Gardner v City of New York
2022 NY Slip Op 32408(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 157085/2020
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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KEVIN GARDNER,

Plaintiff,

- v -

THE CITY OF NEW YORK, HW LIC ONE LLC, HW MANHATTAN ONE LLC, CONTRACTING CORP., BASIN HAULAGE INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), E-J ELECTRIC INSTALLATION CO., E-J COMMUNICATION SYSTEMS, PERCIBALLI INDUSTRIES INC.

Defendants.

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INDEX NO. 157085/2020

MOTION DATE 04/12/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on June 12, 20l9, when plaintiff fell off his bike on the roadway in front of 302 West 30th Street, between 8th Avenue and 9th Avenue in the State and City of New York.

Pending before the court is a motion filed by defendants E-J ELECTRIC INSTALLATON CO. and E-J COMMUNICATION SYSTEMS (collectively, "E-J") seeking an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, dismissing the complaint and all cross-claims against E-J with prejudice.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

E-J argues that the complaint and any cross-claims should be dismissed because E-J did not perform work in the location where the accident is alleged to have occurred and as such, E-J was not negligent and cannot be held liable for the alleged injuries.

In support of their argument, E-J submitted a sworn Affidavit by Senior Vice President David Ferguson, (NYSCEF Document #69), which states in part that "any and all work by E-J was performed entirely on 8th Avenue and/or on 8th Avenue within the intersection of 8th Avenue and 30th Street."

E-J also submitted a blueprint (NYSCEF Document #69), which E-J's counsel argues shows that E-J did not perform work in the area where the accident was alleged to have occurred, and that their work was "entirely contained to 8th Avenue and/or 8th Avenue at the intersection of 8th Avenue and 30th Street."

Opposition papers were filed by defendant PERCIBALLI INDUSTRIES, INC. ("Perciballi"); defendant HW Manhattan One LLC ("HW Manhattan"); plaintiff KEVIN GARDNER; and defendant THE CITY OF NEW YORK (the "City"). All opposition papers

argue, generally, that this motion is premature insofar as no one from E-J has been deposed and the deposition of E-J is essential to determine liability.

Specifically, Perciballi argues that the Affidavit of Mr. Ferguson does not identify the work that E-J was performing, though the blueprint seems to indicate that E-J's work involved modification of the traffic signals, including the pedestrian countdown signal. Perciballi argues that "many traffic signals have roadway activation plates and/or other associated devices" and, therefore, the scope of E-J's work needs to be explored through deposition.

HW Manhattan argues that the nature and extent of E-J's work is relevant and material to HW Manhattan's cross-claims, and that work done for the benefit of one street or intersection does not mean adjacent streets were not "used as a staging area" or for other purposes. They argue that without knowing what work and the means and methods of E-J's work, E-J's motion for summary judgment is premature.

Plaintiff argues that Mr. Ferguson did not explain in his Affidavit what records he searched in particular, where they are located, whether they are stored in paper or electronic format, who maintains access to these records, whether the records can be altered by Mr. Ferguson or other individuals or whether there are any additional records which would have produced additional documentation, relative to his purported "search." Plaintiff also argues that Mr. Ferguson fails to outline whether any of his "searches" were able to outline or speak to whether there were work or construction related tools, vehicles, machinery or other materials used for or generated from the construction project underway in the area of the defective condition at the time and place of the accident.

The City argues that it should be afforded the opportunity to depose E-J's witness to determine liability and to establish the scope of work that may have been performed in the vicinity of the location where the accident occurred.

Analysis and Conclusions of Law

Here, plaintiff alleges that his accident occurred in the bicycle lane "in front of 302 West 30th Street, between 8th and 9th Avenues, New York, NY." E-J, in turn, argues that they performed work entirely "on 8th Avenue and/or on 8th Avenue within the intersection of 8th Avenue and 30th Street." It is unclear on this record that the location specified by plaintiff (30th Street, between 8th and 9th Avenues) and the location specified by E-J (the intersection of 8th Avenue and 30th Street) are two different and distinct locations that do not overlap.

Further, the Affidavit of Mr. Ferguson does not identify the nature of the work that E-J performed, and it does not specify whether construction-related tools, vehicles, machinery or other materials used for or generated from the construction project were involved in causing the defect alleged by plaintiff. This court finds that the parties are entitled to explore these questions through discovery.

Conclusion

For the reasons specified above, it is hereby:

ORDERED that this motion is DENIED as premature; and it is further

ORDERED that E-J is given leave of court to re-file this motion after relevant discovery has been conducted.

7/15/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**