

Muniz v Myrtle Dev. LLC

2023 NY Slip Op 34964(U)

September 5, 2023

Supreme Court, Queens County

Docket Number: Index No. 702459/20

Judge: Kevin J. Kerrigan

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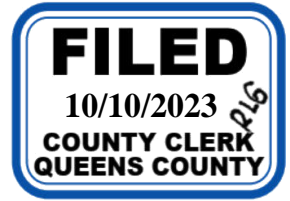
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10



-----X

Milagros Muniz,

Index
Number: 702459/20

Plaintiff,

- against -

Motion
Date: 8/28/23

Myrtle Development LLC, New York City
Transit Authority, City of New York,
Hi Point Wireless Corp, The Hallen
Construction Co. Inc. and The Brooklyn
Union Gas Company d/b/a National Grid,

Defendants.

Motion Seq. No.: 1

-----X

Myrtle Development LLC,

Third-Party Plaintiff,

- against -

Hi Point Wireless Corp,

Third-Party Defendant.

-----X

The following papers numbered E34-E60 and E62-E67 read on this motion by Defendants, The Hallen Construction Co. Inc. and The Brooklyn Union Gas Company d/b/a National Grid, for summary judgment.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E34-54
Affirmation in Opposition.....	E55
Affirmation in opposition-Exhibits.....	E56-60
Affirmation in Opposition.....	E62-63
Reply.....	E64-65
Reply.....	E66-67

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, The Hallen Construction Co. Inc. and The Brooklyn Union Gas Company d/b/a National Grid, for summary judgment is denied.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Movants have not met their burden

Plaintiff allegedly sustained injury as a result of a slip and/or trip and fall after exiting the Q55 bus onto the sidewalk located at 59-41 Myrtle Avenue in Queens County on February 14, 2017.

Plaintiff testified at her first deposition that her accident occurred after exiting the Q55 bus at the subject location. She stepped off of the bus with her left foot directly onto the sidewalk where she was caused to slip on ice situated therein, which covered the entire subject sidewalk flag. There were cracks or broken pieces on the sidewalk, but she did not know whether the forgoing was what caused her accident. However, Plaintiff indicated that the ice on the sidewalk was what "really what made [her] slip." At Plaintiff's second deposition following consolidation, she testified that the cracks on the subject sidewalk underneath the ice contributed to her fall. Marked photographs from Plaintiff's deposition demonstrate that she tripped between approximately the fourth and fifth sidewalk flags from the corner of Myrtle Avenue and 60th Street, and closest to the curb.

Walter Stone, an employee of National Grid, testified that National Grid obtained several street and sidewalk opening permits for the subject location. Per Stone, Hallen Construction is the paving contractor to National Grid who performed the subject paving work. There were two paving orders produced in National Grid's records, both at seven feet north of the north curb of Myrtle Avenue and six feet west of the west curb of 60th Street. Another paving order for the subject location was produced, and appears to confirm a project that was completed in December of 2016. Stone reviewed the Plaintiff's marked photograph and testified that Hallen performed work on the sidewalk, which was limited to the sidewalk flags where the street sign pole is located at the corner of Myrtle Avenue and 60th Street. In reviewing the marked photograph, Stone indicated that National Grid did not excavate the portion of the sidewalk where Plaintiff drew a circle demonstrating where she fell.

Stone testified regarding the measurements inclusive of where the work was conducted and how far the subject work may have reached. He confirmed that although the work was conducted at or near the corner, it could have reached other sidewalk flags in the surrounding area. He did clarify that the sidewalk flag Plaintiff fell on, per her marked photograph, was not included in the work performed. In support, he referenced the marked photographs, which demonstrated freshly paved sidewalk flags in the surrounding area, versus an older looking sidewalk flag where Plaintiff fell. If the work performed by National Grid had to encroach further than anticipated, they would issue an additional paving order to cover the address in front of the extended work area. Here, no such additional paving orders were issued for 59-41 Myrtle Avenue and instead only covered only 59-37 Myrtle Avenue. Accordingly, Stone's testimony appears to demonstrate that while the work performed was very close in proximity to where Plaintiff fell, it was not at the specific location.

