that Defendant was responsible for roadway repairs. That clause says that Defendant "shall maintain all areas used by the public free from debris, equipment, materials, projections, tools or other items, substances or conditions that may constitute a slipping, tripping or other hazard." This does not refer to street erosion. Mr. Fuchs also cites this provision: "When an Unsafe Condition exists at the site, work shall be stopped in the affected area until the Unsafe Condition is corrected. If the Contractor does not take corrective action immediately, or within the time period specified by the Engineer, the Engineer reserves the right to take whatever

action is required to correct the Unsafe Condition.” Mr. Romain was the engineer for this project, and he did not report the potholes he admitted he saw on the street. He could not have directed defendant, a painting company, to repair the street. Perhaps Mr. Romain should have been (or perhaps he was) obligated to call 311, but he works for the NYC Transit Authority, not defendant.

Plaintiff has failed to raise a triable issue of material fact sufficient to overcome defendant’s prima facie case for summary judgment. Here, plaintiff’s evidence, her testimony, as to the cause of the pothole, is without any evidentiary support, as is the affidavit of plaintiff’s expert, Mr. Fuchs, who misconstrues the provisions of the contract and offers only his speculative opinion that trucks and other equipment used by defendant for the painting project created the pothole and were thus the proximate cause of the plaintiff’s injuries. “When an expert’s affidavit is offered as proof to defeat a summary judgment motion, it must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent’s favor” (*Ann JJ. v Schenectady Ass’n for Retarded Citizens*, 59 AD3d 772, 773 [3d Dept 2009] [internal quotation marks omitted], quoting *Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008]). “Where [as here] the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment” (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]; see also *Dodkowitz v Nelson*, 22 AD3d 709, 710 [2d Dept 2005] [expert’s speculation that wood rot was the proximate cause of a plaintiff’s injury was insufficient to counter prima facie entitlement to summary judgment]).

Accordingly, defendant's motion is granted and the complaint is dismissed.

This shall constitute the decision and order of the court.

Dated: November 19, 2020

ENTER:



Hon. Debra Silber, J.S.C.