[*1] SCANNED ON 3/29/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice PART 5

Index Number : 112730/2010
BARAHONA, DONALDO E.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT CAL # 12

INDEX NO. 112730/10
MOTION DATE 12/20/11
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/27/12
MAR 27 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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DONALDO E. BARAHONA,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, EMPIRE CITY SUBWAY COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, JAB CONSTRUCTION, INC., WARREN GEORGE INC., TRIUMPH CONSTRUCTION CORP., LIMOS UNLIMITED, and SHARMA MANGAT RAM,

Defendants.

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Index No. 112730/10

Motion Date: 12/20/11
Motion Seq. No.: 002
Motion Cal. No.: 12

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Akiva Ofshtein, Esq.
Ofshtein Law Firm, P.C.
1723 East 12th Street, 4th Floor
Brooklyn, NY 11229
718-455-5252

For Empire:
Darrell John, Esq.
Conway, Farrell, et al., P.C.
48 Wall Street
New York, NY 10005
212-785-2929

By notice of motion dated September 27, 2011, defendant Empire City Subway Company (Empire) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Plaintiff opposes.

I. BACKGROUND

On May 10, 2010, plaintiff rear-ended a vehicle stopped at the intersection of 42nd Street and Fifth Avenue in Manhattan, allegedly sustaining physical injuries. (Affirmation of Darrell John, Esq., dated Sept. 27, 2011 [John Aff.], Exh. C).

Court records reflect that on September 28, 2010, plaintiff commenced the instant action

with the filing of a summons and complaint, asserting that Empire:

> negligently failed to keep the [ ] roadway of 5th Avenue at its intersection with 42nd Street . . . in a reasonably safe condition for motorist[s], on and prior to May 10, 2010; carelessly and negligently operated, maintained, managed, and controlled the aforesaid roadway in allowing the traffic light at the said intersection to become and remain in the state of disrepair and/or improper repair; [and] in failing to inspect said traffic light, causing, permitting and allowing said traffic light to remain defective and/or missing for an excessive and unreasonable period of time . . . .

On November 5, 2010, Empire joined issue with service of its answer. (John Aff., Exh. B).

By affidavit dated July 28, 2011, Calvin Gordon, specialist for Empire, states that he conducted a search of "any records related to work performed by [Empire], or a subcontractor, at the intersection of 5th Avenue and 42nd Street including the blocks north, south, east and west of the intersection for the two year period prior to and including May 10, 2010," which yielded records pertaining to one job, number 118994RT, which was unrelated to traffic lights. (*Id.*, Exh. G). The records annexed to Gordon's affidavit reflect that Empire obtained two permits related to this job, which allowed it to build eight, four-inch conduits on 42nd Street between Fifth and Sixth Avenues, and that the job was finished and the roadway re-paved on March 21, 2009. (*Id.*).

On September 27, 2011, Empire served plaintiff with the instant motion, annexing thereto, *inter alia*, Gordon's affidavit. (John Aff.). On November 10, 2011, plaintiff served Empire with his opposition papers, annexing thereto two permits relating to job number 118994RT. (Affirmation of Akiva Ofshtein, Esq., in Opposition, dated Nov. 10, 2011 [Ofshtein Opp. Aff.]). On November 29, 2011, Empire served plaintiff with its reply. (Affirmation of Darrell John, Esq., in Reply, dated Nov. 28, 2011 [John Reply Aff.]).

II. CONTENTIONS

Empire asserts that it is entitled to summary judgment as its work was completed a year

before the accident and did not relate to or affect the traffic signals at the subject intersection. (John Aff.).

In opposition, plaintiff claims that Empire's motion should be denied as premature, as discovery is necessary to determine whether, as a result of a contract among City, the New York City Department of Transportation (DOT), and Empire, Empire performed work at the accident location, and the permits annexed to his opposition reflect that Empire worked at the subject intersection. (Ofshtein Opp. Aff.).

In reply, Empire contends that plaintiff speculates as to the existence of a contract among City, DOT, and Empire, and that the work permits on which he relies relate to job number 118994RT. (John Reply Aff.).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A summary judgment motion may be denied as premature if it "appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." (CPLR 3212[f]). "However, the mere hope that evidence sufficient to

defeat [the] motion . . . may be uncovered during the discovery process is insufficient to deny [it]." (*Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

Here, Empire has demonstrated that the only work it performed at the subject intersection during the two years before the accident does not relate to traffic lights. It has thus established, *prima facie*, entitlement to summary judgment. (*See Soumas v Consolidated Edison*, 40 AD3d 478 [1st Dept 2007] [where plaintiff testified that she tripped on gravel from adjacent construction, and defendant offered evidence reflecting it installed payphone at subject intersection four months before accident, defendant established *prima facie* entitlement to summary judgment]; *see also Flores*, 66 AD3d 599 [defendant established *prima facie* entitlement to summary judgment as it offered evidence demonstrating that the location of its work at subject intersection did not coincide with accident location]).

As plaintiff offers no evidence demonstrating that Empire performed additional work at the site or that its work in connection with job 118994RT caused the traffic lights to malfunction, instead offering only permits associated with the job, he has failed to demonstrate the existence of triable factual issues as to whether Empire caused the traffic light defect. (*See Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [issuance of permit to defendant to store materials "on the sidewalk in proximity to the accident site is insufficient to raise a question of fact as to whether [defendant] performed any work at the site . . . or that such work was the cause of the pothole in question"]; *see also Siegel v City of New York,* 86 AD3d 452 [1st Dept 2011] [plaintiff's speculation as to whether defendant's work caused injury-causing defect insufficient to establish triable factual issues]; *Flores,* 66 AD3d 599 [same]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005] [same]). And, having speculated as to the existence of a contract

among City, DOT, and Empire, he has offered no basis for believing that further discovery will be fruitful. (*See Hanover Ins. Co. v Prakin,* 81 AD3d 778 [2d Dept 2011] [defendants failed to demonstrate summary judgment motion was premature, as they "failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence"]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Empire City Subway Company's motion for summary judgment is granted; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 27, 2012
New York, New York

MAR 27 2012

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE