

Gallo v City of New York

2024 NY Slip Op 33752(U)

October 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 507185/2019

Judge: Lisa S. Ottley

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
CAROLINE GALLO,

Plaintiff,

Index # 507185/2019

-against-

Decision and Order

Motion Seq. # 2

THE CITY OF NEW YORK, DIFAZIO INDUSTRIES LLC
and CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Defendants.
-----X

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on April 15, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1, 2 [Exh. A-M]
Affirmation/Affidavit in Opposition.....	4, 5, 6 [Exh. A-D]
Reply Affirmations.....	7, 8

Plaintiff, Caroline Gallo, commenced this action due to a trip and fall as a result of a raised, depressed, holey, and/or uneven condition on a roadway, which occurred on 18th Avenue between 80th and 81st Streets, in Brooklyn, New York, on or about February 19, 2018. Plaintiff alleges that she tripped and fell on a raised portion of asphalt roadway when exiting the passenger side of her vehicle.

Defendant, Difazio Industries, LLC (hereinafter, "Difazio"), moves pursuant to CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims, on the grounds that it did not conduct work at the alleged accident site nor create the alleged defective condition. Plaintiff and the defendants, The City of New York (hereinafter, "the City") and Consolidated Edison Company of New York, Inc. (hereinafter, "Con Ed") oppose Difazio's motion on the grounds that the Difazio has failed to make a *prima facie* showing entitling them to summary judgment by failing to demonstrate that it did not create the uneven condition; there remains questions of fact regarding Difazio's liability; the motion is premature; and Difazio has failed to provide the construction file and other evidence that it did not work in the area of the accident pursuant to the permit issued by the City.

Discussion

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, Grassick v. Hicksville Union Free School District, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." See also, Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co., 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. See, CPLR 3212[b]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986].

According to Difazio, it did not own, occupy, control, or have special use of the roadway located at 18th Avenue between 80th and 81st Streets. Difazio argues that it did not create the hazardous condition because it did not perform any work at the location of the plaintiff's alleged accident, which is 18th Avenue between 80th and 81st Streets. Instead, two years prior to the accident in 2016, Difazio performed work on 18th Avenue between 81st and 82nd Streets. This work consisted of the repairing, modifying, and cleaning of a sewer catch basin specifically located on or near the corner of 18th Avenue and 82nd Street. Difazio characterizes the distance between where the plaintiff allegedly fell and where the work was performed as an entire city block. In support, Difazio has offered the deposition testimony of its President, John Difazio, who testified that the work was pursuant to a New York City Department of Design and Construction bid contract for catch basin repair, which did not involve any excavation and was a one-day job. In further support, Difazio has offered the NYC Department of Transportation permit, which specifically granted Difazio permission to perform sewer installation on 18th Avenue between 81st and 82nd Streets, indicating the maximum length of 100 feet for the work to be done. Lastly, Difazio has provided its construction work records that include diary notes, indexes, working conditions document, a New York 811 one call ticket, a map/drawing of the location, and photographs of the catch basin.

Difazio argues that any and all cross-claims for common law indemnification and contribution should be dismissed as there is no evidence Difazio was negligent or responsible for the happening in plaintiff's accident and it did not perform work at the location of plaintiff's alleged accident. As to contractual claims or breach of contract claims by the City, Difazio argues that the alleged accident was not connected with or as the result of any work contract between Difazio and the City. Similarly, Difazio did not have any contract with Con Ed for work at the subject location. In regard to actual and constructive notice, Difazio argues that it did not receive any complaints and did not have notice of any defects since it did not perform work at the location of plaintiff's alleged accident.

In opposition, the plaintiff, the City, and Con Ed argue that Difazio failed to produce evidence of where work was actually done, rendering the deposition testimony of Mr. Fazio speculative, unsubstantiated, and inadmissible. It is argued that deposition testimony is insufficient on the issue of whether Difazio performed excavation in the area of the accident on 18th Avenue between 80th and 81st Streets since there was a permit that granted Difazio 100 feet of roadway on 18th Avenue between 81st and 82nd Streets. Opposition also argues that Difazio's work was sufficiently close in time and location to plaintiff's alleged accident, and a question of fact exists as to whether Difazio is responsible for the subject hazardous condition. In addition, they argue that discovery is incomplete, and the motion is premature since Difazio has not provided its construction file for the work performed pursuant to the permit. Regarding actual and constructive notice, it is argued that notice is irrelevant since Difazio created the alleged condition.

In reply, Difazio argues that while the permit issued to Difazio to perform work on 18th Avenue between 81st and 82nd Streets was for a distance of 100 feet, it only granted permission to work between the two boundary streets of 81st and 82nd Streets. Therefore, this 100-foot distance is limited to 18th Avenue between 81st and 82nd Streets and does not extend into 18th Avenue between 80th and 81st Streets. The permit did not grant permission beyond the stated area, and it is conceded by all parties that the plaintiff's alleged accident occurred on 18th Avenue between 80th and 81st. The distance between Difazio's work and plaintiff's alleged accident is approximately an entire city block away and another permit would have been required for Difazio to work on 18th Avenue between 80th and 81st. Moreover, contrary to the City's argument, the work performed did not include any major sewer installation, excavation, nor repaving, but only catch basin repairs. Difazio also argues that it has provided all discovery and its construction file consisting of a diary notes/indexes/working conditions document, a New York 811 one call ticket, a map/drawing of the location, and photographs of the catch basin.

It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care. See, Forbes v Aaron, 81 A.D.3d 876, 918 N.Y.S.2d 118 (2nd Dept., 2011). As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. See, Kydd v Daarta Realty Corp., 60 A.D.3d 997, 877 N.Y.S.2d 352 (2nd Dept., 2009).

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk. See, Pizzolorusso v. Metrol Mechanical, et. al., 205 A.D.3d 748, 168 N.Y.S.3d 103 (2nd Dept., 2022), citing, Sturm v. Myrtle Catalpa, LLC, 149 A.D.3d 1130, 53 N.Y.S.3d 356 (2nd Dept., 2017). Ordinarily, a defendant moving for summary judgment in a trip and fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. See, Adzei v. Edward Builders, et.al., 221 A.D.3d 639, 198 N.Y.S.3d 755 (2nd Dept., 2023). To constitute constructive notice, a condition must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. See, Gordon v. American Museum of National History, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).


Here, Difazio has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting evidence showing that it did not owe a duty to the plaintiff as it did not own, occupy, control, or have a special use of the subject property at the time of the accident and, thus, could not be held liable for injuries caused by the allegedly dangerous conditions. See, Mitchell v Icolari, 108 A.D.3d 600, 969 N.Y.S.2d 503 (2nd Dept., 2013). Furthermore, Difazio’s submission of the permit, bid contract, diary notes/ indexes/working conditions document, one call ticket, map/drawing of the location, photographs of the catch basin, and deposition testimony, make out Difazio’s prima facie case that it had not caused or created the alleged defect, or negligently repaired the roadway where the injured plaintiff fell, since its work was confined to 18th Avenue between 81st and 82nd Streets, whereas the plaintiff allegedly fell a block away on 18th Avenue between 80th and 81st Streets. See, Ciavarelli v Town of Islip, 67 A.D.3d 623, 888 N.Y.S.2d 172 (2nd Dept., 2009); Arrucci v City of New York, 45 A.D.3d 617, 846 N.Y.S.2d 269 (2nd Dept., 2007). In opposition, plaintiff, the City, and Con Ed failed to raise a triable issue of fact as they did not offer proof beyond mere speculation that Difazio, in fact, did any work at the location in question, or alternatively, that the nature of the work in question might reasonably be expected to require activity beyond 18th Avenue between 81st and 82nd Streets and into 18th Avenue between 80th and 81st Streets. As such, the court finds that DiFazio’s repairs to a catch basin on the corner of 18th avenue and 82nd Street in 2016 is not in reasonable proximity to the location of plaintiff’s alleged accident on 18th Avenue between 80th and 81st Streets. See, Rosa v. City of New York, et. al., 215 A.D.3d 707, 187 N.Y.S.3d 685 (2nd Dept., 2023).

As to the defendants’ argument that the plaintiff’s motion for summary judgment is premature due to outstanding discovery, the court finds the argument unavailing especially in light of Difazio providing its construction file in discovery. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. See, Singh v Avis Rent A Car Sys., Inc., 119 A.D.3d 768, 989 N.Y.S.2d 302 (2nd Dept., 2014). Here, the mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion. See, Lopez v WS Distrib., Inc., 34 A.D.3d 759, 825 N.Y.S.2d 516 (2nd Dept., 2006).

Accordingly, Difazio’s motion for summary judgment is hereby granted in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
October 7, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

2024 OCT 21 A 11:31
 KINGS COUNTY CLERK
 FILED