

Upton v Oliveira Contr., Inc.

2020 NY Slip Op 35531(U)

December 9, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31657/2018E

Judge: Alison Y. Tuitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

SHAIQUEEN UPSON,

INDEX NUMBER: 31657/2018E

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

**OLIVEIRA CONTRACTING, INC. and
METRO PAVING LLC,**

Defendants.

The following papers numbered 1 to 11,

Read on this Defendants' Motion and Cross-Motion for Dismissal/Summary Judgment and Plaintiff's Cross-Motion for Sanctions

On Calendar of 11/20/20

Notices of Motion/Cross-Motions-Exhibits, Affirmations 1, 2, 3

Affirmations in Opposition 4, 5, 6, 7

Reply Affirmations 8, 9, 10, 11

Upon the foregoing papers, defendant Metro Paving LLC's ("Metro") motion to dismiss the action for failure to state a cause of action and for summary judgment, and defendant Oliveira Contracting, Inc. ("Oliveira") cross-motion to dismiss the complaint and cross-claims or, in the alternative, granting its cross-claims for contractual indemnification against Metro are consolidated for the purposes of this decision. For the reasons set forth herein, defendant Metro's motion for summary judgment is granted and defendant's Oliveira's cross-motion for summary judgment and contractual indemnification against Metro is denied. Plaintiff's cross-motion for sanctions has been withdrawn by the plaintiff.

This is an action to recover for personal injuries allegedly sustained by plaintiff on April 21, 2018 while she was walking on 170th Street near Webster Avenue, Bronx, New York. Plaintiff claims to have fallen in the roadway as a result of a misleveled manhole cover that was not level with the surrounding area.

Plaintiff testified that the accident happened at approximately 5:50 - 6:20 p.m. in the dark roadway of Webster Avenue, close to 170th Street, in front of the Save More Deli located at 1188 Webster Avenue, Bronx, New York. At that time, the Webster roadway was under construction. Plaintiff testified that she tripped over a manhole cover that raised about four to five inches off the roadway. Plaintiff did not see the manhole cover because it was dark outside. After she fell, she saw the raised manhole cover and observed that the manhole cover was not level with the roadway. Plaintiff took photographs of the subject roadway a few days after the accident and then again with her attorney. Those photographs were shown to plaintiff at her deposition, and she testified that they accurately depicted the roadway as it appeared at the time of her accident. They were marked as Exhibits at the deposition, and plaintiff marked on the photographs the area in the roadway where the accident allegedly happened.

Plaintiff submits an affidavit wherein she explains how the accident occurred, consistent with her testimony. She further states that she called her mother to tell her what happened and her mother told her to go to the emergency room, which she did. Plaintiff states that she has never claimed that anything other than the manhole cover surrounded in asphalt caused her accident. There was construction work on Webster Avenue and 170th Street, and prior to her accident, “the road had been dug up and the asphalt removed and was very bumpy to ride on.”

Allison Baker, plaintiff’s mother, submits an affidavit stating that she resides at 1368 Webster Avenue, Bronx, which is at the corner of Webster Avenue and East 170th Street. On the evening of April 21, 2018, plaintiff dropped off her daughter with Ms. Baker for a visit. Ms. Baker’s apartment faces Webster Avenue and she has a clear, unobstructed view of all the stores on the other side of the street. Minutes after her granddaughter had been dropped off, she received a call from plaintiff telling her that she fell in the street, in front of the Save More Deli on Webster Avenue, and Ms. Baker told plaintiff to go to the hospital. Plaintiff told her that she fell in the street because there was a raised metal sewer. Ms. Baker states that “all of Webster Avenue was dug up”. The day after, Ms. Baker noted that the area in the roadway where plaintiff fell “was torn up and the metal sewer was raised above the street level”. Ms. Baker claims that there was construction on the roadway of Webster Avenue for at least two weeks prior to her fall. The street remained in a “dug up condition” before plaintiff fell and for a time after her accident. Ms. Baker further states that she was shown photographs of where plaintiff fell and the sewers and streets looked in the same condition on and prior to the date of

plaintiff's accident. She also remembers that there was a News 12 television crew on Webster Avenue in February 2018, that were reporting about the broken up roadway on Webster Avenue because of community complaints.

Defendant Metro moves to dismiss the action pursuant to CPLR §3211(a)(7), arguing that the pleading fails to state a cause of action, and for summary judgment arguing that there are no issues of fact. Defendant Oliveira cross-moves for dismissal of the action or, in the alternative, granting its cross-claims against Metro for contractual indemnification.

Defendant Oliveira contracted with the City of New York ("City") to conduct a project for the reconstruction of the Webster Avenue Select Bus Service which involved roadway, sidewalk and street median renovation at locations from East 165th Street to East Gun Hill Road. On or about May 16, 2017, the work commenced on the project. Pursuant to the contract, Oliveira was permitted to subcontract out work, with approval from the City. In April 2018, Oliveira entered into a subcontract with Metro for asphalt milling and paving of the roadway to be conducted as part of the roadway renovation for the project.

Metro argues that the action and cross-claims against it must be dismissed because Metro did not have any employees and did not perform any work at the subject location, either prior to or on the date of the alleged accident. Metro was hired by defendant Oliveira by contract dated April 9, 2018 and executed on April 10, 2018 and April 17, 2018; which included milling and paving a number of streets, including the subject location. Metro alleges that it did not begin its work on the Webster Project until April 26, 2018, five days after the plaintiff's alleged accident. Dennis Kellerman, President of Metro, states in an affidavit that while Metro was retained to perform milling and paving work, Metro had not begun any work at the subject location prior to or on the day of the plaintiff's alleged accident.

Certified Metro payroll records verify that no work was performed by Metro on or before the date of plaintiff's accident at the subject location. The payroll records for the weeks of April 2, 2018 through April 9, 2018, April 10, 2018 through April 16, 2018, and April 17, 2018 through April 23, 2018 clearly indicate that no Metro employees were performing work on the Webster Project. Further, the payroll records for April 24, 2018 through April 30, 2018 indicate that Metro employees performed work on the project on April 26, 27 and 30, 2018. Moreover, daily logs for the project maintained by Metro indicate that work was not performed on this project until April 26, 27 and 30, 2018.

Defendant Metro argues that there is no dispute between Metro and Oliveira that Metro did not mill or pave the subject roadway upon which plaintiff fell prior to plaintiff's accident. Metro did not begin its work until April 26, 2018, five days after plaintiff's alleged accident. Metro and Oliveira agree that Metro did not begin its work at the subject location until days after plaintiff's accident. In response, Oliveira argues that the photographs show a milled roadway, and Metro was the only milling contractor on the project, therefore, Metro was responsible for the roadway.

In support of its cross-motion, Oliveira contends that the photographs of the roadway taken by plaintiff and her attorney show that the road was in a "milled" state, which allegedly did not occur until five days after the accident. Pursuant to the records of Oliveira, and the affidavits of Marco Desa, project manager for Oliveira, Goolcha Sookdeo, superintendent for Oliveira, and Dennis Kellerman of President of Metro, Metro began milling of the roadway at the location of the subject accident on April 26, 2018. This area was not milled by Oliveira or any other entity before it was milled by Metro on April 26, 2018. According to the contract between Oliveira and Metro, Metro was responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract which was effective April 9, 2018. The subcontractor agreed to take responsible precautions for the safety and provide reasonable protection to prevent damage, injury or loss in connection with work done at the site.

Oliveira argues that plaintiff's testimony is incredible as a matter of law. The accident is alleged to have involved a defect caused by work being done to the roadway at the subject location. From the photograph exhibits, Oliveira argues that the area where plaintiff identified as the scene of the incident clearly shows a milled roadway. Plaintiff did not take the photos referenced to until "a few" days after the accident. Oliveira argues that all of the evidence shows that Webster Avenue, between 169th and 170th Streets, was not milled by Oliveira or any other entity before it was milled by Metro on April 26, 2018. Defendant Oliveira further argues that the affidavits provided by both Metro and Oliveira, as well as the records and notes prepared by defendants, show that it was impossible that the roadway was in a milled state on the date of the accident, as milling did not begin on that roadway until April 26, 2018, five days after the subject accident occurred.

In response, plaintiff argues that she did not fall as a result of a "milled roadway"; she alleges that she fell on a raised manhole cover that had asphalt around it. Moreover, Oliveira fails to address the issue of the manhole cover and areas surrounding it. None of the evidence produced by Oliveira established that the

condition of plaintiff's fall was not in that condition at the time of the accident. The photographs depict the raised manhole cover which allegedly caused plaintiff's fall. Plaintiff argues that the photographs also depict extensive roadway excavation and what appears to be replacement of underground water or sewer lines.

Furthermore, Oliveira's time sheet for two months prior to this accident for the work performed pursuant to the contract clearly show that Oliveira was working in the area of plaintiff's alleged accident and had already performed extensive work at the time of her accident. A synopsis of these documents reveals the following work performed prior to plaintiff's accident: 02/19/2018 Excavate and remove materials; subsequently backfill, grade, compact and prepare sidewalk by west bus pad of 169th - 170th Street; 02/20/2018 Excavate and remove materials; subsequently backfill, grade, compact, pour & finish sidewalk by west bus pad of 169th - 170th Street; 02/21/2018 Excavate and remove materials; subsequently backfill, grade, compact, pour & finish sidewalk by west bus pad of 169th - 170th Street; 03/02/2018 Installation of temporary asphalt at transitional areas and potholes; 03/03/2018 Installation of temporary asphalt at transitional areas and potholes; 03/06/2018 Installation of 6F top course asphalt at various pothole locations site wide; Asphalt installation at curbside road base; 3/19/2018 Cleanup and site maintenance; mainly between 169th - 170th; 04/11/2018 setting and grouting of warning tactile pavers along W of 169th & Webster; 04/12/2018 Setting and grouting of warning tactile pavers along W of 169th & Webster; Saw cutting at W of 169th Street and Webster; 04/13/2018 Setting and grouting of warning tactile pavers along W of 169th & Webster; Saw cutting at W of 169th Street and Webster.

The contract between Oliveira and the City involved extensive roadway renovation, sidewalk renovation, sewer, water main and street median renovation at the location of the accident. The contract identifies the general scope of Oliveira's work as "Reconstruction of Webster Avenue Select Bus Service at Select Locations From East 165th Street to East Gunhill Road Including Sewer, Water Main, Street Lighting and Traffic Work With All Work Incidental Thereto."

Article 7 of the contract provides:

Protection of Work and of Persons and Property:

Notices and Indemnification

7.1 During the performance of the Work and up to the date of the Final Acceptance, the Contractor shall be under an absolute obligation to protect the finished and unfinished Work against any damages, loss, injury, theft and/or vandalism,...

7.2 During the performance of the Work and up to the date of Final Acceptance the Contractor shall take all reasonable precautions to protect all persons and the property of the City and of others from damage, loss or injury resulting from the Contractors and/or its Subcontractors operations under this Contract. The Contractor's obligations to protect shall include the duty to provide, place or replace and adequately maintain at or about the Site, suitable and sufficient protection such as lights, barricades and enclosures.

The court's function on a motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Metro's motion for summary judgment is granted. The contract between defendants Oliveira and Metro was executed on April 10, 2018 and April 17, 2018, and required Metro to perform milling and paving work at the subject location. Metro's evidence shows that it did not begin its work on the project until April 26, 2018, five days after plaintiff's accident. Furthermore, contrary to Oliveira's assertion that "[p]laintiff alleged that a defective roadway, due to it having been milled, was the cause of the accident", plaintiff never testified

about a milled roadway. Plaintiff testified that her fall was caused by a raised manhole, surrounded by asphalt. There was never any testimony that a “milled” condition caused plaintiff’s fall. Since the evidence shows that Metro did not perform any work at this project until after plaintiff’s accident, Metro’s motion for summary judgment must be granted, and the complaint and cross-claims against it must be dismissed.

Oliveira’s cross-motion for to dismiss the claims against it or, in the alternative, for contractual indemnification, is denied. The evidence shows that Oliveira had been performing work at this project for months, and up to one week preceding plaintiff’s accident. Under the contract with the City, defendant Oliveira was required to “take all reasonable precautions to protect all persons”... “from damage, loss or injury resulting from the Contractors and/or it's Subcontractors operations under this Contract.” Thus, plaintiff has raised questions of fact as to whether Oliveira took all reasonable protections to protect plaintiff. The photographs clearly show a raised manhole cover, surrounded by asphalt and a roadway in disrepair. Plaintiff claims that it was the raised manhole cover that caused her to fall. Based on the evidence presented, Oliveira had been working in the subject area of plaintiff’s accident prior to the accident. There is no evidence that Metro had worked there prior to her fall. Thus, Oliveira is not entitled to contractual indemnification from Metro.

This constitutes the decision and Order of this Court.

Dated: 12/9/20



Hon. Alison Y. Tuitt