

Sestak v Hylan Datacom & Elec. LLC

2023 NY Slip Op 34387(U)

December 15, 2023

Supreme Court, New York County

Docket Number: Index No. 151752/2019

Judge: Judy H. Kim

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

-----X

PAULINA SESTAK,

Plaintiff,

- v -

HYLAN DATACOM & ELECTRICAL LLC, CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 151752/2019

MOTION DATE 05/09/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 118

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 87, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, Hylan Datacom & Electrical LLC’s motion for summary judgment is denied and the City of New York’s motion for summary judgment is granted.

On February 15, 2019, plaintiff commenced this action asserting negligence claims against defendants arising out of injuries she sustained on January 18, 2018 at approximately 7:20 p.m., when she slipped and fell on ice located against the curb in the roadway in front of 2009 Broadway, near the corner of Broadway and West 69th Street, New York, New York, sustaining injuries (NYSCEF Doc. Nos. 78 [Compl. at ¶¶24-25]) and 79 [Bill of Particulars at ¶2]).

In motion sequence 002, Hylan moves for summary judgment dismissing this action as against it. In motion sequence 003, the City moves for the same relief. These motions are consolidated for disposition.

Hylan's Motion for Summary Judgment

Hylan moves for summary judgment on the grounds that it “had neither ownership of the subject roadway, nor any maintenance obligation for removing snow or ice from the subject roadway” and lacked “actual notice or construction notice of any alleged roadway ‘black ice’ condition” (NYSCEF Doc. No. 76 [Fumo Affirm. at ¶4]).

In support of its motion, Hylan submits the examination before trial (“EBT”) testimony of John Gambino, Hylan’s Director of Underground Utilities, in which he testified that Hylan was hired by CityBridge to remove a phone booth and install a kiosk on Broadway between West 68th Street and West 69th Street (NYSCEF Doc. No. 96 [Gambino EBT at p. 10, 26, 43]). Gambino testified that, when laying concrete during the summer, water from a tank attached to the truck may be used to mix the cement but that there would not be any reason to do so in the winter (Id. at pp. 70-71, 90). Gambino also testified that there was no reason that water would be used by Hylan at the subject location since the work on the date of plaintiff’s accident involved a minimal dry-cut into the sidewalk (Id. at p. 73). However, he did not recall whether he was on the job site on the day of plaintiff’s fall (Id. at p. 83).

Hylan also submits the EBT testimony of Robert Randazzo, the General Foreman of Hylan’s Underground Division. Randazzo testified that in demolishing a sidewalk, water would be required under certain circumstances, depending on the amount of dust being projected (NYSCEF Doc. No. 82 [Randazzo EBT at p. 19]). Randazzo further testified that water could be used in excavating the sidewalk if the excavation produces a sufficient amount of dust (Id. at pp. 16, 19-20). He could not state whether Hylan used water in connection with its work at the subject location prior to plaintiff’s fall (Id. at pp. 19-20, 45).

In opposition, plaintiff argues that Hylan has not met its prima facie burden to establish that it did not create the subject condition and that triable issues of fact exist as to whether water emanating from Hylan's construction site created the icy condition that caused plaintiff to fall. Plaintiff submits, principally, three affidavits.

Plaintiff submits her own affidavit, in which she attests as follows:

I was involved in an accident on January 18, 2018 at around 7:15 p.m. when I slipped on ice located on the roadway directly next to the curb on Broadway between West 69th Street and West 68th Street in Manhattan ... As we were crossing the street I observed that, the sidewalk on the west side of Broadway was blocked off by an area of construction. This area of construction was blocked off by orange warning cones and yellow tape. This blocked off construction area ran from near the corner of West 69th Street to several feet towards West 68th Street. As we crossed we turned towards the left in an effort to get around this construction. I had almost crossed the street and was just about to step up onto the sidewalk when I suddenly started to slip. When I started to slip, I tried to maintain my balance, but I was unable to and I fell to the roadway.