Stephen Dillon, an employee of Hallen Construction, testified at his deposition regarding the work performed by Hallen near the subject location. Per Dillon, Hallen conducted work on the roadway at Myrtle Avenue and 60th Street, closer to the street sign pole. Dillon specified that the work was done near and around a manhole situated therein. When asked how a person may pinpoint exactly where the work was conducted from the paperwork he reviewed, he indicated "from the address," or Myrtle Avenue and 60th Street. When asked if there was any documentation to specify where the work was conducted, aside from at Myrtle Avenue and 60th Street, Dillon responded "no." In regard to the sidewalk, Dillon testified that the work may have encroached onto the sidewalk located at Myrtle Avenue and 60th Street. However, he could not say for sure if it did. If the work did encroach onto the sidewalk, he could not confirm where on the sidewalk work was performed. He reviewed the photographs marked by Plaintiff and indicated that the work was likely done where there are freshly paved areas are depicted.

Initially, movants contend that they are entitled to summary judgment because Plaintiff testified in her first deposition that she slipped on ice and not due to a sidewalk defect. Consequently, Plaintiff's subsequent testimony that a deteriorated sidewalk condition caused her accident, should be disregarded. However, the Court notes that even Plaintiff's initial deposition testimony raises an issue of fact as to whether a combination of ice and/or a sidewalk defect caused her accident. Indeed, when asked if "anything about the sidewalk, other than ice, including unevenness, cracks, or anything like that, caused [her] to fall," she responded "I don't know."

Notwithstanding, movants further aver that even if Plaintiff's accident was caused by a sidewalk defect, they did not perform any work in the area where the accident occurred. Rather, the work performed was near the street sign pole located at Myrtle Avenue and 60th Street. In opposition, Plaintiff and Defendant Myrtle Development, LLC argue that Stone and Dillon's testimony both failed to eliminate all questions of fact regarding whether Defendants performed work on the sidewalk where Plaintiff fell. Specifically, both witnesses simply referenced Plaintiff's marked photographs to discern freshly paved sidewalk flags versus older sidewalk flags in coming to their conclusion regarding where the work was done. Moreover, Dillon offered vague testimony on multiple occasions regarding the exact location of the work done by Hallen.

There is also a question raised regarding whether the crack in the sidewalk or the accumulated ice and/or water therein was a result of work conducted by the movants. Allen Shahipour, part owner of Myrtle Development, testified that a water main was damaged as a result of construction performed by Hallen and National Grid. The forgoing caused the basement of 59-41 Myrtle Avenue to flood and water to run onto the street. Dillon testified that it is possible when conducting work that a pipe may be damaged. Thus, the opponents to the motion argue that the crack in the sidewalk and/or the ice and/or water accumulated therein may have been caused by Hallen and National Grid. It is noted that the forgoing theory of liability is unsupported by any evidence and appears to be based solely on speculation (see Humphreys v. Veneziano, 268 A.D.2d 461 [2d Dept 2000]).

A contractor may be liable for negligence "which results in the creation of a dangerous condition upon a public street or sidewalk" (see Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Losito v. City of New York, 38 A.D.3d 854 [2d Dept. 2007]). Here, there appears to be a question of fact regarding whether National Grid and/or Hallen Construction created the subject defect. While Stone's testimony places the work conducted squarely outside of the location where Plaintiff's accident occurred, Dillon's testimony does not. Dillon could not testify with certainty, sufficient to eliminate all questions of fact, whether Hallen performed work at the location of Plaintiff's accident. Moreover, even if the sidewalk flag where Plaintiff fell was not replaced by National Grid or Hallen, that does not negate the fact that the work done to the immediate surrounding area could have impacted the subject sidewalk flag. Thus, in viewing the evidence in the light most favorable to the Plaintiff, the instant motion must be denied (see Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 [2007]).

Accordingly, the motion is denied.

Serve a copy of this order with notice of entry without undue delay.

Dated: September 5, 2023



KEVIN J. KERRIGAN, J.S.C.

