

Durant v City of New York

2023 NY Slip Op 30705(U)

February 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 7604/2012

Judge: Devin P. Cohen

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This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 7604/2012
Seq. 003-005

Part 91

DECISION/ORDER

LISA DURANT,

Recitation, as required by CPLR §2219 (a), of the papers
considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed . . . 1-3
Order to Show Cause and Affidavits Annexed.
Answering Affidavits . . . 4-6
Replying Affidavits . . . 8
Exhibits . . .
Other . . .

CITY OF NEW YORK, MFM CONTRACTING CORP.,
FELIX ASSOCIATES LLC, JOHN CIVETTA & SONS INC.,
STEVEN MAESE, LUXURY COACHMAN TRANSPORT,
CONSOLIDATED EDISON COMPANY OF NY INC., FCR
CONSTRUCTION SERVICES LLC, VERIZON NEW YORK
INC., PERFETTO CONTRACTING CO. INC., BROOKLYN
EVENTS CENTER LLC, SICON CONTRACTORS INC., AND
TRI-MESSINE CONSTRUCTION,

Defendants.

Upon the foregoing papers, defendant Perfetto Contracting Company, Inc. ("Perfetto")'s
motion for summary judgment (Seq. 003), Sicon Contractor's ("Sicon") cross-motion for
summary judgment (Seq. 004), and Tri-Messine Construction ("Tri-Messine")'s cross-motion for
summary judgment (Seq. 005) are decided as follows:

Introduction

This action, and approximately fourteen other joined actions with individual index
numbers, arise out of a motor vehicle accident that occurred on February 27, 2011 along Atlantic
Avenue when a forty-passenger limousine-style bus struck an allegedly defective road plate. The
individually named plaintiffs in these actions were all passengers on the bus and allege that they

were thrown from their seats and injured when the bus came to a sudden stop. Three additional actions have subrogors named as plaintiffs seeking to recover for alleged property damage.

As an initial matter, defendant Perfetto's motion (Seq. 003) is granted without opposition. Perfetto has demonstrated that it performed work at a location 300 feet away from where the allegedly defective road plate was located and that this project occurred significantly earlier than the subject accident.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

The arguments in Sequences 004 and 005 are substantially intertwined as each of the moving parties were in privity with one another. Con Ed subcontracted defendant Vali to regrade a manhole cover on Atlantic Avenue just past its intersection with Flatbush Avenue (Vincent Ali, President of Vali, Aff. at ¶ 4). Vali in turn sub-contracted Sicon to perform this work (*id.*). Con Ed inspected Sicon's work and then retained Tri-Messine to do a final restorative paving around the newly elevated manhole cover (*id.* at ¶ 5). This work was commenced and completed on April 22, 2010 (*id.* at ¶ 7; *see also* Con Ed Opening Ticket PS 599839). Sicon's president Teddy Ferrara attested to the accuracy of the plans submitted by Con Ed, which indicate that the work was performed within five feet of the intersection of Flatbush and Atlantic (Ferrara Aff. at ¶¶ 7-8). Both Mr. Vali and Mr. Ferrara stated that the work performed by these sub-contractors was completed on the same day it was commenced and

therefore did not involve road plates, which would have only been employed on a multi-day project (Vali Aff. at ¶ 10; Ferrera Aff. at 10). The sole owner of Tri-Messine Alfonso Messina contends that each of the foregoing contentions about the location of the work and the non-involvement of road plates apply equally to Tri-Messine's paving/patching work at the site (Messina Aff. at ¶¶ 4–6). Each party admits that this project was the closest one in their records to the situs of the accident but argues that this project did not involve any roadway plates, was finished almost ten months before the accident, and was done approximately a full block away from the situs of the accident. Finally, both defendants note that the subject manhole cover was demolished in Fall 2010, prior to the accident, by Civetta & Sons for a subway expansion at Barclays Center (Patrick Kirby, representative of Civetta & Sons, EBT at 29–37, 41, 109–110), and therefore could not have been a cause of the bus accident.

In opposition, plaintiff argues that these motions for summary judgment are premature. It is undisputed that the discovery in these actions was being managed by the Central Compliance Party (“CCP”) before the pandemic, and that all of the plaintiffs had been deposed by 2020. Then, the bus driver Stephen Maese and a representative of Civetta & Sons were deposed in January 2020. Following the declaration of emergency due to Covid-19, the only deposition that took place on consent was that of defendant Perfetto. The plaintiff contends that, in the absence of further depositions, these motions for summary judgment should not be countenanced by the court.

While the court is not unsympathetic to the discovery delays occasioned by the Covid-19 emergency, both the age of these actions and the absence of any motions to compel the depositions that the plaintiffs claim are vital to the issue of liability militate against finding that the instant motions for summary judgment are premature. Sicon and Tri-Messine have

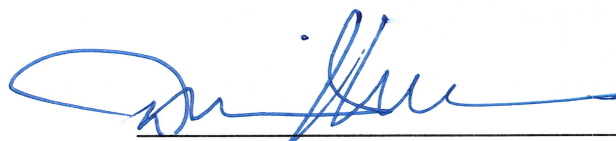
demonstrated through competent evidence that the work performed either by or at the direction of this constellation of parties was not at the essentially undisputed situs of the accident and did not involve road plates. Significantly, at the oral argument of these motions, all parties were afforded an opportunity to provide *any* evidence or inkling that evidence existed that would place the work of these parties at the scene of the accident. None was provided.

Therefore, Sicon's cross-motion (Seq. 004) and Tri-Messine's cross-motion (Seq. 005) are granted and all claims against these parties are dismissed. Perfetto's motion (Seq. 003) is granted without opposition.

This constitutes the decision and order of the court.

February 23, 2023

DATE



DEVIN P. COHEN
Justice of the Supreme Court