Immediately after I fell I observed that I had slipped on ice. I observed that this ice ran from the blocked off area of construction near the corner of West 69th Street along the curb all the way down to the next intersection. The ice extended about 1-2 feet out from the curb and formed a channel of ice extended down the block from the construction area. When I fell I landed on top of this ice ... This ice was dark in color, and darker than the surrounding roadway.

...

On the date of my accident I did not observe or encounter any snow or ice on the ground, roads or sidewalks, and the roadways and sidewalks were completely dry and clear with the exception of the area where I slipped. The only ice I observed anywhere on the date of my accident was in the area where I slipped and fell. Because there was no ice anywhere else I did not expect to encounter any ice when I slipped.

(NYSCEF Doc. No. 93 [Paulina Sestak Aff. at ¶¶2-6] [emphasis added]).

Plaintiff also submits the affidavit of her husband, Vladimir Sestak, in which he attests, in pertinent part, that:

On January 19, 2018, the day after my wife's accident, I returned twice to the accident location. On January 19, 2018 I first returned to the accident scene in the

morning at about 7:20 a.m. At this time I did not see any workers at the site but I again observed the construction area blocked off by the orange cones and yellow tape. At 7:20 a.m. I also again observed the ice running along the curb directly from this area of construction to where my wife slipped and fell. I did not see any snow or ice anywhere else at the accident location. At this time I took additional photographs showing the ice condition that caused my wife to slip.

On January 19, 2018 I returned to the accident location a second time in the afternoon at about 1:00 pm. At 1:00 p.m. I observed vehicles from a company called Hylan Datacom parked on the street next to the area of construction, and I observed workers working at this construction site ...

(NYSCEF Doc. No. 94 [Vladimir Sestak Aff. at ¶¶2-5, 8]).

Finally, plaintiff submits the affidavit of Mark L. Kramer, a forensic meteorologist, in which he attests that:

Based on my review of the certified weather records [from the National Centers For Environmental Information] there was no precipitation in Central Park in Manhattan on January 18, 2018. The records for January 18, 2018 further show that prior to the incident the air temperature stayed at or below freezing, with a low of 19° F.

On January 17, 2018 only a light snowfall of 0.4 inches fell in Central Park. The total amount of water that fell in Central Park on January 17, 2018 was 0.19 inches of water. Specifically, on January 17, 2018 snow began in Central Park at 9:59 am and the snow continued to 11:55 a.m. The snowfall began again at 1:03 p.m. and ended at 1:25 p.m. The snowfall began again at 2:43 p.m. and ended totally for the day at 3:09 p.m. On January 17, 2018 the ground temperature was at or above freezing prior to 3:19 p.m., and thereafter was below freezing for the remainder of the day. On January 17, at 11:51 p.m., the air temperature at Broadway and West 696 Street was approximately 22° F ...

On January 19, 2018, there was no precipitation the entire day in Central Park.

Based upon my review of the meteorological records, I can state within a reasonable degree of meteorological certainty that the ice condition that caused Ms. Sestak to slip and fall was not caused by any snowfall or precipitation that occurred on January 17, 2018 or January 18, 2018, and was not caused by any natural precipitation. On January 18, 2018 the air temperature was never above 32° F, and any water that was sprayed or used by Hylan at the Broadway and West 69th Street job site would have frozen at some point before it evaporated. Based on the testimony, the marked photographs and the certified weather records that I have reviewed, the ice condition that caused Ms. Sestak to slip and fall was due to the

construction work that Hylan admitted performing at the accident location on the accident date of January 18, 2018.

(NYSCEF Doc. No. 112 [Kramer Aff. at ¶¶6-9] [emphasis added]).

The City's Motion for Summary Judgment

The City moves for summary judgment dismissing plaintiff's complaint and Hylan's crossclaims¹ against it, on the grounds that it did not create or have actual or constructive notice of the icy condition that precipitated plaintiff's fall. In support of its motion, the City submits, in relevant part, certified climatological data from the National Centers for Environmental Information, documenting snow and precipitation in Central Park for January 2018 (See NYSCEF Doc. No. 74 [Climatological Data]), as well as the New York City Department of Sanitation ("DSNY") records for snow and ice removal for Broadway between West 68th Street and West 69th Street for the two-week period prior to and including the date of plaintiff's accident (NYSCEF Doc. Nos. 68-69). The City also submits transcripts from the examinations before trial ("EBT") of Gerard West, a DSNY supervisor, conducted on March 3, 2022 and June 17, 2022, in which he testified, in sum and substance, that on the night of January 17, 2018, the City salted roads, including the site of plaintiff's fall, but did not plow (NYSCEF Doc. Nos. 67 [March 3, 2022 EBT at pp. 32, 37-38] and 84 [June 17, 2022 EBT at pp. 50-58]). Finally, the City submits the affidavit of Jason Chen, a DSNY employee, detailing the results of his search for 311 complaints of snow and ice for Broadway between West 68th Street and West 69th Street for the two-week period prior to and including the date of plaintiff's accident, which uncovered no complaints (NYSCEF Doc. No. 71 [Chen Aff. at ¶¶3-5]).

¹ On March 12, 2019, Hylan interposed an answer asserting crossclaims against the City for contribution, indemnification, and failure to procure insurance (NYSCEF Doc. No. 78 [Answer at ¶11]).

In opposition, plaintiff relies on the same affidavits submitted in opposition to Hylan's motion and argues that “[g]iven the visibility of the ice condition in question as seen in the photographs, the fact that it ran the length of a block on Broadway, a major NYC thoroughfare, and the absence of snow/ice anywhere else ... a triable issue of fact exists regarding whether a reasonable amount of time had elapsed for the City to remove the ice” (NYSCEF Doc. No. 104 [Memo. of Law. in Opp. at p. 16]). Plaintiff also argues that summary judgment would be inappropriate because the City may, ultimately, be vicariously liable for any negligence on the part of Hylan, because Hylan was performing work under a contract with non-party CityBridge, LLC (“CityBridge”) which is a contractor and franchisee of the City (Id.).

In reply, the City asserts that this latter argument mischaracterizes CityBridge as a contractor of the City and that its search of Department of Transportation records for the location of plaintiff's fall—submitted by the City in support of its motion (NYSCEF Doc. Nos. 72 and 73)—reveal that the six permits issued to CityBridge, were not for work performed pursuant to a City contract, and that there is no relationship between the City and a contractor of CityBridge such that vicarious liability would lie.

DISCUSSION

“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. 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, 324 [1986] [internal citations omitted]).

Hylan’s motion is denied. “A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (See Briggs v Pick Quick Foods, Inc., 103 AD3d 526, 526 [1st Dept 2013] quoting Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]).

Hylan has failed to demonstrate that it did not create the hazardous condition. Gambino’s EBT testimony that Hylan would not, as a rule, use water in connection with its work on the date of plaintiff’s accident is speculative and insufficient to satisfy Hylan’s prima facie burden (See Scotto v 315 Park Ave S, LLC, 179 AD3d 624, 624-625 [1st Dept 2020] [defendant’s witnesses testimony as to general policy barring use of plastic tarping at work site insufficient to establish that defendant did not place specific plastic tarping at issue such that such that summary judgment for defendant was warranted]). Randazzo also did not testify that water was not used by Hylan on the days prior to plaintiff’s accident.

While Hylan argues that the City is responsible for cleaning and maintaining public roadways, this general principle does not preclude Hylan’s liability should plaintiffs establish that Hylan’s negligence resulted in the creation of the dangerous icy condition on a public street (See Fernandez v 707, Inc., 85 AD3d 539, 541 [1st Dept 2011] citing Barbitsch v City of New York, 241 AD2d 472 [1997]). Since it remains an open question whether Hylan created this icy condition, its argument that this action must be dismissed because it lacked actual or constructive notice of same is unavailing—“[w]hen a party ... by its affirmative acts of negligence has created or increased a dangerous condition which is the proximate cause of plaintiff’s injuries, it may be held

liable in tort ... [and] a plaintiff is not required to show actual or constructive notice of the dangerous condition” (Figueroa v Lazarus Burman Assoc., 269 AD2d 215, 217 [1st Dept 2000] [internal citations omitted]).

