Lewis v City of New York
2006 NY Slip Op 30770(U)
May 24, 2006
Supreme Court, New York County
Docket Number: 108159/04
Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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ELLEN LEWIS,

Plaintiff,

-against-

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THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NICO ASPHALT PAVING, INC., TROCOM CONSTRUCTION CORP., PETROCELLI ELECTRIC CO., INC. and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Defendants.

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MARILYN SHAFER, J. :

Defendant Trocom Construction Corp. (Trocom) moves for summary judgment dismissing the complaint and all cross claims brought against it.

This is a personal injury action. Plaintiff alleges that on September 22, 2003, she tripped and fell in the crosswalk located at the intersection of Central Park West and West 72nd Street, New York, New York. She contends that she tripped upon a raised metal deck plate in the street, near the southeast corner of said intersection, that extended partially into the crosswalk thereat.

The complaint alleges that on September 22, 2003, Trocom entered into a contract with defendant City of New York (City) with respect to performing certain repair, renovation and/or construction work at the subject crosswalk; and that on September 22, 2003, Trocom did perform certain repair, renovation and/or construction work at the subject crosswalk. The complaint further alleges that Trocom operated, managed, maintained and controlled the subject crosswalk; and that plaintiff's accident was the result of a dangerous, defective and unsafe condition which was caused, created and/or permitted by defendants, their agents, servants and/or employees, and

that such condition was known or in the exercise of reasonable care should have been known to defendants, their agents, servants and/or employees.

Trocom moves for summary judgment, arguing that it had no involvement with the installation of the steel construction plate that is claimed to have caused the accident, and that it had neither actual nor constructive notice of the existence of the plate. Trocom submits photographs of the part of the crosswalk where the plate was installed. Trocom also submits a copy of plaintiff's transcript at a hearing conducted pursuant to section 50-h of the General Municipal Law, on April 14, 2004. Plaintiff identifies the plate from the photographs.

Trocom states that nowhere does plaintiff provide proof that Trocom created or had notice of the condition that caused the accident. Based on her testimony, plaintiff has no knowledge as to how long the plate existed at the accident location or who placed the plate at the accident location. According to Trocom, plaintiff fails to prove the necessary elements to establish a prima facie case of negligence against Trocom and her claim must be dismissed.

Trocom also submits an affidavit from its vice president Anthony Santoro, a copy of an excerpted portion of the contract for the replacement and/or readjustment of sewer and/or water main manholes, and copy of a log maintained by Trocom in connection with the contract work. Trocom claims that the log contains every location at which Trocom performed work under the contract.

According to Trocom, the log has no record of Trocom performing any work at the intersection of Central Park West and West 72nd Street. Moreover, Trocom claims that under the contract, Trocom did not require the use of any deck plate, nor did it use any deck plates in performing any of the contract work. In his affidavit, Santoro explains that no deck plates were

necessary in performing any of the contract work because the operation to saw cut the roadway, replace the existing sewer casting and fully restore the roadway took only 30 to 45 minutes in total, including full restoration of the roadway. He asserts that the use of metal deck plates is generally required in circumstances where an excavation or opening in the roadway will be left open for a significant period of time. He states that in its contract work, Trocom was not required to excavate the roadway and did not use plates. Additionally, Santoro avers that Trocom made a search into its records, and found nothing that would indicate that Trocom performed work at the intersection of Central Park West and West 72nd Street.

The motion is opposed by plaintiff, defendants City, Empire City Subway Company (Limited) (Empire), Petrocelli Electric Co., Inc. (Petrocelli) and Nico Asphalt Paving, Inc. (Nico). All parties in opposition to the motion argue that the motion is premature and that very little discovery has been conducted at this time. None of the parties, except plaintiff, has been deposed. City specifically refers to the annexed portions of the contract, explaining that the completeness of the exhibit and its meaning is unclear. City states that this court has already denied summary judgment to Petrocelli as premature. Plaintiff states that Trocom obtained permits from City that reveal that Trocom had permission to open the sidewalk and/or roadway at the subject intersection for the time periods stated in the permits.

In reply, Trocom claims that the motion should be granted at this time, because no proof has been raised creating an issue of fact as to Trocom's liability. Trocom submits photographs of the subject crosswalk which depict a manhole after the plate was removed and excavation completed. The manhole cover bears the name "Con Edison." According to Trocom, this indicates that it is not a sewer or water casting that Trocom was contracted by City to replace, but

it is a Consolidated Edison owned and operated facility. Trocom asserts that it was not contracted by Consolidated Edison to repair or replace any utility, gas, steam or electric . . hardware, castings or facilities; Trocom was contracted by City for the purpose of replacing various sewer and water main castings in other locations.

Summary judgment is the procedural equivalent of a trial, and should be denied if there is any doubt as to existence of a triable issue of fact or where the issues raised are arguable. See Ugarriza v Schmieder, 46 NY2d 471 (1979). Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Id .

In a trip and fall case, in order to establish a prima facie case, plaintiff must demonstrate that defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition. Cusack v Waldbaum, Inc., 290 AD2d 474 (2nd Dept 2002).

The court finds that it is premature to grant summary judgment to Trocom at this time. In the interest of equity, the other parties should be allowed to carry out discovery. Such discovery is required before the parties opposing this motion can sufficiently prosecute this action. See Groves v Land's End Hous. Co., 80 NY2d 978 (1992). At the end of discovery, Trocom can renew its motion for summary judgment.

Accordingly, it is

ORDERED that Trocom's motion for summary judgment is denied without prejudice, to be renewed upon the completion of discovery.

DATED:

5/24/06

ENTER:

J.S.C.

HON. MARILYN SHAFER, JSC