

Blackmon v 165-25 147th Ave., LLC
2024 NY Slip Op 35388(U)
June 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 704774/2022
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS

IAS PART 30

Justice

Index No.:704774/2022

-----X
ALICIA BLACKMON,

Motion Date: 4/15/2024

Plaintiff,

Motion Cal. No.: 2

-against-

Motion Sequence No.: 3

165-25 147th AVENUE, LLC,
TULLY ENVIRONMENTAL, INC.,
TULLY CONSTRUCTION CO., INC. and
CLEARBROOK,

Defendants.

-----X
165-25 147th AVENUE, LLC,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK and
METROPOLITAN TRANSPORTATION AUTHORITY,

Third-Party Defendants.

-----X
METROPOLITAN TRANSPORTATION AUTHORITY,

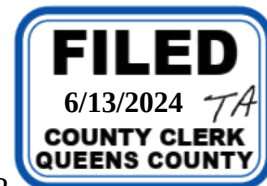
Second Third-Party Plaintiff

-against-

TULLY ENVIRONMENTAL, INC.
TULLY CONSTRUCTION CO. INC. and
CLEARBROOK,

Second Third-Party Defendants

-----X



The following efiled papers numbered 66-80, 86-88, 90, 98-103 submitted and considered on this motion by Defendants/Second Third-Party Defendants, Tully Construction Co. Inc., (hereinafter “Tully”) and Tully Environmental, Inc, i/s/h/a Tully Environmental, Inc. and Clearbrook (hereinafter “Clearbrook”, and collectively known as “Tully Environmental”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 to dismiss the complaint by plaintiff Alicia Blackmon (hereinafter “Blackmon”) and all cross-claims and counterclaims against Tully and Tully Environmental.

Papers
Numbered

Notice of Motion-Affirmation in Support-	
Affidavits-Exhibits.....	EF 66-80
Affirmations in Opposition-Affidavits-Exhibits.....	EF 86-87, 88, 90
Affirmation in Reply-Affidavits-Exhibits.....	EF 98-103

Relevant Factual and Procedural Background

This personal injury lawsuit stems from an alleged trip-and-fall incident involving Blackmon on May 29, 2019, at the Metropolitan Transportation Authority (MTA) JFK Depot, located at 165-25 147th Avenue, County of Queens, State of New York. Blackmon alleged that on the date of the accident, she was caused to trip and fall on a sewer grate. On May 10, 2019, Tully Environmental performed cleaning services at the subject location, as specified in work orders. 165-25 147th Avenue, LLC was the property owner and had an agreement with the MTA on the date of the incident.

Blackmon initiated a lawsuit against 165-25 147th Avenue, LLC, Tully Construction Co., Inc. ("Tully"), and Tully Environmental, Inc. On July 22, 2022, defendant 165-25 147th Avenue, LLC appeared in this litigation with the service of its Answer to the Complaint with cross-claims against Tully and Tully Environmental. Tully and Tully Environmental joined issue by serving their Answer to the Complaint on September 2, 2022. Defendant 165-25 147th Avenue, LLC then initiated a third-party action, naming the City of New York and the MTA as third-party defendants on November 29, 2022.

Subsequently, the MTA brought a second third-party action, naming Tully and Tully Environmental as second third-party defendants. By stipulation dated August 1, 2023, Tully and Tully Environmental's time to appear was extended to August 18, 2023. Instead of filing an answer to the second third-party complaint, Tully Environmental filed the instant motion seeking summary judgment under CPLR 3212. Tully Environmental argued that all claims must be dismissed against them because they had no ownership or proprietary interest in the subject location, did not enter into any contracts or agreements at the premises on May 29, 2019, the date of Blackmon's accident, and

that their work was limited to specific cleaning services pursuant to work orders issued by the MTA, which did not include installation, repair, or maintenance of the subject grate involved in the incident. The motion was denied by the undersigned on December 15, 2023, and Tully Environmental served an answer to the Second third-party complaint on February 21, 2024. Now, Tully Environmental makes this application for an Order pursuant to CPLR 3212 to dismiss the complaint and all claims, cross-claims and counterclaims against Tully Environmental.

Law and Application

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from

affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

This Court notes that the motion at hand by Tully Environmental is not a successive summary judgment motion. Although the previous motion requested relief under CPLR 3211(c) to treat it as a motion for summary judgment, the court denied that motion in its entirety, hence, the summary judgment aspects were never adjudicated. However, the current motion does not present any new evidence, the photographs and other documents were previously submitted and considered.

“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” (*see Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once a prima facie 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” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). Summary judgment is a drastic measure that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2d Dept. 2004]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*see Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]; citing *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; *see also Adams v Bruno*, 124 AD3d 566, 567 [2d Dept 2015]).

Here, This Court finds that Tully Environmental fail to meet their prima facie burden. The affidavit of John Diffley, the Safety and Compliance Manager of Tully, states that Clearbrook picked up the grates, raising questions about Clearbrook and Tully's involvement. The work orders and agreements fail to specify the exact location of the work performed, merely stating "JFK depot." This lack of specificity does not sufficiently establish that the work did not involve the area where the incident occurred. In light most favorable to Blackmon, Tully failed to establish prima facie, that Tully did not perform any work at the subject premises, and did not create any dangerous condition at the subject premises.

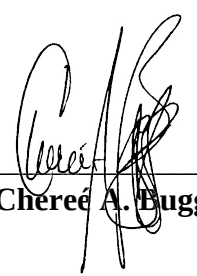
Moreover, Tully Environmental's argument that the defect was open and obvious, and therefore not inherently dangerous, is unsupported by the evidence presented. “A condition is open

and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident” (see *Martinez v Fairfield Hills E., LLC*, 213 AD3d 837, 837 [2d Dept 2023]; citing *Williams v E & R Jamaica Food Corp.*, 202 AD3d 1028, 1029 [2d Dept 2022]). “Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition” (see *Holmes v Macy’s Retail Holdings, Inc.*, 184 AD3d 811, 811 [2d Dept 2020]; citing *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 636 [2d Dept 2010]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). “The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case” (see *Id* at 837; citing *Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154 [2d Dept 2020]). Here, the photographs submitted and the affidavit of Diffley do not demonstrate that the condition was not inherently dangerous. In light most favorable to Blackmon, Tully Environmental failed to establish prima facie that the alleged defect was open and obvious and not inherently dangerous (see *Stanger v City of New York*, 190 AD3d 776 [2d Dept 2021]; *Lee v Acevedo*, 152 AD3d 577, 578 [2d Dept 2017]).

Furthermore, the motion is premature as there has been no opportunity for discovery. Blackmon contends that he “has not had an opportunity to make document demands to Tully and Clearbrook for all documents relating to the work performed at the subject premises, nor has plaintiff had an opportunity to obtain documents from the MTA regarding its supervision and inspection of such work. Nor has plaintiff had an opportunity to depose the Tully/Clearbrook employees who were actually at the site on May 10, 2019 to determine what they did, what parts of the premises they visited both during their work and on the way to and from, and/or whether they may have jostled, moved, or otherwise affected the grating.” Under CPLR 3212(f), a motion for summary judgment should be denied if facts essential to justify opposition may exist but cannot yet be stated (see *R. Vig Properties, LLC v Rahimzada*, 213 AD3d 871, 873 [2d Dept 2023]). Blackmon “provide[d] an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (see *Mogul v Baptiste*, 161 AD3d 847, 848 [2d Dept 2018]). Accordingly, it is hereby

ORDERED, that the motion by Defendants Tully Environmental, Inc., Tully Construction Co., Inc., and Clearbrook for summary judgment is denied without prejudice to renew at the completion of discovery.

Dated: June 13, 2024


Hon. Cheree A. Buggs, JSC