The City’s motion is granted, however. As a municipality, the City bears the burden to establish that “it did not create the condition that allegedly caused the fall” and either “did not have actual or constructive notice of that condition” or, if it did have such notice, that it did not have a sufficient period of time between the notice and the accident for the City remedy this condition (Pena v City of New York, 161 AD3d 522 [1st Dept 2018]; see also Entrada v City of New York, 2017 NY Slip Op 30930[U], 2 [Sup Ct, Bronx County 2017], affd, 2018 NY Slip Op 03933 [1st Dept 2018]).

As it is undisputed that the City did not undertake any snow removal at the location of plaintiff’s accident prior to her accident but instead only salted the area, the City has established that it did not cause or create the subject icy condition (See Entrada v City of New York, 2017 NY Slip Op 30930[U], 2 [Sup Ct, Bronx County 2017], affd, 2018 NY Slip Op 03933 [1st Dept 2018]). In addition, the City has established through the various City records submitted that it did not receive actual notice of this icy condition. The City has also established it had no constructive notice of same.

Constructive notice may be charged to a defendant only where “the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same” (Bolte v City of New York, 48 Misc 3d 1208(A) [Sup Ct, Bronx County 2015] citing Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). In this case, “[t]he fact that the Sanitation Department may have conducted road inspections and performed spot-salting in the sanitation district which encompassed the accident

site does not establish that the City had any constructive notice of this particular ice condition” (Otero v City of New York, 248 AD2d 689, 690 [2d Dept 1998]). Furthermore, “there is no allegation in this case that a storm or weather event occurred prior to the accident which would have placed the City on notice that icy or unsafe conditions were likely to exist” (Otero v City of New York, 248 AD2d 689, 690 [2d Dept 1998]). To the contrary, plaintiff’s meteorologist’s assertion that the ice in question was not caused by any weather event² and plaintiff’s testimony that she did not notice the “black ice” until after her fall further establish the absence of constructive notice (See Pena v City of New York, 161 AD3d 522 [1st Dept 2018]).

Finally, the City has established that there is no basis for plaintiff to hold the City vicariously liable for the alleged negligence of Hylan (See Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]). In opposition, plaintiff fails to rebut any of the foregoing or establish any outstanding triable issue of fact that precludes summary judgment for the City.

Accordingly, it is hereby

ORDERED that Hylan Datacom & Electrical LLC’s motion for summary judgment is denied; and it is further

ORDERED that the City of New York’s motion for summary judgment is granted and this action is hereby dismissed as against it; and it is further

ORDERED that, within fifteen days of the date of this decision and order, counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon plaintiff and Hylan Datacom & Electrical LLC; and it is further

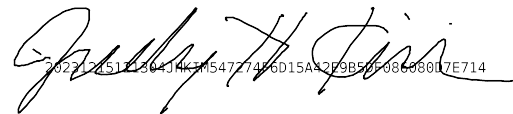
² To the extent that the parties’ meteorological records reflect that there was 9.8 inches of recorded snowfall on January 4, 2018, it would be speculative to assert that any of these storms caused the icy condition such that the City had constructive notice in light of the intervening multi-day thaw thereafter (See Pena v City of New York, 161 AD3d 522 [1st Dept 2018]; see also Saavedra v City of New York, 137 AD3d 421 [1st Dept 2016]).

ORDERED that, within fifteen days of the date of this decision and order, counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this Court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, in light of the dismissal of the City of New York from this action, the Clerk of the Court is directed to transfer this matter to the inventory of a non-City Part.

This constitutes the decision and order of the Court.



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HON. JUDY H. KIM, J.S.C.

12/15/2023
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE